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

WRIT PETITION NO.1778 OF 2023

Hexaware Technologies Limited,)
Building No.152, Millennium Business Park,)
Sector – 3, A Block, Mhape, Navi Mumbai,)
Thane – 400 710) ….Petitioner

V/s.

1. Assistant Commissioner of Income Tax,)
Circle 15(1)(2), Mumbai, Room No.483A,)
4th Floor, Aayakar Bhavan, Maharshi Karve)
Road, Mumbai – 400 020)
2. Principal Commissioner of Income Tax,)
Mumbai – 6, Mumbai, Room No.501,)
5th Floor, Aayakar Bhavan, Maharshi Karve)
Road, Mumbai – 400 020)
3. Principal Chief Commissioner of Income)
Tax, Room No.321, 3rd Floor, Aayakar Bhavan,)
Maharshi Karve Road, Mumbai – 400 020)
4. Central Board of Direct Taxes, Department)
of Revenue, Ministry of Finance, North Block,)
Secretariat Building, New Delhi – 110 001)
5. Union of India, Through Joint Secretary &)
Legal Adviser, Branch Secretariat, Department)
of Legal Affairs, Ministry of Law and Justice,)
2nd Floor, Aayakar Bhavan, M.K. Road, New)
Marine Lines, Mumbai – 400 020) ….Respondents

Mr. J.D. Mistri, Senior Advocate a/w. Mr. Madhur Agrawal i/b. Mr. Atul K. Jasani for petitioner.

Ms. Swapna Gokhale a/w. Mr. Suresh Kumar, Mr. Akhileshwar Sharma, Ms. Samiksha Kanani and Ms. Dhanalaxmi Iyer for respondents - Revenue.

CORAM : K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
RESERVED ON : 16th APRIL 2024
PRONOUNCED ON : 3rd MAY 2024

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

1 Since the pleadings are completed, by consent of the parties, we decided to dispose the petition at the admission stage itself.

2 Therefore, Rule. Rule made returnable forthwith.

3 Petitioner is engaged in information technology consulting, software development and business process services. Respondent no.1 is the Assistant Commissioner of Income Tax and Jurisdictional Assessing Officer (JAO) of petitioner, respondent no.2 is the Principal Commissioner of Income Tax, respondent no.3 is the Principal Chief Commissioner of Income Tax, respondent no.4 is the Central Board of Direct Taxes and respondent no.5 is the Union of India.

4 Petitioner filed return of income for Assessment Year 2015-2016 on 28th November 2015 declaring total income of Rs.204,54,44,990/-. In the return of income, petitioner claimed deduction under Section 10AA of the Act of Rs.195,94,62,306/- and also claimed deduction under Section 80JJAA of the Act of Rs.6,54,04,038/-. For claiming such deductions, petitioner filed an audit report in Form No.56F and Form No.10DA. Further, the details of deduction claimed under Section 10AA and 80JJAA of the Act was also reported in the Tax Audit report in Form 3CB read with Form 3CD which was submitted to respondent no.1 also during the course of assessment proceedings.

5 Petitioner's case was selected for scrutiny and notice dated 17th June 2016 under Section 143(2) of the Act came to be issued. Respondent no.1 also issued a notice dated 22nd August 2017 under Section

142(1) of the Act. This was followed by another notice dated 5th October 2017 calling upon petitioner to file details of deduction claimed under Chapter VIA alongwith all supporting documents. By its letter dated 13th November 2017 petitioner submitted details of deduction claimed under Chapter VIA of the Act alongwith all supporting documents. Petitioner further filed computation of income and provided reference to disclosures in Form 3CD with respect to the deductions claimed by petitioner. Further submissions were filed during the assessment proceedings. Respondent no.1, thereafter passed an assessment order dated 30th November 2017 under Section 143(3) of the Act accepting the return of income filed by petitioner.

6 Almost 3 ½ years later, respondent no.1 issued a notice dated 8th April 2021 under Section 148 of the Act stating that he had reason to believe that income chargeable to tax for Assessment Year 2015-2016 has escaped assessment within the meaning of Section 147 of the Act. Petitioner was also provided a copy of the reasons recorded.

Petitioner, thereafter filed a writ petition being Writ Petition No.3179 of 2021 challenging the notice issued under Section 148 of the Act on the ground that the said notice has been issued on the basis of the provisions which have ceased to exist and are no longer in the statute. The petition was allowed on 29th March 2022 and the Court held that the notice dated 8th April 2021 was invalid.

7 On a Special Leave Petition that the Revenue had filed in the case of ***Union of India & Ors. vs. Ashish Agarwal***,[1] the Hon'ble Apex Court, in exercise of jurisdiction under Article 142 of the Constitution of India, passed orders with respect to the notices and *inter alia* held that the notices issued under Section 148 of the Act after 1st April 2021 be treated as notice issued under Section 148A(b) of the Act and provided for time lines to be followed by the Assessing Officers for providing assessees the information and material relied upon by the Revenue for initiating reassessment proceedings. The Hon'ble Apex Court also clarified that all the defences available to assessees under the provisions of the Act would be available to assessee.

8 Thereafter, respondent no.1 issued the notice dated 25th May 2022 stating that the said notice is issued in view of the decision of the Hon'ble Apex Court in *Ashish Agarwal* (Supra). It was also stated that the information relied on by respondent no.1 was embedded in the reasons recorded which is being provided as an attachment to the imputed initial notice. In the reasons, it was alleged as under :

(i) Petitioner has claimed deduction under Section 80JJAA of the Act, which allows deduction of an amount equal to 30% of the additional wages paid to the new regular workmen employed by assessee. The basic condition to avail this deduction is to derive profit from

1 (2022) 444 ITR 1 (SC)

manufacture of goods in the factory. This condition has not been fulfilled by petitioner and hence, petitioner is not eligible for deduction under Section 80JJAA of the Act;

(ii) The percentage of profit derived by assessee from its undertaking eligible for deduction under Section 10AA of the Act is more than the profit derived from the non-eligible undertaking and, hence, it appears that petitioner has reported higher profits in the units eligible for 100% deduction;

(iii) In the computation of income, petitioner has added Rs.79.49 Crores on account of realized foreign exchange loss (Forex), which was reduced in computation of income in the last year. However, in the last year, the total amount reduced was Rs.86.40 Crores and, therefore, the difference of Rs.6.90 Crores has escaped assessment and is required to be added to the total income of petitioner; and

(iv) Certain transactions have been undertaken in the name of Calibre Point Business Solutions Ltd. However, as per AIMS Module of ITBA, Caliber Point Business Solutions Ltd. has not filed its return of income for the subject year. Further, as Calibre Point Business Solutions Ltd. is amalgamated with petitioner, the income from the said transactions has also escaped assessment and is required to be brought to tax.

9 Petitioner, by its letter dated 10th June 2022, filed its objections challenging the validity of the notice. Petitioner, *inter alia*, submitted that :

(a) The present reopening is contrary to Section 149(1)(b) of the Act, as no income, which is represented in the form of an 'asset', has escaped assessment and there is no such allegation by respondent no.1 in this regard;

(b) Approval under Section 151 of the Act for issuing the impugned initial notice has not been obtained from the appropriate authority and, hence, the reassessment proceedings are invalid and bad in law;

(c) For all the issues raised in the reasons, complete details and documents were available with respondent no.1 during the course of the original assessment proceedings and, therefore, the present reopening is clearly a case of change of opinion and hence, invalid and bad in law;

(d) Relying on various provisions of the Act, it was submitted that petitioner being engaged in the business of software development and information technology enable services will qualify as an industrial undertaking for the purpose of Section 80JJAA of the Act and, hence, will be eligible for deduction under the said Section;

(e) In fact, the claim of deduction under Section 80JJAA of the Act has been consistently allowed by respondent no.1 or the Appellate Authorities since the Assessment Year 2010-2011;

(f) Petitioner had originally credited Rs.86.40 Crores being the loss on forward contract to hedging reserve account in the balance sheet as

on 31st March 2014. This amount was not routed through the profit and loss account of petitioner and was separately claimed as a deduction in the computation of income for Assessment Year 2014-2015, i.e., the earlier assessment year. During the relevant financial year, on materialization of the part of Forex contract, the amount of Rs.79.49 Crores being the actual loss was transferred from hedging reserve account to profit and loss account. However, as the deduction had already been claimed in the earlier year, there was no deduction claimed in this year in the computation of income. The difference of Rs.6.90 Crores pertains to transactions which did not materialize till 31st March 2015 and hence, the same was not transferred from the hedging reserve to profit and loss account. Further the said amount has been charged to the profit and loss account of subsequent year and has been adjusted in the computation of income of the subsequent years, and therefore, does not reflect in the income chargeable to tax of the current year. Thus, there is no income which has escaped assessment;

(g) Calibre Point Business Solutions Ltd., which was a wholly owned subsidiary of petitioner, had merged with petitioner on the appointed date of 1st April 2013 as per order dated 10th October 2014 of the Bombay High Court. Subsequent to the merger, all the transactions of Calibre Point Business Solutions Ltd. were considered in the return and assessment of petitioner and hence, all the transactions of Calibre Point Business Solutions Ltd. are already accounted for in the books of petitioner

and considered while filing the income tax return. Therefore, there is no escapement of income on this count as well.

10 Notwithstanding the detailed reply filed by petitioner, respondent no.1 issued a notice dated 29th June 2022 stating that petitioner is requested to submit any further explanation/documentary evidence in support of petitioner's case before 4th July 2022. It is further stated in the notice that the information is called for due to change in incumbency as per the provision of Section 129 of the Act.

Petitioner informed respondent no.1 that the submissions dated 10th June 2022 should be considered as a response to the notice dated 29th June 2022. Further, at the request of respondent no.1, online response was also filed on 22nd July 2022.

11 Respondent no.1 thereafter passed the impugned order dated 26th August 2022, *inter alia*, holding as under :

(i) The revenue audit has raised objection on the issue of claim of deduction under Section 80JJAA of the Act and hence, the objection of petitioner that there is no information which suggests that escapement of income is not tenable;

(ii) The objection of reassessment proceedings being barred by limitation does not have any merit in view of CBDT Instruction No.1 of 2022;

(iii) The approval has rightly been obtained for issuing the original notice under Section 148 of the Act as per the then existing provisions and hence, the allegation that the approval has not been obtained from the appropriate authority is rejected;

(iv) Business of software development does not come within the ambit of an industrial undertaking being engaged in manufacture of production of articles or things. Hence, petitioner is not eligible for deduction under Section 80JJAA of the Act;

(v) With respect to the issue of Forex loss of Rs.6.90 Crores, *prima facie* the contention of petitioner appears to be acceptable but in the absence of supporting details and documentary evidence in respect of foreign exchange gain/loss, the issue remains unverifiable. Therefore, the issue of claim of deduction on account of Forex loss is not found to be genuine;

(vi) Transaction of Calibre Point Business Solutions Ltd. has been reported in the income tax return of petitioner and this issue has not resulted in any escapement of income;

Respondent no.1 further did not make any adverse comment with respect to claim of deduction under Section 10AA of the Act and, therefore, in our view, it must be presumed that the said issue has already been dropped by respondent no.1 while passing the impugned order.

12 Respondent no.1, thereafter, issued the notice dated 27th August 2022 manually, stating that respondent no.1 has information in the case of petitioner, which requires action in consequence of the judgment of the Hon'ble Apex Court, which suggests that income chargeable to tax for Assessment Year 2015-2016 has escaped assessment. It is further stated in the notice that it has been issued after taking approval of respondent no.3.

13 Separately, a communication dated 27th August 2022 was issued where respondent no.1 stated that DIN No.ITBA/AST/M/148_1/ 2022-23/1044985555(1) has been generated for the issuance of notice dated 26th August, 2022 under Section 148 of the Act. In response, petitioner filed on 23rd September 2022 its return of income to the notice dated 27th August 2022 and also sought a copy of the approval for passing the impugned order and for issuing the notice, which was provided on 30th September 2022.

It is necessary to note that respondent no.4, which is the Central Board of Direct Taxes (CBDT), has issued Circular No.19 of 2019 *inter alia* providing that any communication issued by respondent without a DIN (Document Identification Number) shall be treated as invalid and shall be deemed to have never been issued.

14 Being aggrieved by the assumption of jurisdiction by respondent no.1, which petitioner says was unlawful, in (i) issuing the notice dated 25th May 2022 purporting to treat notice dated 8th April 2021

as notice issued under Section 148A(b) of the Act for Assessment Year 2015-2016; (ii) passing the order dated 26th August 2022 under Section 148A(d) of the Act for Assessment Year 2015-2016; and (iii) issuing the notice dated 27th August 2022 by respondent no.1 under Section 148 of the Act for Assessment Year 2015-2016, petitioner has approached this Court under Articles 226 of the Constitution of India.

15 **Mr. Mistri submitted as under** :

(a) Taxation and Other Laws (Relaxation and Amendment of certain provisions) Act, 2020 [TOLA] was not applicable for Assessment Year 2015-2016 and, therefore, there is no question of Revenue relying on TOLA to justify the impugned notice under Section 148 of the Act as being within the period of limitation. This view has been held by this Court in ***Tata Communications Transformation Services Ltd. vs. Assistant Commissioner of Income Tax and Ors.***[2] as well as ***Siemens Financial Services (P.) Ltd. vs. Deputy Commissioner of Income Tax***[3];

(b) Notice dated 27th August 2022 issued under Section 148 of the Act is barred by limitation as per the first proviso to Section 149 of the Act. The first proviso to Section 149 of the Act provides that no notice under Section 148 shall be issued at any point of time in a case for a relevant assessment year beginning on or before the 1st day of April 2021, if a notice under Section 148 could not have been issued 'at that time' on

2 (2022) 443 ITR 49 (Bom)
3 (2023) 154 taxmann.com 159 (Bombay)

account of being beyond the time limit specified under the provision of clause (b) of sub-section (1) of Section 149, as it stood immediately before the commencement of the Finance Act, 2021;

(c) The term 'at that time' in the first proviso refers to the date on which notice under Section 148 of the Act is issued by the Assessing Officer. On the said date, if a notice could not have been issued under the erstwhile provision of Section 149(1)(b) of the Act, for any assessment year beginning on or before the 1st day of April 2021, the notice cannot be issued even under the new provisions. Section 149(1)(b) of the erstwhile provisions provided a time limit of six years from the end of the relevant assessment year for issuing notice under Section 148 of the Act. For the relevant assessment year, being Assessment Year 2015-2016, sixth year expired on 31st March 2022. The notice under Section 148 of the Act, in the present case, is issued on 27th August 2022, i.e., clearly beyond the period of limitation prescribed in Section 149 read with the first proviso to the said Section. The stand of the Revenue to interpret the first proviso to Section 149 of the Act to be applicable only for Assessment Years 2013-2014 and 2014-2015, i.e., for assessment years where the period of limitation had already expired on 1st April 2021 is not correct because that would render the first proviso to Section 149 of the Act redundant and otiose. The time limit to issue notice under Section 148 of the Act had already expired on 1st April 2021 for Assessment Year 2013-2014 and Assessment Year 2014-

2015 when Section 149 of the Act was amended. Therefore, reopening for Assessment Year 2013-2014 and Assessment Year 2014-2015 had already been barred by limitation on 1st April 2021. Moreover, that would render the parts 'at any time' or 'beginning on or before 1st day of April 2021' or the words 'at that time' used in the proviso redundant. If we accept the interpretation given by the Revenue, then it would amount to rewriting the proviso to Section 149(1)(b) of the Act;

(d) The fifth and sixth provisos to Section 149 of the Act are not applicable. The fifth proviso is not applicable for extension of limitation for issuing the notice under Section 148 of the Act. The fifth and sixth provisos to Section 149 of the Act are only applicable with respect to the period of limitation prescribed in Section 149(1) of the Act, i.e., three years or ten years, as the case may be. The fifth proviso or sixth proviso extend limitation for issuing notice under Section 149 of the Act, however, the first proviso is an exception to the period of limitation and provides for a restriction on the notices under Section 148 of the Act being issued for Assessment Years upto 2021-2022 beyond a certain date. Whether Section 149 of the Act would operate, the Court has to first decide whether a notice issued under Section 148 of the Act is within the period of limitation in terms of Section 149(1)(a) or (b) of the Act. To decide whether the notice is within the period of limitation under Section 149(1)(a) or (b) of the Act, the extension of time as per the fifth and/or sixth proviso would be

considered. Once the notice is otherwise within the period of limitation, thereafter one has to see whether the said time limit is within the restriction provided in the first proviso or not. If the notice is beyond the restriction period, the notice is invalid. The fifth and/or the sixth proviso cannot apply at this stage to extend the period of restriction as per the first proviso and this has been confirmed in ***Godrej Industries Ltd. vs. The Assistant Commissioner of Income Tax and Ors.***[4]

In the alternative, even if the fifth and sixth provisos are applicable, under the fifth proviso the period to be excluded would be counted from 25th May 2022, i.e., the date on which the show cause notice was issued under Section 148A(b) of the Act by respondent no.1 subsequent to the decision of the Hon'ble Apex Court in the case of *Ashish Agarwal* (Supra) and upto 10th June 2022, which is a period of 16 days. The period from 29th June 2022 upto 4th July 2022 cannot be excluded as the same was not based on any extension sought by petitioner but at the behest of respondent no.1. Even if the same was to be excluded, still that would mean further exclusion of 5 days. Even then the impugned notice dated 27th August 2022 is still beyond limitation;

(e) The impugned notice dated 27th August 2022 is invalid and bad in law as the same has been issued without DIN. In the impugned notice dated 27th August 2022 no DIN is mentioned and, hence, in view of

4 2024 SCC OnLine Bom 681

the Circular No.19 of 2019 dated 14th August 2019 issued by CBDT, the notice is invalid. A separate intimation letter dated 27th August 2022 cannot validate the notice because (i) the intimation letter refers to a DIN with respect to notice dated 26th August 2022 under section 148 of the Act whereas, the impugned notice issued to petitioner is dated 27th August 2022; and (ii) the procedure prescribed in Circular No.19 of 2019 for non mention of DIN has not been complied with. In the case of non compliance of those procedure prescribed in the notice for non mention of DIN, the notice would be invalid and bad in law as held in ***Ashok Commercial Enterprises vs. Assistant Commissioner of Income Tax***[5] and ***Principal Commissioner of Income Tax vs. Tata Medical Center Trust***[6];

(f) The impugned notice dated 27th August, 2022 is invalid and bad in law being issued by the JAO which is not in accordance with Section 151A of the Act which gives power to CBDT to notify the Scheme for the purpose of assessment, reassessment or recomputation under Section 147 for issuance of notice under Section 148 of the Act or for conducting of inquiry or issuance of show cause notice or passing of order under Section 148A of the Act or sanction for issuance of notice under Section 151 of the Act. In exercise of the powers conferred under Section 151A of the Act, CBDT issued a notification dated 29th March, 2022 after laying the same before each House of Parliament and formulated a Scheme called “the

5 (2023) 459 ITR 100
6 (2023) 459 ITR 155 (Cal)

e-Assessment of Income Escaping Assessment Scheme, 2022" (the Scheme). The Scheme provides that (a) the assessment, reassessment or recomputation under Section 147 of the Act and (b) the issuance of notice under Section 148 of the Act shall be through automated allocation, in accordance with risk management strategy formulated by the Board as referred to in Section 148 of the Act for issuance of notice and in a faceless manner, to the extent provided in Section 144B of the Act with reference to making assessment or reassessment of total income or loss of assessee. The impugned notice dated 27th August, 2022 has been issued by respondent no.1 (JAO) and not by the NFAC, which is not in accordance with the aforesaid Scheme;

(g) No income chargeable to tax which is represented in the form of 'an asset' has escaped assessment and, hence, the extended period of time limit specified in Section 149(1)(b) of the Act cannot apply. The only issue which remains for issuing the impugned notice is the claim of deduction under section 80JJAA of the Act. An issue of correctness of claim of deduction can never represent escapement of income in the form of an asset. This is because the term 'asset' is defined in Explanation to Section 149 of the Act to include immovable property being land or building or both, shares and securities, loans and advances, deposit in bank account. The present case does not fall in any of the types of the assets as mentioned above. The alleged claim of disallowance of deduction also cannot fall

under the category of either expenditure in respect of transaction in relation to an event or an entry in the books of account because it is neither a case of expenditure in respect of transaction in relation to an event nor a case of entry in the books of account as no entries are passed in the books of account for claiming a deduction under the provisions of the Act;

(h) Respondent no.1 has no power to review his own assessment when the same information was provided and considered by him during the original assessment proceedings. There cannot be a reopening based on a change of opinion. The claim of deduction under Section 80JJAA of the Act was made by petitioner in the return of income and petitioner had filed Form 10DA being the report of the Chartered Accountant. In the Form, a note has been filed alongwith Form 10DA and it has specifically been submitted by petitioner that software development activity constitutes 'manufacture/production of article or thing'. The claim of deduction under Section 80JJAA of the Act was also disclosed in the Tax Audit Report filed alongwith the return of income. Moreover, during the assessment proceedings, the Assessing Officer had issued a notice dated 5th October, 2017 asking for details of deduction claimed under Chapter VI of the Act. Petitioner, by its letter dated 13th November 2017, gave the details of deduction claimed alongwith supporting documents. Thereafter, the Assessing Officer passed the assessment order dated 30th November 2017 allowing the claim of deduction under Section 80JJAA of the Act.

Therefore, the present case is clearly a case of change of opinion which is not permissible even under the new provisions as held in *Siemens Financial Services (P.) Ltd.* (Supra). The claim of deduction under Section 80JJAA has been allowed to petitioner consistently since Assessment Year 2010-2011 and hence, respondent no.1 cannot allege escapement of income on account of claim being wrongly allowed in Assessment Year 2015-2016 when such claim stands allowed for earlier years on identical facts, i.e., with respect to the same business activity.

16 **Ms. Gokhale submitted as under** :

(a) The original notice dated 8th April 2021 issued under Section 148 of the Act was within limitation because six years under the old provisions for Assessment Year 2015-2016 would expire only on 31st March 2022.

We have to note that to the query raised by the Court that how after 1st April 2021 respondent could have issued the notice under the old provisions and the fact that it has been quashed, Ms. Gokhale had no answer;

(b) The notice issued on 25th May 2022 was within 30 days of pronouncement of judgment in *Ashish Agarwal* (Supra) and reply to the notice was received on 10th June 2022. This period from 25th May 2022 and 10th June 2022 was to be excluded. Later, on 29th June 2022 notice was issued and petitioner replied on 22nd July 2022. This period from 29th June

2022 and 22nd July 2022 also has to be excluded;

(c) The time limit for issuing notice under un-amended Section 149 which was falling from 20th March 2020 till 31st March 2021 was extended by Section 3 of the Taxation and Other Laws (Relaxation and Amendment of certain provisions Act), 2020 (TOLA) read with Notification No.20 of 2021 dated 31st March 2021 and Notification No.38 of 2021 dated 27th April 2021, until 30th June 2021. The power of reassessment that existed prior to 31st March 2021 continued to exist till the extended period, i.e., till 30th June 2021. The Finance Act, 2021, however, has merely changed the procedure to be followed prior to issuance of notice with effect from 1st April 2021. Subsequently, the Hon'ble Apex Court in *Ashish Agarwal* (Supra) held that the Section 148 notices issued between 1st April 2021 and 30th June 2021 will be deemed to have been issued under Section 148A of the Act. Any notice issued under Section 148 from 1st April 2021 would be governed only by the timelines specified under the new Section 149 even though it may relate to the past assessment years. Consequently, applying the new Section 149, should any proceedings be initiated by the end of 31st March 2020, the same would get extended because of TOLA upto 30th June 2021. If this is not done then some of the assessment years for the past periods cannot be proceeded at all in the absence of TOLA. The Hon'ble Apex Court's expression that 'revenue should not be left remediless' cannot be overlooked and the decision rendered inoperative. CBDT with a

view to implement the judgment of the Hon'ble Apex Court in the case of *Ashish Agarwal* (Supra) in a uniform manner, in exercise of power under Section 119 of the Act, has interpreted the judgment and issued guidelines for implementation of the same by explaining the scope of judgment, operation of new Section 149 of the Act to identify cases where fresh notices under Section 148 of the Act can be issued, cases where Assessing Officer is required to provide the information in material relied upon within 30 days and procedure to be followed by the Assessing Officers to comply with the Hon'ble Apex Court's judgment. The contention by petitioner that CBDT has misconstrued the observations of the Hon'ble Apex Court with regards to the reopening of cases is also not tenable. CBDT, vide Instruction No.1 of 2022 dated 11th May 2022 had issued guidelines for interpretation of judgment and the concerning assessment years for which the decision of the Hon'ble Apex Court will be applicable. The validity of CBDT Instruction No.1 of 2022 was challenged in the case of ***Touchstone Holdings Pvt. Ltd. vs. Income Tax Officer, Ward 25(3), Delhi***[7] before the Hon'ble Delhi High Court. The Hon'ble Delhi High Court in its order dated 9th September 2022 dismissed the writ petition alongwith the challenge to paragraph 6.2(i) of CBDT Instruction No.1 of 2022 dated 11th May 2022, wherein the challenge to Instruction No.1 of 2022 issued by CBDT was held as not maintainable. This submission was raised by Revenue in ***New India Assurance Company***

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Ltd. vs. Assistant Commissioner of Income Tax[8] and has not been accepted by this court;

(d) It is open to CBDT to clarify that the law laid down by the Hon'ble Apex Court in *Ashish Agarwal* (Supra) means that the extended reassessment notices will travel back in time from the original date when such notices were to be issued;

(e) As regards the submission that the notice was issued by the JAO and not Faceless Assessing Officer (FAO) and hence, invaild, they both have concurrent jurisdiction;

(f) In any event, petitioner has alternate remedy by way of an appeal if reassessment order is passed not to the liking of petitioner.

17 Mr. Suresh Kumar and Mr. Sharma, who were present in Court because there were similar petitions where they are concerned on behalf of the Revenue, sought leave of the Court to make submissions in this petition as well to supplement the arguments of Ms Gokhale. They were permitted.

18 **Mr. Suresh Kumar submitted as under :**

(a) In view of the Finance Act, 2021, which came into force from 1st April 2021, for Assessment Year 2015-2016, the Revenue will have upto ten years to issue notice under Section 148 of the Act subject to it complying with the preconditions mentioned in Section 149(1)(b) of the Act;

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(b) The six years limitation prescribed as it stood immediately before the commencement of the Finance Act, 2021 will not be applicable.

19 **Mr. Sharma submitted as under :**

(a) The expression “at that time” used in the first proviso to Section 149(1) of the Act would mean 1st April 2021 and not the date of the notice under Section 148 of the Act.

(b) Mr. Sharma, relying on the notification dated 29th March 2022 [Notification No.18/2022/F. No.370142/16/2022-TPL], submitted as under :

(i) The guideline dated 1st August 2022 issued by the CBDT includes a suggested format for issuing notice under Section 148 of the Act, as an Annexure to the said guideline and it requires the designation of the Assessing Officer alongwith the office address to be mentioned and, therefore, it is clear that the JAO is required to issue the said notice and not the FAO.

(ii) ITBA step-by-step Document No.2 dated 24th June 2022, an internal document, regarding issuing notice under Section 148 for the cases impacted by Hon'ble Supreme Court's decision dated 4th May 2022 in the case of *Ashish Agarwal* (Supra), requires the notice issued under Section 148 of the Act to be physically signed by the Assessing Officers and, therefore, the JAO has jurisdiction to issue notice under Section 148 of the Act and it need not be issued by FAO.

(iii) FAO and JAO have concurrent jurisdiction and merely because the Scheme has been framed under Section 151A of the Act, it does not mean that the jurisdiction of the JAO is ousted or that the JAO cannot issue the notice under Section 148 of the Act.

(iv) The notification dated 29th March 2022 provides that the Scheme so framed, is applicable only 'to the extent' provided in Section 144B of the Act and Section 144B of the Act does not refer to issuance of notice under Section 148 of the Act. Hence, the notice cannot be issued by the FAO as per the said Scheme.

(v) No prejudice is caused to petitioner when the notice is issued by the JAO and, therefore, it is not open to petitioner to contend that the said notice is invalid merely because the same is not issued by the FAO.

(vi) Office Memorandum dated 20th February 2023 issued by Central Board of Direct Taxes (TPL division) with the subject – "*seeking inputs/comments on the issue of challenge of jurisdiction of JAO – reg.*" the Office Memorandum contains the arguments of the Revenue in the context of the Scheme to submit that the notice under Section 148 of the Act is required to be issued by the JAO and not FAO.

(c) No prejudice has been caused to assessee by the JAO issuing the notice because the reassessment will be done by the FAO and as held by the Calcutta High Court in ***Triton Overseas Private Limited vs.***

Union of India and Ors.[9]; this objection of petitioner has to be rejected.

FINDINGS :

20 After hearing all the counsels, the following issues came up for consideration :

> (1) Whether TOLA is applicable for Assessment Year 2015-2016 and whether any notice issued under Section 148 of the Act after 31st March 2021 will travel back to the original date?
>
> (2) Whether the notice dated 27th August 2022 issued under Section 148 of the Act is barred by limitation as per the first proviso to Section 149 of the Act?
>
> (3) Whether the impugned notice dated 27th August 2022 is invalid and bad in law as the same has been issued without a DIN?
>
> (4) Whether the impugned notice dated 27th August 2022 is invalid and bad in law being issued by the JAO as the same was not in accordance with Section 151A of the Act?
>
> (5) Whether the issues raised in the impugned order show an alleged escapement of income represented in the form of an asset or expenditure in respect of transaction in relation to an event or an entry in the books of account as required in Section 149(1)(b) of the Act?
>
> (6) Whether respondent no.1 has proposed to reopen on the basis of change of opinion and if it is permissible?
>
> (7) When the claim of deduction under Section 80JJAA of the Act has been consistently allowed in favour of petitioner by the Assessing Officers/ Appellate Authorities in the earlier years, can the Assessing Officer have a belief that there is

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escapement of income?

(8) Whether the approval granted by the Sanctioning Authority was valid?

21 **As regards issue no.1**, for Assessment Year 2015-2016 the provisions of TOLA are not applicable. This is a categorical finding in *Tata Communications Transformation Services Ltd.* (Supra) and has been followed by the *Siemens Financial Services (P.) Ltd.* (Supra)

Paragraph 27 of *Siemens Financial Services (P.) Ltd.* (Supra) reads as under :

> *27. This Court, in a series of judgments, has held that TOLA cannot apply in respect of reassessment proceedings for AY 2015-16 and subsequent years:-*
>
> *(a) Tata Communications Transformation Services Ltd (supra), paragraph 49(c) reads as under :*
>
> > *"49. Some more reasons why the reopening notices must go are :*
> >
> > *(a) ……..*
> >
> > *(b) ……..*
> >
> > *(c) In any case, Relaxation Act is not applicable for Assessment Years 2015-2016 or any subsequent year and, hence, the question of applicability of the Notification Nos.20 and 38 of 2021 does not arise. The time limit to issue notice under section 148 of the Act for the Assessment Years 2015- 2016 onwards was not expiring within the period for which section 3(1) of Relaxation Act was applicable and, hence, Relaxation Act could never apply for these assessment years. As a consequence, there can be no question of extending the period of limitation for such assessment years."*
>
> *(b) Judgment in Tata Communications (Supra) has been affirmed by the Supreme Court in Ashish Agarwal (supra) in paragraph 7, where, the Supreme Court states that it is in complete agreement with the view of the High Courts. It*

reads as under :

> *"7. 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 1st April, 2021. We are in complete agreement with the view taken by the various High Courts in holding so."*

(c) J.M. Financial (supra) – paragraphs 5 to 7 read as under :

> *"5. Respondents have relied upon a letter dated 18th March 2021 issued by one Income Tax Officer, who has given an opinion to the Additional Commissioner of Income Tax that in view of the Taxation and other Laws (Relaxation of Certain Provisions) Act, 2020 (Relaxation Act), limitation, inter alia, under provisions of Section 151(1) and Section 151(2), which were originally expiring on 31st March 2020 stand extended to 31st March 2021. According to the Income Tax Officer, in view of the above, Assessment Year 2015-2016 which falls under the category within four years as on 31st March 2020, the statutory approval for issuance of notice under Section 148 of the Act for the Assessment Year 2015-2016 may be given by the Range Head as per the said provisions. Mr. Sharma clarifies that the Income Tax Officer is only conveying the view of the Principal Commissioner of Income Tax because this letter has been issued on the letterhead of Principal Commissioner of Income Tax.*
>
> *6. Even for a moment we agree with the view expressed by the Principal Commissioner of Income Tax, still it applies to only cases where the limitation was expiring on 31st March 2020. In the case at hand, the assessment year is 2015-2016 and, therefore, the six years limitation will expire only on 31st March 2022. Certainly, therefore, the Relaxation Act provisions may not be applicable. In any event, the time to issue notice may have been extended but that would not amount to amending the provisions of Section 151 of the Act.*
>
> *7. In our view, since four years had expired from the end of the relevant assessment year, as provided under Section 151(1) of the Act, it is only the Principal Chief Commissioner or Chief Commissioner or Principal*

Commissioner or Commissioner who could have accorded the approval and not the Additional Commissioner of Income Tax. On this ground alone, we will have to set aside the notice dated 31st March 2021 issued under Section 148 of the Act, which is impugned in this petition. In view thereof, the consequent orders and notices will also have to go."

(d) MA Multi-Infra Development Pvt Ltd v. ACIT – paragraph 7 reads as under :

"7. Be that as it may, in our view, the present case is squarely covered by the view taken by this Court in J.M. Financial & Investment Consultancy Services (P) Ltd. (Supra). We accordingly hold that the approval for issuance of notice u/s. 148 ought not have been obtained from the Additional Commissioner of Income Tax but from the authority specifically mentioned u/s. 151(ii) of the Act."

(e) DCW Limited v. ACIT – paragraphs 5,6, 7 & 8 read as under :

"5. In the aforementioned case, which also pertained to assessment year 2015-16 and in which approval was granted on 26th March 2021 by the 'Additional Commissioner of Income Tax', was held to be bad inasmuch as it was held that having been issued beyond the period of four years from the relevant assessment year, the approval ought to have been accorded by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner of Income Tax and not by the Additional Commissioner of Income Tax. The Court also held that the provisions of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 ('Relaxation Act') may have extended the time to issue a notice under section 148 of the Act but did not have the effect of amending the provisions of section1 151 of the Act. This Court held :

"5. Respondents have relied upon a letter dated 18th March 2021 issued by one Income Tax Officer, who has given an opinion to the Additional Commissioner of Income Tax that in view of the Taxation and other Laws (Relaxation of Certain Provisions) Act, 2020 (Relaxation Act), limitation, inter alia, under provisions of Section 151(1) and Section 151(2), which were originally expiring on 31st March 2020 stand extended to 31st March 2021. According to the Income Tax Officer, in

view of the above, Assessment Year 2015-2016 which falls under the category within four years as on 31st March 2020, the statutory approval for issuance of notice under Section 148 of the Act for the Assessment Year 2015-2016 may be given by the Range Head as per the said provisions. Mr. Sharma clarifies that the Income Tax Officer is only conveying the view of the Principal Commissioner of Income Tax because this letter has been issued on the letterhead of Principal Commissioner of Income Tax.

6. Even for a moment we agree with the view expressed by the Principal Commissioner of Income Tax, still it applies to only cases where the limitation was expiring on 31st March 2020. In the case at hand, the assessment year is 2015-2016 and, therefore, the six years limitation will expire only on 31st March 2022. Certainly, therefore, the Relaxation Act provisions may not be applicable. In any event, the time to issue notice may have been extended but that would not amount to amending the provisions of Section 151 of the Act."

6. In the present case, counsel for the respondents reiterated the stand of the revenue as was taken before the Court in the aforementioned case. However, we do not find any reason to take a view different from the one which has already been taken by this Court in the aforementioned judgment.

7. Without going into any other issues, since the issue of grant of approval by an authority, as prescribed under section 151 of the Act goes to the root of the matter, we wish to deal only with the said issue and hold that even in the present case, the approval ought to have been granted by either the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner and not by the Additional Commissioner of Income tax.

8. Since the notice was being issued beyond the four years period prescribed under the un-amended provisions of section 151(1) of the Act, it ought to have the satisfaction accorded by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner of Income Tax which is not so in the present case."

(f) Soumya Girdhari Agarwal v. ITO – paragraph 4 read as under :

> *"4. On a reading of Section 151 it is clear that a notice under Section 148 of the Act, 1961 cannot be issued after the expiry of period of four years from the end of the relevant assessment year, unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner was satisfied, on the reasons recorded by the A.O., that it was a ft case for the issue of such a notice.*
>
> *In the present case, it is clear that assessment year under consideration was 2015-16 and, therefore, the notice impugned dated 29th March, 2021 was admittedly beyond the four years period for which the approval ought to have been granted by any one of the aforementioned four authorities and not by the Joint Commissioner. It is clear that, the A.O. fell in error in holding that the case at hand fell within the four years period, from the end of the assessment year under consideration, which on the face of it appears to be erroneous."*

(g) Voltas Limited v. ACIT – paragraphs 6, 19 to 24 read as under :

> *"(6) In the petition, petitioner has also raised an objection that the sanction obtained under section 151 of the Act was not a valid sanction since the proposed reopening is more than 4 years after expiry of relevant assessment year. As provided under sub-section (1) of section 151 of the Act only a Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner could grant the sanction. Since in this case, admittedly, sanction has been granted by an Additional Commissioner of Income Tax, it is not a valid sanction and therefore, notice issued based on an invalid sanction is also not valid and has to be quashed.*
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> ***************************
>
> *(19) It is also petitioner's case that the approval obtained for issuing notice under section 148 of the Act is not in accordance with the mandate of Section 151 as the said approval is of Additional Commissioner of Income Tax instead of Principal Commissioner of Income Tax. It is petitioner's case that the reasons put up for approval on 26.03.2021, which is after the expiry of four years from the end of the relevant*

assessment year 2015-2016 and approval was granted on 30.03.2021. Therefore, Mr. Joshi submitted that as per Section 151 of the Act, as four years have elapsed at the time of reopening, the sanction is required to be obtained from the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner of Income Tax and since the sanction has not been obtained from any of these four Commissioners of Income Tax, the notice issued is bad in law.

(20) Sub-Section 1 of Section 151 of the Act provides that no notice shall be issued under Section 148 by an Assessing Officer, after the expiry of a period of four years from the end of the relevant assessment year, unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer, that it is a ft case for the issue of such notice.

(21) Admittedly in this case, four years from the end of the relevant assessment year A.Y. 2015-16 has expired before the issuance of notice and the approval also has been obtained from the Additional Commissioner of Income Tax and not Principal Commissioner of Income Tax. In the affidavit-in-reply fled through Yashraj Nain, affirmed on 25.03.2022, these facts have not been disputed but according to respondents, the approval granted by the Additional Commissioner of Income Tax was a valid approval.

(22) Respondents have relied upon Taxation and other Laws (Relaxation of Certain Provisions) Act, 2020 (Relaxation Act), limitation to submit, inter alia, under provisions of Section 151(1) and Section 151(2), which were originally expiring on 31 st March 2020 stand extended to 31st March 2021. According to the Income Tax Officer, the statutory approval for issuance of notice under Section 148 of the Act for the Assessment Year 2015-2016 may be given by the Range Head as per the said provisions.

(23) Even for a moment, we agree with the view expressed by respondents, still it applies to only cases where the limitation was expiring on 31st March 2020. In the case at hand, the assessment year is 2015-16 and, therefore, the six years limitation will expire only on 31st March 2022. Certainly, therefore, the Relaxation Act provisions will not be applicable. In any event, the time to issue notice may have been extended but that

> *would not amount to amending the provisions of Section 151 of the Act.*
>
> *(24) In our view, since four years had expired from the end of the relevant assessment year, as provided under Section 151(1) of the Act, it is only the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner who could have accorded the approval and not the Additional Commissioner of Income Tax. On this ground alone, we will have to set aside the notice dated 31.03.2021 issued under Section 148 of the Act, which is impugned in this petition."*
>
> *Similarly in Johnson and Johnson v. DCIT, Equitable Financial Consultancy Services Pvt Ltd v. ITO and Asian Paints Ltd. v. ACIT.*

Therefore, there is no question of Revenue relying on TOLA to justify the impugned notice under Section 148 of the Act as being within the period of limitation.

22 This Court in *Tata Communications Transformation Services Ltd.* (Supra) as well as in *Siemens Financial Services (P.) Ltd.* (Supra) has also rejected the argument of Revenue on the issue of travel back. Paragraphs 28, 29 and 30 of *Siemens Financial Services (P.) Ltd.* (Supra) read as under :

> *28. The interpretation placed by the CBDT in paragraph 6.1 of Instruction No.1/2022 dated 11th May 2022 cannot be countenanced as it is not open to them to clarify that the law laid down by the Apex Court means that the extended reassessment notices will travel back in time to their original date when such notices were to be issued and, then, the new section 149 of the Act is to be applied as this is contrary to the judgment of this court in Tata Communications (supra) wherein it is held that TOLA does not envisage traveling back of any notice. However, even assuming that it is held that these notices travel back to the date of the original notice issued on 25th June 2021, even then the approval of the Principal Chief Commissioner of Income Tax should be*

obtained in terms of section 151(ii) of the Act as a period of three years from the end of the relevant assessment year ended on 31st March 2020 for AY 2016-17.

29. Further, the CBDT in Instruction no.1/2022 at paragraph 6.2(ii) has wrongly stated that the notices issued under section 148 of the Act for AY 2016-17 are to be considered as having been issued within a period of three years from the end of the relevant assessment year and, on that basis, has wrongly mentioned that the approval of the specified authority under section 151(i) should be taken. This conclusion is premised on the basis that these notices travel back to 31 March 2020 which premise is completely erroneous as explained hereinbefore. The notice under section 148 of the Act is issued on 31 July 2022 and, hence, is issued beyond period of three years from the end of the relevant assessment year and, accordingly, the approval of the specified authority under section 151(ii) of the Act should be taken.

30. This court in Tata Communications (Supra), has rejected that argument of the Revenue on the issue of travel back. This court in paragraph 37 of Tata Communications (Supra) has held that Section 3(1) of TOLA does not provide that any notice issued under Section 148 of the Act, after 31st March 2021 will relate back to the original date or that the clock is stopped on 31st March, 2021 such that the provision as existing on such date will be applicable to notices issued relying on the provision of TOLA. The court held that Section 3(1) of TOLA merely extends the limitation provided in the specified Acts including Income-tax Act for doing certain Acts but such Acts must be performed in accordance with the provisions of the specified Acts. The court had also recorded that the Delhi High Court had considered and rejected the contention of the Revenue that the notice issued after 1st April 2021 relates back to an earlier period. The Delhi High Court had considered and rejected the argument of the Revenue that TOLA creates a legal fiction such that the notices issued under Section 148 of the Act are deemed to be issued on 31st March, 2021. TOLA only granted power to the Central Government to notify the period during which actions are required to be taken that can fall within the ambit of TOLA, and the power to extend the time limit within which those actions are to be taken. There was no amendment to the provisions of Sections 147 to 151 of the Act. The court also observed that amendments to the substantive provisions of the Act were envisaged under Section 3 of TOLA, which was only a relaxation provision dealing with time limits under various enactments. The Assessing Officer could have assumed jurisdiction while issuing the impugned notices only after complying with the

amended Section 147 which has not been done. In Tata Communications (Supra), this court also held that TOLA was not applicable for A.Y.-2015-2016 or any subsequent years. Hence question of applicability of notification issued under TOLA also would not arise. Paragraphs 34 to 49 of Tata Communications (Supra) read as under :

> *34. It is well settled that the validity of a notice issued under Section 148 of the Act must be judged on the basis of the law existing on the date on which such notice is issued. Even the Revenue accepts this well settled position. Further, the provisions of Sections 147 to 151 are procedural laws and accordingly, the provisions as existing on the date of the notice would be applicable. Even the revenue accepts this legal position and the CBDT Circular No.549 of 1989, that Mr. Mistri relied upon, explaining the provisions of the Finance Act, 1989 specifically sets out that any notices issued by Revenue after the amendment made by the Finance Act, 1989 must comply with the amended provision of the law. Therefore, any notice issued after 1st April, 2021 must comply with the amended provisions of the Act which was amended with effect from 1st April, 2021. This contention has also been considered and upheld by the Delhi High Court and the Allahabad High Court.*
>
> *35. We have to also note the well settled proposition that when the Act specifies that something is to be done in a particular manner, then, that thing must be done in that specified manner alone, and any other method/(s) of performance cannot be upheld. Hence, notices issued under Section 148 of the Act after 1st April, 2021 must comply with the amended provisions of law and cannot be sustained on the basis of the erstwhile provision.*
>
> *36. In order to uphold the arguments of the Revenue in this regard, either a savings clause, or a specific legislative enactment deferring applicability of the amended provisions and the repeal of the old provisions of the Act, would be required. Plainly no such savings clause or enactment is available.*
>
> *37. Section 3(1) of Relaxation Act does not provide that any notice issued under Section 148 of the Act, after 31st March 2021 will relate back to the original date or that the clock is stopped on 31st March, 2021 such that the provision as existing on such date will be applicable to notices issued relying on the provision of Relaxation Act. A plain reading of Relaxation Act, as*

Mr. Mistri rightly submitted, makes it clear that Section 3(1) of Relaxation Act merely extends the limitation provided in the specified Acts (including Income-tax Act) for doing certain Acts but such Acts must be performed in accordance with the provisions of the specified Acts. Therefore, if there is an amendment in the specified Act, the amended provision of the specified Act would apply to such actions of the Revenue. The Delhi High Court has considered and rejected the contention of the Revenue that the notice issued after 1st April 2021 relates back to an earlier period.

38. The Delhi High Court has considered and rejected this argument of the Revenue that Relaxation Act creates a legal fiction such that the notices issued under Section 148 of the Act are deemed to be issued on 31st March, 2021. The so-called legal fiction is directly contrary to the Revenue's own Circular No.549 of 1989, which is binding on them as well as the well settled principle that the validity of a notice is to be judged on the basis of the law that prevails at the time of its issue.

39. Even though Relaxation Act was in existence when the Finance Act, 2021 was passed, the parliament has specifically made the amended provisions of Sections 147 to 151 of the Act as being applicable with effect from 1st April, 2021. Therefore, the intention of the legislature is clear that substituted provisions must apply to notices issued with effect from 1st April, 2021. No savings clause has been provided in the Act for saving the erstwhile provisions of Sections 147 to 151 of the Act, like in Section 297 of the Act where, the Parliament when it intended, has specifically provided the savings clause.

40. On a plain reading of Relaxation Act it is clear that the only powers granted to the Central Government by Relaxation Act is the power to notify the period during which actions are required to be taken that can fall within the ambit of Relaxation Act, and the power to extend the time limit within which those actions are to be taken. A plain reading of the impugned Explanations in Notification Nos.20 of 2021 and 38 of 2021 shows that it purports to "clarify" that the unamended provisions of Sections 147 to 151 of the Act will apply for the purposes of issue of notices under Section 148 of the Act, which is clearly ultra vires Relaxation Act.

41. In our view, the reopening notices issued after 1st April, 2021 are unsustainable and bad in law even if

one was to apply the Explanations to the Notification Nos.20 of 2021 and 38 of 2021. The Explanation seeks to extend the applicability of erstwhile Sections 148, 149 and 151. The impugned Explanation does not cover Section 147, which (as amended) empowers the revenue to reopen an assessment subject to Sections 148 to 153, which includes Section 148A. Thus, even if Explanations are valid, the mandatory procedure laid down by Section 148A has not been followed and hence, without anything further, the notices under Section 148 of the Act are invalid and must be struck down for this reason as well. This proposition has also been upheld by the Delhi High Court.

42. As regards Revenue's arguments that Relaxation Act being a beneficial legislation must be given purposive interpretation', the purpose of Section 3(1) of Relaxation Act is to extend limitation periods as provided in a specified Act (including the Income-tax Act). The purpose of Section 3(1) of Relaxation Act is not to postpone the applicability of amended provisions of a Specified Act. Though Relaxation Act was in existence when the Finance Act, 2021 was passed, the Parliament has specifically enacted the new, (amended) provisions of Section 147 to 151 of the Act and made them applicable with effect form 1st April, 2021. Therefore, it is clear that amendment is to be applied from 1st April, 2021. Further, when there is no ambiguity on the applicability of the provision, there is no question of resorting to purpose test.

43. As regards liberty granted by the Allahabad High Court, certainly, if the law permits issuance of notices under Section 148 of the Act (as amended), afresh, then no liberty is required to be granted by the Court, and it would be within the Assessing Officer's powers to initiate proceedings as per the amended law. The Madras High Court has considered this very plea and granted liberty to initiate reassessment proceedings in accordance with the provisions of the amended Act, "if limitation for it survives".

44. As submitted by Mr. Mistri, with whom we agree, Chapter II of Relaxation Act provide for – "Relaxation of Certain Provisions of Specified Act"and Section 3 forms part of this Chapter. Further Chapter III provides for amendment to Income Tax Act, 1961 and various Sections of the Act have been amended in Chapter III. From this the following propositions emerge :

(a) Wherever the Parliament thought fit, the Parliament

has itself amended the provision of the Income Tax Act, 1961 and not left it for the CBDT to make the amendment. Therefore, it is clear that no power is given under Relaxation Act to postpone the applicability of provisions of the Income Tax Act.

(b) Chapter II of Relaxation Act is only for 'Relaxation of Certain Provisions of Specified Act' and, therefore, there is no question of the Revenue relying on this Chapter and Section 3 to justify the postponement of applicability of certain provisions of the Income Tax Act. If the Parliament wanted to give some right to the CBDT, it would have formed part of Chapter III, however, there is no such provision in Chapter III of the Act.

45. As submitted by Mr. Pardiwalla there are other Sections in the Finance Act, 2021 which have amended other provisions of the Income Tax Act from dates other than 1st April, 2021. Like for example Section 12 of the Finance Act inserted a proviso in Section 43CA. Had the intention of the legislature, while amending Sections 147 to 153, been to give it effect from 1st July, 2021, a similar savings clause could have been inserted, which has not been done. We agree with Mr. Pardiwalla because as per Section 1(2)(a) of the Finance Act, 2021, the amendments to Sections 147 to 153 of the Act shall come into force on 1st April, 2021. Similarly, the Memorandum explaining the provisions of the Finance Bill, 2021 clarifies that these amendments will take effect from 1st April, 2021. Section 12 of the Finance Act inserted a proviso in Section 43CA which inter alia provides that the words 'one hundred and ten percent' in the first proviso will be substituted by the words 'one hundred and twenty percent' if the transfer of residential units takes place during the period beginning from 12th day of November, 2020 and ending on the 30th day of June, 2021. Therefore, had the intention of the legislature, while amending Sections 147 to 153, was to give it effect from 1st July, 2021, a similar savings clause could have been inserted, which has not been done.

46. Mr. Pardiwalla submitted that only Section 4 of Relaxation Act which amended the Act and no such amendments to the substantive provisions of the Act were envisaged under Section 3 of Relaxation Act, which was only a relaxation provision dealing with time limits under various enactments.

47. As noted earlier, it is Revenue's case that Section 3

of Relaxation Act enabled the Central Government to issue notifications which would permit the Assessing Officers to issue notices under Section 148 of the Act after 1st April, 2021 in terms of the erstwhile provisions of Sections 147 to section 151, even though the said provisions were repealed with effect from 1st April, 2021 by the Finance Act, 2021. It is, however, pertinent to note that Section 3 of Relaxation Act falls in Chapter II of the said Act, which is titled 'Relaxation of Certain Provisions of Specified Act'. In contradistinction, Section 4 of Relaxation Act which does amend several provisions of the Act falls in Chapter III, which is titled 'Amendments to the Income Tax Act, 1961'. It will be apposite to notice that the amendments provided for in Section 4 were made by the Legislature itself in terms of the said Section and no such power to amend the Act was delegated to the Central Government. Therefore, we would agree with Mr. Pardiwalla that it is only Section 4 of Relaxation Act which amended the Act and no such amendments to the substantive provisions of the Act were envisaged under Section 3 of Relaxation Act, which was only a relaxation provision dealing with time limits under various enactments.

48. Mr. Pardiwalla submitted that even assuming for a moment that the primary contention of petitioners that the Explanations in the notifications are invalid is not accepted, still the impugned notices will be bad in law as the Explanation only seeks to effectuate the provisions of the erstwhile Sections 148, 149 and 151 of the Act. It does not cover the erstwhile Section 147 of the Act. As rightly submitted by Mr. Pardiwalla, the Assessing Officer could have assumed jurisdiction while issuing the impugned notices only after complying with the amended Section 147. The same has not been done by the Assessing Officers as (a) his assumption of jurisdiction is on the basis of his 'reason to believe' that income chargeable to tax has escaped assessment, a concept, which is no longer recognised in the amended Section 147; and (b) the amended Section 147 is in any event subject to Sections 148 to 153, which would also include the procedure contained in Section 148A, which has not been followed. Therefore, the impugned notices do not even comply with the relevant statutory provisions, even if we do not find fault with the Explanations in the two notifications. Infact the Delhi High Court in paragraph 84 of Mon Mohan Kohli (Supra) has also considered and accepted this aspect of the matter.

49. Some more reasons why the reopening notices

must go are :

(a) Section 297 of the Act provides a saving clause for applicability of various provisions of the 1922 Act, even though the Act itself had been repealed. In the absence of such a saving clause for applicability of erstwhile Sections 147 to 151 of the Act, the amended provision of the Act would apply from 1st April, 2021.

(b) Moreover, the reopening notices issued after 1st April, 2021 are bad in law even if one was to apply the Explanations to the Notification Nos.20 and 38. The Explanations seek to extend the applicability of erstwhile Sections 148, 149 and 151. They do not cover Section 147, which empowers revenue to reopen subject to Section 148 to 153, which includes Section 148A. Thus, even if Explanation are valid, procedure of Section 148A is not followed and hence, notices are invalid.

(c) In any case, Relaxation Act is not applicable for Assessment Years 2015-2016 or any subsequent year and, hence, the question of applicability of the Notification Nos.20 and 38 of 2021 does not arise. The time limit to issue notice under Section 148 of the Act for the Assessment Years 2015-2016 onwards was not expiring within the period for which Section 3(1) of Relaxation Act was applicable and, hence, Relaxation Act could never apply for these assessment years. As a consequence, there can be no question of extending the period of limitation for such assessment years.

These findings of the Bombay High Court have not been disturbed by the Apex Court in Ashish Agarwal (Supra). The Apex Court only modified the orders passed by the respective High Courts to the effect that the notices issued under Section 148 of the Act which were subject matter of writ petitions before various High Courts shall be deemed to have been issued under Section 148A(b) of the Act and the Assessing Officer was directed to provide within 30 days to the respective assessee the information and material relied upon by the Revenue so that the assessee could reply to the show cause notices within two weeks thereafter. The Apex Court held that the Assessing Officer shall thereafter pass orders in terms of Section 148A(d) in respect of each of the concerned assessees. Thereafter, after following the procedure as required under Section 148A may issue notice under Section 148 (as substituted). The Apex Court also expressly kept open all contentions which may be available to the assessee including those available under Section 149 of the Act and all rights and contentions which may be available

> *to the concerned assessee and revenue under the Finance Act 2021 and in law, shall be continued to be available.*

23 Even in *New India Assurance* (Supra), the Court held that reliance by Revenue on Instruction No.1 of 2022 issued by CBDT is grossly misplaced and neither the provisions of TOLA nor the judgment in *Ashish Agarwal* (Supra) provide that any notice issued under Section 148 of the Act after 31st March 2021 will travel back to the original date. Paragraphs 36, 37 and 38 of *New India Assurance* (Supra) read as under :

> *36. Therefore, in the present case, as the foundation of the entire reassessment proceeding, viz., the notice issued in June 2021 itself was barred by limitation in view of non-applicability of Notification No.20/2021, the superstructure sitting thereon, viz., the reassessment proceedings initiated pursuant to judgment in Ashish Agarwal will also be regarded as beyond time limit. Therefore, on this ground as well, the impugned reopening notice dated 28th July 2022 issued for AY 2013-14 in petitioner's case is barred by limitation and deserves to be quashed and set aside. Alternatively, it is well settled that a notice under Section 148 of the Act cannot be issued in order to reopen the assessment of an assessee in a case where the right to reopen the assessment was already barred under the pre-amended Act on the date when the new legislation came into force. In CIT V/s. Onkarmal Meghraj (HUF) the Hon'ble Apex Court held :*
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> > *"That raises the question whether that proviso could be applied without reference to any period of limitation. It is a well-settled principle that no action can be commenced has expired. It is unnecessary to cite authorities in support of this position. Does the fact that the second proviso says that there is no period of limitation make a difference? xxxxxxxxxx.*
> >
> > *xxxxxxxxxx In J.P. Jani, Income-tax Officer v. Induprasad Devshanker Bhatt (1969) 72 I.T.R. 595; (1969) 1 S.C.R. 714 (S.C.) this court held that the Income-tax Officer cannot issue a notice under section 148 of the Income Tax Act, 1961, in order to reopen the assessment of an assessee in a case where the right ti reopen the assessment was barred under the 1922 Act at the date when the new Act camne into force. It was held that section 297(2)(d)(ii) of*

the 1961 Act was applicable only to this cases where the right of the Income-tax Officer to reopen an assessment was not barred under the repealed Act. This decision is broadly in line with the opinion of Das and Kapur JJ. in Prashar's case (1963) 49 I.T.R. (S.C.) 1; (1964) 1 S.C.R. 29 (S.C.) xxxxxxxxxx.

For AY 2013-14, the time limit to issue a notice under Section 148 of the Act had already expired on 1st April 2021. On the said date, the assessee had a vested right, which de hors the 1st proviso to the amended Section 149 of the Act, could not be taken away and thus, based on the well settled principles of law, the reopening of the AY 2013-14 after 31st March 2021 is invalid, without jurisdiction and barred by limitation.

37. We shall deal with Mr. Sharma's submissions as under :

(a) As regards reliance on the provisions of the Limitation Act, 1963, the provisions of the Limitation Act, 1963 do not apply to the provisions of the Income Tax Act, 1961 and especially, not in the present case in view of the specific period provided for in the provisions of the Act as well as TOLA. In any case, this defence of respondents cannot be sustained as they have not taken any such contention in either the order passed under Section 148A(d) or in the affidavit in reply;

(b) As regards applicability of Section 3 of TOLA - exclusion of Covid period, this argument is, in effect, nothing but the theory of travel back in time which was urged by the Revenue to support the reopening notices issued between 1st April 2021 to 30th June 2021 before this Court, as well as other High Courts [and which eventually led to the judgment in Ashish Agarwal (Supra)]. As noted earlier, this Court and other Courts have already snubbed the relate back/travel back in time theory and also the Instruction No.1 of 2022;

(c) As regards applicability of Notifications No.20 of 2021 dated 31st March 2021 and No.38 of 2021 dated 27th April 2021 extending the time limit even for AY 2014-15 and it is extended till 30th June 2021, respondent, in other words, argues that the Notification No.20 of 2021 seeks to extend the time limit inter alia for issuing notice under Section 148 which was expiring on 31st March 2021 not only under the provisions of the Act, but would also include the time extension in the Act by virtue of TOLA. To put in another way, the time limit expiring on 31st March 2021 specified in Notification No.20 of 2021, according to respondents, would have to be read to include limitation under the Act read with TOLA. As noted earlier, this contention is flawed inasmuch as it expands the scope of the Notification and violates its plain

language, viz., the time limit, specified in, or prescribed or notified under the Income Tax Act falls for completion. The limitation under the Act (erstwhile Section 149) for reopening the assessment for the AY 2013-14 expired on 31st March 2020. Hence, Notification No.20 of 2021 did not apply to the facts of the present case. Notification No.38 of 2021 dated 27th April 2021 categorically uses the expression the time limit for completion of such action expires on the 30th day of April 2021 due to its extension by the said notifications, such time limit shall further stand extended to the 30th day of June 2021. Hence, it is incorrect to say that 31st March 2021 under the Act would mean under the Act, plus, extension by TOLA;

(d) The submission that the Hon'ble Supreme Court, while deciding Ashish Agarwal (Supra), was conscious of the limitation of 6 years expiring on 31st March 2021 under the pre-amendment provisions in respect of AY 2013-14 if the Covid period was not excluded, despite which the Apex Court has stated that all notices issued should be read to be issued under Section 148A to prevent the Revenue getting remediless, is unacceptable. This argument clearly fails to appreciate that the effect of Revenue's contention is that despite the substantive defence available to the assessee in Section 149 of the amended Act, as well as the express directions of the Hon'ble Supreme Court allowing the assessee to take all defences available under the Act, the judgment of Ashish Agarwal (Supra) would permit them to reopen the assessment of AY 2013-14 would not only make the defence expressly available to the assessees useless and unusable, but would be contrary to well established principles of law. In Supreme Court Bar Association (Supra), the Hon'ble Supreme Court espoused that its powers conferred under Article 142 of the Constitution of India, being curative in nature and even with the width of its amplitude, cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. Article 142 would not be used to supplant substantive law applicable to a case or cause and it will not be used to build a new edifice where none existed earlier by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. In the present case, Revenue's argument, if accepted, would be in conflict with the above law as despite the express language of 1st proviso to Section 149, reopening notice for the AY 2013-14 would be permitted to be issued beyond 6 years on the pretext that the Hon'ble Supreme Court in exercise of its powers under Article 142 permitted them to do so and otherwise, they would be remediless. On the contrary, while permitting the Revenue to re-initiate the reassessment

proceedings, the Apex Court also granted liberty to assessees to raise all defences available to the assessee including the defences under Section 149 of the Act. The Apex Court observed that its order will strike a balance between the rights of the Revenue as well as the respective assessees. Moreover, in Siemens Financial (Supra), this Court has already considered a similar contention of the Revenue and held that equity has no place in taxation or while interpreting taxing statute such intendment would have any place and that taxation statute has to be interpreted strictly. The Revenue also fails to appreciate that no particular case was considered by the Hon'ble Supreme Court while deciding Ashish Agarwal (Supra).

It is apposite to cite here an extract of the judgment of the Hon'ble Supreme Court in Parashuram Pottery Works Co. Ltd V/s. Income Tax Officer, which reads as under :

> *…….. It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well-versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity…".*

(e) The contentions that (i) the true meaning of Apex Court order in Ashish Agrawal (Supra) is that the notices issued under Section 148, irrespective of the Assessment Year of the unamended Act, between 1st April 2021 to 30th June 2021 are to be treated as show cause notices without being hit by limitation, if issued on or before 30th March 2021 and (ii) the defence under Section 149 available to the assessee would mean that if the Revenue had issued any notice under Section 148 under the unamended Act during the period 1st April 2021 to 30th June 2021 pertaining to AY 2013-14, the same would be barred by limitation under Section 149 in effect means the Civil Appeal of the Revenue in Ashish Agrawal (Supra) was dismissed, are completely flawed. It completely fails to appreciate that the limitation period to issuance of reopening notices under Section 148 for all Assessment Years prior to AY 2013-14 had already expired on 31st March 2019 or earlier. The provisions of TOLA obviously

could not save such a time limit and the Revenue could not have validly issued reopening notices for years prior to AY 2013-14 on or after 1st April 2019. Therefore, the defence so expressly allowed to be taken by the Hon'ble Supreme Court would otherwise be unnecessary;

(f) The submission that the Apex Court, in exercise of power under Article 142 of the Constitution, has deemed the notices issued between 1st April 2021 to 30th June 2021 under Section 148A(b) of the Act issued within limitation and by following the manner of computation of limitation provided in TOLA, the days from 1st April 2021 to 30th June 2021 would stand excluded and, therefore, the notices could be deemed to be issued on 31st March 2021, we find it to be rather fallacious. The fallacy of this contention of Revenue is conspicuous inasmuch as if the notices issued under Section 148 between 1st April 2021 and 30th June 2021, which according to them, are deemed to be issued on 31st March 2021, then it is obvious that the provisions of the new reassessment law introduced by the Finance Act, 2021 cannot apply as they came into force w.e.f. 1st April 2021 and onwards. Ashish Agarwal (Supra) in no uncertain words stated that the new provisions have to apply to all such notices. Therefore, the argument urged is completely contrary to law as well as the binding directions of the Hon'ble Supreme Court;

(g) As regards reliance on Touchstone Holdings (Supra), the Hon'ble Delhi High Court held that the initial notice dated 29th June, 2021 issued under Section 148 is within limitation. No findings on the validity or otherwise of the notice issued after May 2022 pursuant to the judgment in Ashish Agarwal (Supra) is given. Moreover, in that case, petitioner did not argue that for AY 2013-14 the time limit would have expired even under TOLA on 31st March 2021;

(h) As regards Salil Gulati (Supra), the Delhi High Court, to reach its conclusion, has merely relied upon its earlier decision in Touchstone Holdings (Supra). It will be relevant to note that following Salil Gulati (Supra), a similar view was taken by the Delhi High Court in Yogita Mohan V/s. Income Tax Officer. Against the judgment, in an SLP preferred by the assessee, the Apex Court has issued notice vide its order dated 20th February 2023. It should also be noted that the Hon'ble Gujarat High Court in Keenara Industries (P.) Ltd. V/s. Income Tax Officer and the Allahabad High Court in Rajeev Bansal V/s. Union of India have taken a view that notices issued for AY 2013-14 were barred by limitation in view of the amended Section 149 of the Act. Subsequently, the Apex Court, in SLPs preferred by the Revenue, has issued notice and stayed both the orders/judgments;

(i) We are unable to comprehend the contention raised that if the notice dated 30th May 2022 under Section 148A(b) of the Act is valid in terms of Apex Court order in Ashish Agrawal (Supra), then the notice under Section 148 of the Act cannot be issued on 31st March 2021 and respondent cannot be expected to do impossible. It has nowhere been urged by petitioner that assessing officer ought to complete the proceedings before the show cause notice under Section 148A(b) of the Act was issued. It is the case of petitioner that the reopening notice under Section 148 ought to have been issued within 6 years from the end of the AY 2013-14. This limitation period, as extended by TOLA, expired on 31st March 2021. However, in the present case, the reopening notice has been issued in July 2022 and, therefore, beyond the statutory time limit. In any case, as stated above, the Hon'ble Supreme Court, while invoking powers under Article 142, consciously and categorically granted liberty to assessees to raise all defences available to the assessee, including the defences under Section 149 of the Act. This specific and express directions cannot be set at naught. Accepting this contention of the Revenue would be a travesty of justice.

38. In the circumstances, in our view, the notice issued under Section 148 of the Act, impugned in this petition, for AY 2013-14 is issued beyond the period of limitation.

24 **As regards issue no.2**, Section 149 of the Act reads as under :

Time limit for notice.

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—

(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:]

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 28[a notice under section 148 or section 153A or section 153C 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 or section 153A or section 153C, as the case may be], as they stood immediately before the commencement of the Finance Act, 2021:*

Provided *further that the provisions of this sub-section shall not apply in a case, where a notice under section 153A, or section 153C read with section 153A, is required to be issued in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before the 31st day of March, 2021:*

*[**Provided** also that for cases referred to in clauses (i), (iii) and (iv) of Explanation 2 to section 148, where,—*

(a) a search is initiated under section 132; or

b) a search under section 132 for which the last of authorisations is executed; or

(c) requisition is made under section 132A,

after the 15th day of March of any financial year and the period for issue of notice under section 148 expires on the 31st day of March of such financial year, a period of fifteen days shall be excluded for the purpose of computing the period of limitation as per this section and the notice issued under section 148 in such case shall be deemed to have been issued on the 31st day of March of such financial year:

Provided *also that where the information as referred to in Explanation 1 to section 148 emanates from a statement recorded or documents impounded under section 131 or section 133A, as the case may be, on or before the 31st day of March of a financial year, in consequence of,—*

(a) a search under section 132 which is initiated; or

(b) a search under section 132 for which the last of authorisations is executed; or

(c) a requisition made under section 132A,

after the 15th day of March of such financial year, a period of fifteen days shall be excluded for the purpose of computing the period of limitation as per this section and the notice issued under clause (b) of section 148A in such case shall be deemed to have been issued on the 31st day of March of such financial year:]

Provided *also that for the purposes of computing the period of limitation as per this section, the time or extended time allowed to the assessee, as per show-cause notice issued under clause (b) of section 148A or the period during which the proceeding under section 148A is stayed by an order or injunction of any court, shall be excluded:*

Provided *also that where immediately after the exclusion of the period referred to in the immediately preceding proviso, the period of limitation available to the Assessing Officer for passing an order under clause (d) of section 148A 30[does not exceed seven days], such remaining period shall be extended to seven days and the period of limitation under this sub-section shall be deemed to be extended accordingly.*

Explanation.—For the purposes of clause (b) of this sub-section, "asset" shall include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account.

[(1A) Notwithstanding anything contained in sub-section (1), where the income chargeable to tax represented in the form of an asset or expenditure in relation to an event or occasion of the value referred to in clause (b) of sub-section (1), has escaped the assessment and the investment in such asset or expenditure in relation to such event or occasion has been made or incurred, in more than one previous years relevant to the assessment years within the period referred to in clause (b) of sub-section (1), a notice under section 148 shall be issued for every such assessment year for assessment, reassessment or recomputation, as the case may be.]

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.]

The first proviso to Section 149 of the Act provides that no notice under Section 148 shall be issued at any point of time in a case for a relevant assessment year beginning on or before the 1st day of April 2021, if

a notice under Section 148 could not have been issued at that time on account of being beyond the time limit specified under the provision of clause (b) of sub-section (1) of this Section, as it stood immediately before the commencement of the Finance Act, 2021. The term 'at that time' in the first proviso refers to the date on which notice under Section 148 is to be issued by the Assessing Officer. The term 'at that time' has to refer to the term 'at any time' used earlier in the said proviso. The reference to 'at any time' is to the date of the notice to be issued by the Assessing Officer and, therefore, the term 'at that time' would also refer to the said date. On the said date, if a notice could not have been issued under the erstwhile provision of Section 149(1)(b) of the Act, for any assessment year beginning on or before the 1st day of April 2021, the notice cannot be issued even under the new provisions.

25 Section 149(1)(b) of the erstwhile provisions provided a time limit of six years from the end of the relevant assessment year for issuing notice under Section 148 of the Act. For the relevant assessment year, being Assessment Year 2015-2016, 6th year expired on 31st March 2022. The notice under Section 148 of the Act, in the present case, is issued on 27th August 2022, i.e., clearly beyond the period of limitation prescribed in Section 149 read with the first proviso to the said section. This is squarely covered by paragraphs 36 and 37 of *New India Assurance* (Supra) which has been reproduced above in paragraph 23.

26 The purpose of the first proviso to Section 149 of the Act is consistent with the stated object of the government to make prospective amendments in the Act. Accordingly, the proviso provides that up to Assessment Year 2021-2022 (period before the amendment), the period of limitation as prescribed in the erstwhile provisions of Section 149(1)(b) of the Act would be applicable and only from Assessment Year 2022-2023, the period of ten years as provided in Section 149(1)(b) of the Act, would be applicable. The submission of the Revenue to interpret the first proviso to Section 149 of the Act to be applicable only for Assessment Years 2013-2014 and 2014-2015, i.e., for assessment years where the period of limitation had already expired on 1st April 2021 is not sustainable. The interpretation canvassed by the Revenue is clearly contrary to the plain language of the proviso. When the language in the statute is clear, it has to be so interpreted and there is no scope for interpreting the provision on any other basis. The taxing statue should be strictly construed. [***Godrej & Boyce Manufacturing Company Ltd. vs. DCIT***] [10]

27 The interpretation as canvassed by the Revenue would render the first proviso to Section 149 of the Act redundant and otiose. The time limit to issue notice under Section 148 of the Act had already expired on 1st April 2021 for Assessment Year 2013–2014 and 2014–2015, when Section 149 of the Act was amended. Therefore, reopening for Assessment

10 (2017) 394 ITR 449 (SC)

Years 2013-2014 and 2014-2015 had already been barred by limitation on 1st April 2021. Accordingly, the extended period of ten years as provided in Section 149(1)(b) of the Act would not have been applicable to Assessment Years 2013-2014 and 2014-2015, de hors the proviso. It is a settled principle of law that when limitation has already expired, it cannot be revived by way of a subsequent amendment and, hence, for Assessment Years 2013-2014 and 2014-2015 proviso to Section 149 of the Act was not required. Hence, to give meaning to the proviso it has to be interpreted to be applicable for Assessment Years upto 2021-2022. In ***Commissioner of Income Tax vs. Onkarmal Meghraj (HUF)***[11], the Hon'ble Apex Court was dealing with the question whether a proviso could be applied without reference to any period of limitation. It held that "*it is a well-settled principle that no action can be commenced where the period within which it can be commenced has expired. It is unnecessary to cite authorities in support of this position. Does the fact that the second proviso says that there is no period of limitation make a difference?*"

The interpretation canvassed by the Revenue would render the following parts of the proviso redundant -

(i) 'at any time' in the first line of the proviso.

(ii) 'beginning on or before 1st day of April, 2021,' in the second line of the proviso.

11 (1974) 93 ITR 233 (SC)

(iii) 'at that time' in the fourth line of the proviso.

If we have to give effect to the interpretation suggested by the Revenue, then the proviso would have read as under :

"*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 a notice under Section 148 or Section 153A or Section 153C could not have been issued* ~~*at that time*~~ *[****on 1st day of April, 2021****] on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this Section or Section 153A or Section 153C, as the case may be, as they stood immediately before the commencement of the Finance Act, 2021;* ***OR***

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 a notice under Section 148 or Section 153A or Section 153C could not have been issued* ~~***at that time***~~ *[****on 1st day of April, 2021****] on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this Section or Section 153A or Section 153C, as the case may be, as they stood immediately before the commencement of the Finance Act, 2021*".

28 Section has to be interpreted so as to give meaning to all the words/phrases used in the Section and it should not be interpreted in such a way so as to render any part or phrase in the Section otiose. As stated

aforesaid, if the interpretation canvassed by the Revenue is to be accepted then, not only various parts of the Section would be rendered otiose, one would have to also substitute one phrase with another phrase in the said Section, which is clearly not permissible in law. Reliance in this regard is placed on the decision of the Hon'ble Apex Court in the case of ***Commissioner of Income Tax vs. Sham L. Chellaram***[12].

29 It was submitted on behalf of Revenue that the period of limitation for the purposes of Section 149 of the Act has to be seen with respect to the original notice under Section 148 of the Act, which was issued to petitioner on 8th April 2021 and as the said notice was issued within the period of six years from the end of the relevant assessment year, which was expiring on 31st March 2022, the reassessment proceedings are within the period of limitation prescribed in Section 149 of the Act. It is not acceptable.

Section 149 of the Act sets out, *inter alia*, the time limit for issuing notice under Section 148 of the Act. Apart from the period of limitation set out in the said Section, the first proviso lays down a further restriction on the issue of a notice under section 148 of the Act. The period of limitation as well as the said further restriction is framed/provided in respect of a notice under 148 of the Act, and not for a notice under section 148A of the Act. The notice dated 8th April 2021, which though originally

12 373 ITR 292 (Bom)

issued as a notice under section 148 of the Act, (under the provisions of the Act prior to the amendments made by the Finance Act, 2021), has now been treated as a notice issued under section 148A(b) of the Act in accordance with the decision of the Hon'ble Apex Court in *Ashish Agarwal* (Supra). Once the notice dated 8th April 2021 has been treated as having been issued under Section 148A(b) of the Act, the said notice is no longer relevant for the purpose of determining the period of limitation prescribed under Section 149 or the restriction as per the first proviso below Section 149 of the Act. Therefore, for considering the restriction on issue of a notice under section 148 of the Act prescribed in the first proviso to Section 149 of the Act, the fresh/presently impugned notice dated 27th August 2022 issued under Section 148 of the Act is required to be considered. The said notice is admittedly beyond the erstwhile period of limitation of six years prescribed by the Act prior to its amendment by the Finance Act, 2021. For the Assessment Year 2015-2016, the erstwhile time limit of six years expired on 31st March 2022 and, the impugned notice under Section 148 of the Act has been issued on 27th August 2022 and, therefore, the impugned notice dated 27th August 2022 is barred by the restriction of the first proviso to Section 149 of the Act.

30 With respect to applicability of the fifth proviso and the sixth proviso to Section 149(1)(b) of the Act for extension of limitation for issuing the notice under Section 148 of the Act, fifth and sixth provisos are

only applicable with respect to the period of limitation prescribed in Section 149(1) of the Act, i.e., three years or ten years, as the case may be. Fifth proviso or sixth proviso extend limitation for issuing notice under Section 149 of the Act, however, the first proviso is an exception to the period of limitation and provides for a restriction on the notices under Section 148 being issued for Assessment Years upto 2021-22 beyond a certain date. Therefore, the way the Section would operate, is first to decide whether a notice issued under Section 148 of the Act is within the period of limitation in terms of Section 149(1)(a) or (b) of the Act. To decide whether the notice is within the period of limitation under Section 149(1)(a) or (b) of the Act, the extension of time as per the fifth and/or sixth proviso would be considered. Once, the notice is otherwise within the period of limitation, thereafter one has to see whether the said time limit is within the restriction provided in the first proviso or not. If the notice is beyond the restriction period, the notice is invalid. The fifth and/or the sixth proviso cannot apply at this stage to extend the period of restriction as per the first proviso. Hence, if a notice is not within the time prescribed under the first proviso to Section 149(1) of the Act, then such period cannot be extended by fifth proviso and sixth proviso. In *Godrej Industries Ltd.* (Supra) paragraph 15 reads as under :

> *15. Based on petitioner's facts, the show cause notice under Section 148A(b) of the Act was issued on 24th May 2022 asking petitioner to furnish a reply by 8th June 2022. Petitioner filed a detailed reply in response to the show cause*

notice on 8th June 2022 and, therefore, only the period from 24th May 2022 to 8th June 2022 could be excluded by virtue of the first limb of the fifth proviso to Section 149 of the Act. Subsequently, petitioner received another letter dated 28th June 2022 which annexed certain details and provided further time for making detailed submissions upto 8th July 2022. Petitioner replied to the letter and made detailed submissions on 2nd July 2022. Therefore, even assuming this period is to be excluded, the period which could be excluded is only from 24th May 2022 to 8th June 2022. Even after considering the letter dated 28th June 2022 and the reply dated 2nd July 2022, at the highest a further period from 28th June 2022 to 8th July 2022 could be excluded but the period of time from 8th June 2022 to 28th June 2022 cannot be excluded as per the fifth proviso. This is because petitioner on 8th June 2022 did not request for any further time and furnished its response to the show cause notice under Section 148A(b) of the Act. It is the Assessing Officer who has suo moto issued another letter on 28th June 2022 asking petitioner to furnish further details by 8th July 2022. Therefore, even assuming a period of 27 days (i.e., 16 days from 24th May to 8th June and 11 days from 28th June to 8th July) are excluded from the date of the impugned notice under Section 148 of the Act issued on 31st July 2022, the impugned notice would yet be barred by limitation and could not have been issued by virtue of the first proviso to Section 149 of the Act.

Even if the fifth and sixth provisos are held to be applicable, the impugned notice would still be beyond the period of limitation. The fifth proviso extends limitation with respect to the time or extended time allowed to an assessee as per the show cause notice issued under Section 148A(b) of the Act or the period, during which the proceeding under Section 148A of the Act are stayed by an order of injunction by any Court. Hence, in the present case, in view of the fifth proviso, the period to be excluded would be counted from 25th May 2022, i.e., the date on which the show cause notice was issued under Section 148A(b) of the Act by respondent no.1 subsequent to the decision of the Hon'ble Apex Court in

the case of *Ashish Agarwal* (Supra) and upto 10th June 2022, which is a period of 16 days. Further, the time period from 29th June 2022 upto 4th July 2022 cannot be excluded as the same was not based on any extension sought by petitioner, but at the behest of respondent no.1. Even if the same was to be excluded, still it will mean further exclusion of 5 days. Considering the said excluded period as well, the impugned notice dated 27th August 2022 is still beyond limitation. The fact that the original notice dated 8th April, 2021 issued under Section 148 of the Act, was stayed by this Court on 3rd August 2021, and its stay came to an end on 29th March 2022 on account of the decision of this Court, will not be relevant for providing extension as per the fifth proviso. The fifth proviso provides for extension for the period during which the proceeding under Section 148A of the Act is stayed. The original stay granted by this Court was not with respect to the proceeding under Section 148A of the Act, but with respect to the proceeding initiated as per the erstwhile provision of Section 148 of the Act and, hence, such stay would not extend the period of limitation as per the fifth proviso to Section 149 of the Act. The question of applicability of the sixth proviso does not arise on the facts of the present case. We find support for this in *Godrej Industries Ltd.* (Supra).

In view of the aforesaid, the impugned notice dated 27th August 2022 is clearly barred by the law of limitation.

31 **As regards issue no.3**, in the notice dated 27th August 2022

impugned in the petition, admittedly there is no DIN mentioned. It is petitioner's case that the notice is invalid and bad in law in view of the Circular No.19 of 2019 dated 14th August 2019 issued by CBDT. A separate intimation letter also dated 27th August 2022 was issued and the said letter reads as under :

निर्धारण वर्ष / AY : 2015-16	द.प.सं. एवं प्रपत्राक संख्या / DIN & Document No.: ITBA/AST/S/91/2022-23/1044985587(1)	दिनांक / Dated : 27/08/2022

Intimation Letter for Notice u/s 148 of the Income-tax Act, 1961

महोदय/महोदया/मेसर्स,

Sir/Madam/M/s,

This is to inform you that Notice u/s 148 of the Income-tax Act, 1961 dated 26/08/2022 is having Document No.(DIN) ITBA/ AST/M/148_1/2022-23/1044985555(1).

This is a system generated document and does not require any signature.

(emphasis supplied)

We agree with petitioner that this letter cannot validate the notice issued under Section 148 of the Act on 27th August 2022. The reason is firstly, the intimation letter refers to a DIN with respect to some notice under Section 148 of the Act dated 26th August 2022. The impugned notice issued to petitioner is dated 27th August 2022 and not 26th August 2022 for which the DIN is generated. Secondly, the procedure prescribed in Circular No.19 of 2019 dated 14th August 2019 for non-mention of DIN in case letter/notice/order has not been complied with by respondent no.1. It is

settled that if DIN is not mentioned in the letter/notice/order, the reason for not mentioning the DIN and the approval from specified authority for issuing such letter/notice/ order without DIN has to be obtained and mentioned in such letter/notice/order. In the present case, in the impugned notice dated 27th August 2022, no such reference is there. Therefore, as held in *Ashok Commercial Enterprises* (Supra) and *Tata Medical Center Trust* (Supra), the impugned notice is clearly invalid and bad in law. It will be useful to reproduce paragraph 18 of *Ashok Commercial Enterprises* (Supra) :

> *18. Whether the impugned assessment order dated 28th September 2021 is invalid on account of it being issued without a DIN?*
>
> *(a) The CBDT, in exercise of powers under Section 119(1) of the Act, has issued a Circular No.19/2019 dated 14th August 2019 providing that no communication shall be issued by any Income Tax Authority inter alia relating to assessment orders, statutory or otherwise, inquiries, approvals, etc. to an assessee or any other person on or after 1st October 2019 unless a computer generated DIN has been allotted and is quoted in the body of such communication. The Circular reads as under :*
>
> > *CIRCULAR NO.19/2019 (F. NO.225/95/2019-ITA.II], DATED 14-8-2019*
> >
> > *With the launch of various e-governance Initiatives, Income tax Department is moving toward total computerization of its work. This has led to a significant improvement in delivery of services and has also brought greater transparency in the functioning of the tax-administration Presently, almost all notices and orders are being generated electronically on the Income Tax Business Application (ITBA) platform. However, it has been brought to the notice of the Central Board of Direct Taxes (the Board) that there have been some instances in which the notice. order, summons, letter and any correspondence (hereinafter referred to as "communication" were found to have been issued*

manually, without maintaining a proper audit trail of such communication.

2. In order to prevent such instances and to maintain proper audit trail of all communication, the Board in exercise of power under section 119 of the income-tax Act, 1961 (hereinafter referred to as "the Act"), has decided that no communication shall be issued by any income-tax authority relating to assessment, appeals, orders, statutory or otherwise, exemptions, enquiry. investigation, verification of information, penalty, prosecution, rectification, approval etc. to the assessee or any other person, on or after the 1st day of October, 2019 unless a computer- generated Document Identification Number (DIN) has been allotted and is duly quoted in the body of such communication.

3. In exceptional circumstances such as,-

(i) when there are technical difficulties in generating/ allotting/quoting the DIN and issuance of communication electronically;or

(ii) when communication regarding enquiry, verification etc. is required to be issued by an income-tax authority, who is outside the office, for discharging his official duties: or

(iii) when due to delay in PAN migration. PAN is lying with non-jurisdictional Assessing Officer; or

(iv) when PAN of assessee is not available and where a proceeding under the Act (other than verification under section 131 or section 133 of the Act) is sought to be initiated; or

(v) when the functionality to issue communication is not available in the system, the communication may be issued manually but only after recording reasons in writing in the file and with prior written approval of the Chief Commissioner/ Director General of income-tax. In cases where manual communication is required to be issued due to delay in PAN migration, the proposal seeking approval for issuance of manual communication shall include the reason for delay in PAN migration. The communication issued under aforesaid circumstances shall state the fact that the communication is issued manually without a DIN and the date of obtaining of the written approval of the Chief Commissioner/ Director General of Income-tax for issue of manual communication in the following format-

"……. This communication issues manually without a DIN on account of reason/reasons given in para3(i)/3(ii)/3(iii)/ 3(iv)/ 3(v) of the CBDT Circular No …. dated (strike off those which are not applicable) and with the approval of the Chief Commissioner/Director General of Income Tax vide number …. dated ….

4. Any communication which is not in conformity with Para-2 and Para-3 above, shall be treated as invalid and shall be deemed to have never been issued.

5. The communication issued manually in the three situations specified in para 3- (i), (ii) or (iii) above shall have to be regularised within 15 working days of its issuance, by-

i. uploading the manual communication on the System.

ii. compulsorily generating the DIN on the System;

iii. communicating the DIN so generated to the assessee/any other person as per electronically generated proforma available on the System.

6. An intimation of issuance of manual communication for the reasons mentioned in para 3(v) shall be sent to the Principal Director General of Income-tax (Systems) within seven days from the date of its issuance.

7. Further, in all pending assessment proceedings, where notices were issued manually, prior to issuance of this Circular, the Income-tax authorities shall identify such cases and shall upload the notices in these cases on the Systems by 31th October, 2019.

Paragraph 3 of the Circular sets out five exceptional circumstances where the aforementioned mandatory requirement may not be adhered to, but requires that if an order/communication is to be issued without a DIN, it can be done only after recording reasons in writing in the file and with the prior written approval of the Chief Commissioner/Director General of Income Tax. Further, paragraph 3 requires that if such exceptional circumstances are claimed, the orders/communication issued without a DIN must state this fact in a specific format set out in paragraph 3 of the Circular.

Paragraph 4 of the Circular provides that any order/ communication which is not in conformity with paragraphs 2

and 3 of the Circular shall be treated as invalid and shall be deemed to have never been issued.

The contents of the Circular have been re-iterated in a Press Release dated 14th August 2019;

(b) It is indisputable that the impugned assessment order dated 28th September 2021 does not bear a DIN and further that the said order issued without a DIN does not bear the required format set out in paragraph 3 of the Circular and, therefore, the impugned assessment orders for Assessment Year 2011-2012 to 2019-2020 ought to be treated as invalid and deemed never to have been issued. We find support for this view in Brandix Mauritius Holdings Ltd. (Supra) where the Hon'ble Delhi High Court has held that an order passed in contravention of the said Circular is void, bad in law and of no legal effect. Paragraphs 16 to 17.1, 18 and 19 read as under :

> *16. The final assessment order was passed by the Assessing Officer (AO) on 15.10.2019, under Section 147/144(C)(13/143(3) of the Act. Concededly, the final assessment order does not bear a DIN. There is nothing on record to show that the appellant/revenue took steps to demonstrate before the Tribunal that there were exceptional circumstances, as referred to in paragraph 3 of the 2019 Circular, which would sustain the communication of the final assessment order manually, albeit, without DIN.*
>
> *16.1. Given this situation, clearly paragraph 4 of the 2019 Circular would apply.*
>
> *17. Paragraph 4 of the 2019 Circular, as extracted hereinabove, decidedly provides that any communication which is not in conformity with paragraph 2 and 3 shall be treated as invalid and shall be deemed to have never been issued. The phraseology of paragraph 4 of the 2019 Circular fairly puts such communication, which includes communication of assessment order, in the category of communication which are non-est in law.*
>
> *17.1. It is also well established that circulars issued by the CBDT in exercise of its powers under Section 119 of the Act are binding on the revenue.*
>
> *xxxxxxxxxxx*
>
> *18. The argument advanced on behalf the appellant/*

revenue, that recourse can be taken to Section 292B of the Act, is untenable, having regard to the phraseology used in paragraph 4 of the 2019 Circular.

19. The object and purpose of the issuance of the 2019 Circular, as indicated hereinabove, inter alia, was to create an audit trail. Therefore, the communication relating to assessments, appeals, orders, etcetera which find mention in paragraph 2 of the 2019 Circular, albeit without DIN, can have no standing in law, having regard to the provisions of paragraph 4 of the 2019 Circular.

(c) During the course of hearing, Mr. Suresh Kumar produced an intimation letter dated 13th October 2021 stating that the order dated 28th September 2021 under Section 153C of the Act has a DIN, which is set out therein. Even if this is held to be in compliance with paragraph 5 of the Circular, which deals with regularization of communications without DIN, this can only seek to regularize the failure to generate a DIN, but yet the requirements of paragraph 3 of the Circular will still remain contravened and consequently, the order dated 28th September 2021 ought to be treated as invalid and never issued;

(d) The said Circular also applies to the satisfaction note dated 13th July 2021 issued by respondent no.1. The satisfaction note will fall within the scope of paragraph 2 of the Circular as a communication of the specified type issued to any person. In the case of the satisfaction note no regularization dated 13th October 2021 has been issued;

(e) In view of the binding nature of Circular issued under Section 119 of the Act, and the peculiar facts and circumstances of the case, the consequences of contravention of the Circular set out above, therefore, ought to be given full effect to. The object of the said Circular is clear and laudatory and intended to ensure that proper trail of all assessment and other orders are maintained and further that any deviation therefrom can only be undertaken after prior written approval of the higher authorities under the Act. Therefore, the satisfaction note dated 13th July 2021 and the impugned order of assessment dated 28th September 2021 ought to be treated as invalid and deemed never to have been issued;

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(emphasis supplied)

Therefore, the impugned notice dated 27th August 2022 issued under Section 148 of the Act is invalid and bad in law as the same has been issued without a DIN.

32 **As regards issue no.4**, Section 151A reads as under :

> ***Faceless assessment of income escaping assessment.***
>
> *151A. (1) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of assessment, reassessment or recomputation under section 147 or issuance of notice under section 148 [or conducting of enquiries or issuance of show-cause notice or passing of order under section 148A] or sanction for issue of such notice under section 151, so as to impart greater efficiency, transparency and accountability by—*
>
> *(a) eliminating the interface between the income-tax authority and the assessee or any other person to the extent technologically feasible;*
>
> *(b) optimising utilisation of the resources through economies of scale and functional specialisation;*
>
> *(c) introducing a team-based assessment, reassessment, recomputation or issuance or sanction of notice with dynamic jurisdiction.*
>
> *(2) The Central Government may, for the purpose of giving effect to the scheme made under sub-section (1), by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification:*
>
> *Provided that no direction shall be issued after the 31st day of March, 2022.*
>
> *(3) Every notification issued under sub-section (1) and sub-section (2) shall, as soon as may be after the notification is issued, be laid before each House of Parliament.*

Section 151A of the Act gives the power to the Central Board of Direct Taxes ("CBDT") to notify the Scheme for :

(i) the purpose of assessment, reassessment or recomputation under Section 147; or

(ii) issuance of notice under Section 148; or

(iii) conducting of inquiry or issuance of show cause notice or passing of order under Section 148A; or

(iv) sanction for issuance of notice under Section 151;

so as to impart greater efficiency, transparency and accountability by *inter alia* eliminating the interface between the Income Tax Authorities and assessee. Sub-section 3 of Section 151A of the Act also provides that every notification issued under sub-section (1) and (2) of Section 151A of the Act shall be laid before each House of Parliament.

In exercise of the powers conferred by sub-sections (1) and (2) of Section 151A of the Act, CBDT issued a notification dated 29th March, 2022 [Notification No.18/2022/F. No.370142/16/2022-TPL and formulated a Scheme. The Scheme provides that -

(a) the assessment, reassessment or recomputation under Section 147 of the Act,

(b) and the issuance of notice under Section 148 of the Act,

shall be through automated allocation, in accordance with risk management strategy formulated by the Board as referred to in Section 148 of the Act for issuance of notice and in a faceless manner, to the extent provided in Section 144B of the Act with reference to making assessment or reassessment of total income or loss of assessee. The impugned notice dated 27th August, 2022 has been issued by respondent no.1 (JAO) and not by the

NFAC, which is not in accordance with the aforesaid Scheme.

33 The guideline dated 1st August 2022 relied upon by the Revenue is not applicable because these guidelines are internal guidelines as is clear from the endorsement on the first page of the guideline – "*Confidential For Departmental Circulation Only*". The said guidelines are not issued under Section 119 of the Act. Any such guideline issued by the CBDT is not binding on petitioner. Further the said guideline is also not binding on respondent no.1 as they are contrary to the provisions of the Act and the Scheme framed under Section 151A of the Act. The effect of a guideline came up for discussion in ***Sofitel Realty LLP vs. Income Tax Officer (TDS)***[13] wherein this Court has held that the guidelines which are contrary to the provisions of the Act cannot be relied upon by the Revenue to reject an application for compounding filed by an assessee. The Court held that guidelines are subordinate to the principal Act or Rules, it cannot restrict or override the application of specific provisions enacted by legislature. The guidelines cannot travel beyond the scope of the powers conferred by the Act or the Rules.

The guidelines do not deal with or even refer to the Scheme dated 29th March 2022 framed by the Government under Section 151A of the Act. Section 151A(3) of the Act provides that the Scheme so framed is required to be laid before each House of the Parliament. Therefore, the

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Scheme dated 29th March 2022 under Section 151A of the Act, which has also been laid before the Parliament, would be binding on the Revenue and the guideline dated 1st August 2022 cannot supersede the Scheme and if it provides anything to the contrary to the said Scheme, then the same is required to be treated as invalid and bad in law.

34 As regards ITBA step-by-step Document No.2 regarding issuance of notice under Section 148 of the Act, relied upon by Revenue, an internal document cannot depart from the explicit statutory provisions of, or supersede the Scheme framed by the Government under Section 151A of the Act which Scheme is also placed before both the Houses of Parliament as per Section 151A(3) of the Act. This is specially the case when the document does not even consider or even refer to the Scheme. Further the said document is clearly intended to be a manual/guide as to how to use the Income Tax Department's portal, and does not even claim to be a statement of the Revenue's position/stand on the issue in question. Our observations with respect to the guidelines dated 1st August 2022 relied upon by the Revenue will equally be applicable here.

35 Further, in our view, there is no question of concurrent jurisdiction of the JAO and the FAO for issuance of notice under Section 148 of the Act or even for passing assessment or reassessment order. When specific jurisdiction has been assigned to either the JAO or the FAO in the Scheme dated 29th March, 2022, then it is to the exclusion of the other. To

take any other view in the matter, would not only result in chaos but also render the whole faceless proceedings redundant. If the argument of Revenue is to be accepted, then even when notices are issued by the FAO, it would be open to an assessee to make submission before the JAO and vice versa, which is clearly not contemplated in the Act. Therefore, there is no question of concurrent jurisdiction of both FAO or the JAO with respect to the issuance of notice under Section 148 of the Act. The Scheme dated 29th March 2022 in paragraph 3 clearly provides that the issuance of notice "*shall be through automated allocation*" which means that the same is mandatory and is required to be followed by the Department and does not give any discretion to the Department to choose whether to follow it or not. That automated allocation is defined in paragraph 2(b) of the Scheme to mean an algorithm for randomised allocation of cases by using suitable technological tools including artificial intelligence and machine learning with a view to optimise the use of resources. Therefore, it means that the case can be allocated randomly to any officer who would then have jurisdiction to issue the notice under Section 148 of the Act. It is not the case of respondent no.1 that respondent no.1 was the random officer who had been allocated jurisdiction.

36 With respect to the arguments of the Revenue, i.e., the notification dated 29th March 2022 provides that the Scheme so framed is applicable only 'to the extent' provided in Section 144B of the Act and

Section 144B of the Act does not refer to issuance of notice under Section 148 of the Act and hence, the notice cannot be issued by the FAO as per the said Scheme, we express our view as follows:-

Section 151A of the Act itself contemplates formulation of Scheme for both assessment, reassessment or recomputation under Section 147 as well as for issuance of notice under Section 148 of the Act. Therefore, the Scheme framed by the CBDT, which covers both the aforesaid aspect of the provisions of Section 151A of the Act cannot be said to be applicable only for one aspect, i.e., proceedings post the issue of notice under Section 148 of the Act being assessment, reassessment or recomputation under Section 147 of the Act and inapplicable to the issuance of notice under Section 148 of the Act. The Scheme is clearly applicable for issuance of notice under Section 148 of the Act and accordingly, it is only the FAO which can issue the notice under Section 148 of the Act and not the JAO. The argument advanced by respondent would render clause 3(b) of the Scheme otiose and to be ignored or contravened, as according to respondent, even though the Scheme specifically provides for issuance of notice under Section 148 of the Act in a faceless manner, no notice is required to be issued under Section 148 of the Act in a faceless manner. In such a situation, not only clause 3(b) but also the first two lines below clause 3(b) would be otiose, as it deals with the aspect of issuance of notice under Section 148 of the Act. Respondents, being an authority

subordinate to the CBDT, cannot argue that the Scheme framed by the CBDT, and which has been laid before both House of Parliament is partly otiose and inapplicable. The argument advanced by respondent expressly makes clause 3(b) otiose and impliedly makes the whole Scheme otiose. If clause 3(b) of the Scheme is not applicable, then only clause 3(a) of the Scheme remains. What is covered in clause 3(a) of the Scheme is already provided in Section 144B(1) of the Act, which Section provides for faceless assessment, and covers assessment, reassessment or recomputation under Section 147 of the Act. Therefore, if Revenue's arguments are to be accepted, there is no purpose of framing a Scheme only for clause 3(a) which is in any event already covered under faceless assessment regime in Section 144B of the Act. The argument of respondent, therefore, renders the whole Scheme redundant. An argument which renders the whole Scheme otiose cannot be accepted as correct interpretation of the Scheme. The phrase "to the extent provided in Section 144B of the Act" in the Scheme is with reference to only making assessment or reassessment or total income or loss of assessee. Therefore, for the purposes of making assessment or reassessment, the provisions of Section 144B of the Act would be applicable as no such manner for reassessment is separately provided in the Scheme. For issuing notice, the term "to the extent provided in Section 144B of the Act" is not relevant. The Scheme provides that the notice under Section 148 of the Act, shall be issued through automated

allocation, in accordance with risk management strategy formulated by the Board as referred to in Section 148 of the Act and in a faceless manner. Therefore, “to the extent provided in Section 144B of the Act” does not go with issuance of notice and is applicable only with reference to assessment or reassessment. The phrase “to the extent provided in Section 144B of the Act” would mean that the restriction provided in Section 144B of the Act, such as keeping the International Tax Jurisdiction or Central Circle Jurisdiction out of the ambit of Section 144B of the Act would also apply under the Scheme. Further the exceptions provided in sub-section (7) and (8) of Section 144B of the Act would also be applicable to the Scheme.

37 When an authority acts contrary to law, the said act of the Authority is required to be quashed and set aside as invalid and bad in law and the person seeking to quash such an action is not required to establish prejudice from the said Act. An act which is done by an authority contrary to the provisions of the statue, itself causes prejudice to assessee. All assessees are entitled to be assessed as per law and by following the procedure prescribed by law. Therefore, when the Income Tax Authority proposes to take action against an assessee without following the due process of law, the said action itself results in a prejudice to assessee. Therefore, there is no question of petitioner having to prove further prejudice before arguing the invalidity of the notice.

38 With respect to the Office Memorandum dated 20th February

2023, the said Office Memorandum merely contains the comments of the Revenue issued with the approval of Member (L&S) CBDT and the said Office Memorandum is not in the nature of a guideline or instruction issued under Section 119 of the Act so as to have any binding effect on the Revenue. Moreover, the arguments advanced by the Revenue on the said Office Memorandum dated 20th February 2023 is clearly contrary to the provisions of the Act as well as the Scheme dated 29th March 2022 and the same are dealt with as under –

(i) It is erroneously stated in paragraph 3 of the Office Memorandum that "*The scheme clearly lays down that the issuance of notice under section 148 of the Act has to be through automation in accordance with the risk management strategy referred to in section 148 of the Act.*" The issuance of notice is not through automation but through “automated allocation”. The term “automated allocation” is defined in clause 2(1)(b) of the said Scheme to mean random allocation of cases to Assessing Officers. Therefore, it is clear that the Assessing Officer are randomly selected to handle a case and it is not merely a case where notice is sought to be issued through automation.

(ii) It is further erroneously stated in paragraph 3 of the Office Memorandum that "*To this end, as provided in the section 148 of the Act, the Directorate of Systems randomly selects a number of cases based on the criteria of Risk Management Strategy*." The term ‘randomly’ is further used

at numerous other places in the Office Memorandum with respect to selection of cases for consideration/issuance of notice under Section 148 of the Act. Respondent is clearly incorrect in its understanding of the said Scheme as the reference to random in the said Scheme is reference to selection of Assessing Officer at random and not selection of Section 148 cases as random. If the cases for issuance of notice under Section 148 of the Act are selected based on criteria of the risk management strategy, then, obviously, the same are not randomly selected. The term 'randomly' by definition mean something which is chosen by chance rather than according to a plan. Therefore, if the cases are chosen based on risk management strategy, they certainly cannot be said to be random. The Computer/System cannot select cases on random but selection can be based on certain well-defined criteria. Hence, the argument of respondents is clearly unsustainable. If the case of respondent is that the applicability of Section 148 of the Act is on random basis, then the provision of Section 148 itself would become contrary to Article 14 of the Constitution of India as being arbitrary and unreasonable. Randomly selecting cases for reopening without there being any basis or criteria would mean that the section is applied by the Revenue in an arbitrary and unreasonable manner. The word 'random' is used in clause 2(1)(b) of the said Scheme in the definition of "automated allocation". "Automated allocation" is defined in the said clause to mean "*an algorithm for randomised allocation of cases…..*". The term

'random', in our view, has been used in the context of assigning the case to a random Assessing Officer, i.e., an Assessing Officer would be randomly chosen by the system to handle a particular case. The term 'random' is not used for selection of case for issuance of notice under Section 148 as has been alleged by the Revenue in the Office Memorandum. Further, in paragraph 3.2 of the Office Memorandum, with respect to the reassessment proceedings, the reference to 'random allocation' has correctly been made as random allocation of cases to the Assessment Units by the National Faceless Assessment Centre. When random allocation is with reference to officer for reassessment then the same would equally apply for issuance of notice under Section 148 of the Act.

(iii) The conclusion at the bottom of page 2 in paragraph 3 of the Office Memorandum that "*Therefore, as provided in the scheme the notice under section 148 of the Act is issued on automated allocation of cases to the Assessing Officer based on the risk management criteria*" is also factually incorrect and on the basis of incorrect interpretation of the Scheme. Clause 2(1)(b) of the Scheme defined 'automated allocation' to mean '*an algorithm for randomised allocation of cases by using suitable technological tools, including artificial intelligence and machine learning, with a view to optimise the use of resources*'. The said definition does not provide that the automated allocation of case to the Assessing Officer is based on the risk management criteria. The reference to risk management

criteria in clause 3 of the Scheme is to the effect that the notice under Section 148 of the Act should be in accordance with the risk management strategy formulated by the board which is in accordance with Explanation 1 to Section 148 of the Act. In our view, the Revenue is misinterpreting the Scheme, perhaps to cover its deficiency of not following the Scheme for issuing notice under Section 148 of the Act.

(iv) In paragraph 3.1 of the Office Memorandum, it is stated that the case is selected prior to issuance of notice are decided on the basis of an algorithm as per risk management strategy and are, therefore, randomly selected. It is further stated that these cases are 'flagged' to the JAO by the Directorate of Systems and the JAO does not have any control over the process. It is further stated that the JAO has no way of predicting or determining beforehand whether the case will be 'flagged' by the system. The contention of the Revenue is that only cases which are 'flagged' by the system as per the risk management strategy formulated by CBDT can be considered by the Assessing Officer for reopening, however, in clause (i) in the Explanation 1 to Section 148 of the Act, the term "flagged" has been deleted by the Finance Act, 2022, with effect from 1st April 2022. In any case, whether only cases which are flagged can be reopened or not is not relevant to decide the scope of the Scheme framed under Section 151A of the Act, which required the notice under Section 148 of the Act to be issued on the basis of random allocation and in a faceless manner.

(v) The Revenue has wrongly contended in paragraph 3.1 of the Office Memorandum that "*Therefore, whether JAO or NFAC should issue such notice is decided by administration keeping in mind the end result of natural justice to the assessees as well as completion of required procedure in a reasonable time.*" In our opinion, there is no such power given to the administration under either Section 151A of the Act or under the said Scheme. The Scheme is clear and categorical that notice under Section 148 of the Act shall be issued through automated allocation and in a faceless manner. Therefore, the argument of the Revenue is clearly contrary to the provisions of the Scheme.

(vi) In paragraph 3.3 of the Office Memorandum, it is again erroneously stated that "*Here it is pertinent to note that the said notification does not state whether the notices to be issued by the NFAC or the Jurisdictional Assessing Officer ("JAO").....It states that issuance of notice under section 148 of the Act shall be through automated allocation in accordance with the risk management strategy and that the assessment shall be in faceless manner to the extent provided in section 144B of the Act.*" The Scheme is categoric as stated aforesaid that the notice under Section 148 of the Act shall be issued through automated allocation and in a faceless manner. The Scheme clearly provides that the notice under Section 148 of the Act is required to be issued by NFAC and not the JAO.

Further, unlike as canvassed by Revenue that only the assessment shall be in faceless manner, the Scheme is very clear that both the issuance of notice and assessment shall be in faceless manner.

(vii) In paragraph 5 of the Office Memorandum, a completely unsustainable and illogical submission has been made that Section 151A of the Act takes into account that procedures may be modified under the Act or laid out taking into account the technological feasibility at the time. Reading the said Scheme along with Section 151A of the Act makes it clear that neither the Section or the Scheme speak about the detailed specifics of the procedure to be followed therein. This argument of the Revenue is clearly contrary to the Scheme as the Scheme is very specific to provide, *inter alia*, that the issuance of notice under Section 148 of the Act shall be through automated location and in a faceless manner. Therefore, the Scheme is mandatory and provides the specification as to how the notice has to be issued. Further the argument of the Revenue that Section 151A of the Act takes into account that the procedure may be modified under the Act is without appreciating that if the procedure is required to be modified then the same would require modification of the notified Scheme. It is not open to the Revenue to refuse to follow the Scheme as the Scheme is clearly mandatory and is required to be followed by all Assessing Officers.

(viii) The argument of the Revenue in paragraph 5.1 of the Office Memorandum that the Section and Scheme have left it to the

administration to device and modify procedures with time while remaining confined to the principles laid down in the said Section and Scheme, is without appreciating that one of the main principles laid down in the Scheme is that the notice under Section 148 of the Act is required to be issued through automated allocation and in a faceless manner. There is no leeway given on the said aspect and, therefore, there is no question of the administration to device and modify procedures with respect to the issuance of notice.

39 With reference to the decision of the Hon'ble Calcutta High Court in *Triton Overseas Private Limited* (Supra), the Hon'ble Calcutta High Court has passed the order without considering the Scheme dated 29th March 2022 as the said Scheme is not referred to in the order. Therefore, the said judgment cannot be treated as a precedent or relied upon to decide the jurisdiction of the Assessing Officer to issue notice under Section 148 of the Act. The Hon'ble Calcutta High Court has referred to an Office Memorandum dated 20th February 2023 being F No.370153/7/2023 TPL which has been dealt with above. Therefore, no reliance can be placed on the said Office Memorandum to justify that the JAO has jurisdiction to issue notice under Section 148 of the Act. Further the Hon'ble Telangana High Court in the case of ***Kankanala Ravindra Reddy vs. Income Tax Officer***[14] has held that in view of the provisions of Section 151A of the Act

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read with the Scheme dated 29th March 2022 the notices issued by the JAOs are invalid and bad in law. We are also of the same view.

40 **As regards issue no.5**, it is petitioner's case that the issues raised in the impugned initial notice and the impugned order pertain to correct claim of deduction/allowances or the expenditure incurred. There is also no allegation regarding income escaping tax on account of any undisclosed asset. In the impugned order, the Assessing Officer has restricted the escapement of income only with regard to Rs.6,54,04,038/- on the claim of deduction under Section 80JJAA of the Act and disallowance of excess claim of Forex loss of Rs.6,90,80,180/-. On the Forex loss, respondent has *prima facie* accepted the contentions of petitioner that there was a Forex loss. Therefore, the same cannot be justified as an escapement of income. Respondent no.1 has also accepted that the transactions of Calibre Point Business Solutions Ltd. have been duly incorporated in the accounts of petitioner and that no deduction is claimed in respect of the deduction allowed under Section 10AA of the Act. None of the issues raised in the impugned order show an alleged escapement of income represented in the form of asset as required in Section 149(1)(b) of the Act.

41 As regards the claim of deduction under Section 80JJAA of the Act, an issue of correctness of claim of deduction under Chapter VI of the Act, in our view, cannot be covered by Section 149(1)(b) of the Act. Section

149(1)(b) of the Act prescribes that escaped income must be represented in the form of (i) an asset; (ii) expenditure in respect of a transaction or in relation to an event; (iii) an entry in the books of Account.

The question of a correctness of the claim of deduction under Section 80JJAA of the Act cannot represent escapement of income in the form of an asset. The term 'asset' is defined in Explanation to Section 149 of the Act to include immovable property being land or building or both, shares and securities, loans and advances, deposit in bank account. The present case does not fall in any of the types of the assets as mentioned above. Further, the alleged claim of disallowance of deduction also can never fall under the category of either clause (b) or clause (c) as it is neither a case of expenditure in relation to an event nor a case of an entry in the books of account as no entries are passed in the books of account for claiming a deduction under the provisions of the Act. On this ground also the impugned notice will be invalid.

42 **As regards issue no.6**, respondent no.1 has no power to review his own assessment when the same information was provided and considered by him during the original assessment proceedings. We agree with petitioner that there cannot be a reopening based on a change of opinion. The claim of deduction under Section 80JJAA of the Act was made by petitioner in the return of income and petitioner had filed Form 10DA being the report of the Chartered Accountant. In the said Form, a note has

been filed alongwith Form 10DA and it has specifically been submitted by petitioner that software development activity constitutes 'manufacture/ production of article or thing'. The claim of deduction under Section 80JJAA of the Act was also disclosed in the Tax Audit Report filed by petitioner alongwith the return of income. Further, during the assessment proceedings, the Assessing Officer had issued a notice dated 5th October 2017 asking for details of deduction claimed under Chapter VI of the Act. Petitioner vide a letter dated 13th November 2017 gave the details of deduction claimed under Chapter VI of the Act alongwith supporting documents. The Assessing Officer has passed the assessment order dated 30th November, 2017 allowing the claim of deduction under Section 80JJAA of the Act. The claim for deduction under Section 80JJAA of the Act was allowed by the Assessing Officer in the previous years as well. Hence, the present case is clearly a case of change of opinion or review of the original assessment order which is not permissible even under the new provisions.

43 In *Siemens Financial Services (P.) Ltd.* (Supra) in paragraphs 35 to 39 the Court held as under :

> *35. During the course of assessment proceedings, notice had been issued to petitioner. In reply to the notice under Section 143(2), petitioner had by its letter dated 6th December 2018 recorded, "…… based upon our discussion during the course of the hearing ……..". The transaction wise summary of the software consumable was made available. This was considered during the assessment proceedings and the assessment order accepting revised return came to be passed.*
>
> *36. We would agree with the submissions of Mr. Pardiwalla*

that if change of opinion concept is given a go by, that would result in giving arbitrary powers to the Assessing Officer to reopen the assessments. It would in effect be giving power to review which he does not possess. The Assessing Officer has only power to reassess not to review. If the concept of change of opinion is removed as contended on behalf of the Revenue, then in the garb of re-opening the assessment, review would take place. The concept of change of opinion is an in-built test to check abuse of power by the Assessing Officer. As held in Dr. Mathew Cherian (Supra), whether under old or new regime of reassessment, it is settled position that the issues decided categorically should not be revisited in the guise of reassessment. That would include issues where query have been raised during the assessment and query have been answered and accepted by the Assessing Officer while passing the assessment order. As held in Aroni Commercials (supra) even if assessment order has not specifically dealt with that issue, once the query is raised it is deemed to have been considered and the explanation accepted by the Assessing officer. It is not necessary that an assessment order should contain reference and/or discussion to disclose his satisfaction in respect of the query raised.

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37. The Assessing Officer does not have any power to review his own assessment when during the original assessment petitioner provided all the relevant information which was considered by him before passing the assessment order under section 143(3) of the Act dated 23rd December 2018. Petitioner had debited an amount of Rs.6,41,87,931/- on account of software consumables in the profit and loss account and a detailed break-up of the said expenses were submitted before the Assessing Officer during the course of assessment proceedings vide a letter dated 6th December 2018. It is settled law that proceedings under section 148 cannot be initiated to review the earlier stand adopted by the Assessing Officer. The Assessing Officer cannot initiate reassessment proceedings to have a relook at the documents that were filed and considered by him in the original assessment proceedings as the power to reassess cannot be exercised to review an assessment. In petitioner's case the Assessing Officer having allowed the amount of software consumables as a revenue expenditure now seeks to treat the same as capital expenditure which is a clear change of opinion. Various judicial precedents have held that reassessment proceedings initiated on the basis of a mere change of opinion are invalid and without jurisdiction.

38. The Apex Court in Kelvinator of India Ltd.(Supra) emphasised on the difference between a power to review and

the power to reassess. The Apex Court held that the Assessing Officer has no power to review but has only the power to reassess. The concept of 'change of opinion' must be treated as an in-built test to check abuse of power by the Assessing Officer. The relevant extract of the judgment is reproduced as under :-

> *".....However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989 , Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987 , Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer....."*
>
> *39. The Delhi High Court in Seema Gupta v. ITO held that the order under section 148A(d) and notice under section 148 of the Act should be set aside when the reassessment was initiated on a change of opinion where the same was discussed and verified by the Assessing Officer at the time of original assessment proceedings.*

Therefore, the concept of change of opinion being an in-built test to check abuse of power by the Assessing Officer and the Assessing

Officer having allowed the claim of deduction under Section 80JJAA of the Act in the assessment order dated 13th November 2017, now to disallow the same is based on a clear change of opinion. Reassessment proceedings initiated on the basis of a mere change of opinion is invalid and without jurisdiction. On this ground also the impugned notice issued under Section 148 of the Act has to be quashed and set aside.

44 **As regards issue no.7**, sub-section (1) of Section 80JJAA of the Act reads as under:

> *"Deduction in respect of employment of new employees.*
>
> *80JJAA. (1) Where the gross total income of an assessee to whom section 44AB applies, includes any profits and gains derived from business, there shall, subject to the conditions specified in sub-section (2), be allowed a deduction of an amount equal to thirty per cent of additional employee cost incurred in the course of such business in the previous year, for three assessment years including the assessment year relevant to the previous year in which such employment is provided.*
>
> *(2) No deduction under sub-section (1) shall be allowed,—*
>
> *(a) if the business is formed by splitting up, or the reconstruction, of an existing business:*
>
> *Provided that nothing contained in this clause shall apply in respect of a business which is formed as a result of re-establishment, reconstruction or revival by the assessee of the business in the circumstances and within the period specified in section 33B;*
>
> *(b) if the business is acquired by the assessee by way of transfer from any other person or as a result of any business reorganisation;*
>
> *(c) unless the assessee furnishes the report of the accountant, as defined in the Explanation below sub-section (2) of section 288, before the specified date referred to in section 44AB giving such particulars in the report as may be prescribed3.*
>
> *Explanation.—For the purposes of this section,—*
>
> *(i) "additional employee cost" means the total emoluments paid or*

payable to additional employees employed during the previous year:

Provided that in the case of an existing business, the additional employee cost shall be nil, if—

(a) there is no increase in the number of employees from the total number of employees employed as on the last day of the preceding year;

(b) emoluments are paid otherwise than by an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed4:

Provided further that in the first year of a new business, emoluments paid or payable to employees employed during that previous year shall be deemed to be the additional employee cost;

(ii) "additional employee" means an employee who has been employed during the previous year and whose employment has the effect of increasing the total number of employees employed by the employer as on the last day of the preceding year, but does not include—

(a) an employee whose total emoluments are more than twenty-five thousand rupees per month; or

(b) an employee for whom the entire contribution is paid by the Government under the Employees' Pension Scheme notified in accordance with the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952); or

(c) an employee employed for a period of less than two hundred and forty days during the previous year; or

(d) an employee who does not participate in the recognised provident fund:

Provided that in the case of an assessee who is engaged in the business of manufacturing of apparel or footwear or leather products, the provisions of sub-clause (c) shall have effect as if for the words "two hundred and forty days", the words "one hundred and fifty days" had been substituted:

Provided further that where an employee is employed during the previous year for a period of less than two hundred and forty days or one hundred and fifty days, as the case may be, but is employed for a period of two hundred and forty days or one hundred and fifty days, as the case may be, in the immediately succeeding year, he shall be deemed to have been employed in the succeeding year and the provisions of this section shall apply accordingly;

(iii) "emoluments" means any sum paid or payable to an employee in lieu of his employment by whatever name called, but does not include —

(a) any contribution paid or payable by the employer to any pension fund or provident fund or any other fund for the benefit of the employee under any law for the time being in force; and

(b) any lump sum payment paid or payable to an employee at the time of termination of his service or superannuation or voluntary retirement, such as gratuity, severance pay, leave encashment, voluntary retrenchment benefits, commutation of pension and the like.

(3) The provisions of this section, as they stood immediately prior to their amendment by the Finance Act, 2016, shall apply to an assessee eligible to claim any deduction for any assessment year commencing on or before the 1st day of April, 2016."

It provides that where the gross total income of an assessee to whom Section 44AB applies, includes any profits and gains derived from business, there shall, subject to the conditions specified in sub-section (2), be allowed a deduction of an amount equal to thirty percent of additional employee cost incurred in the course of such business in the previous year, for three assessment years including the assessment year relevant to the previous year in which such employment is provided. The fact that the claim of deduction under Section 80JJAA of the Act has been allowed to petitioner consistently since Assessment Year 2010-2011 is not disputed. Therefore, respondent no.1 cannot allege that income chargeable to tax has escaped assessment on account of such claim being allowed for Assessment Year 2015-2016 when such claim stands allowed for earlier years on identical facts, i.e., with respect to the same business activity.

45 As regards Ms. Gokhale's submissions that the merits of the claim of deduction under Section 80JJAA of the Act cannot be urged/argued in the present writ petition and petitioner has an alternate remedy to argue the merits of the case before the Assessing Officer, in our view, petitioner is not arguing the merits of deduction under Section 80JJAA of the Act. It is the submission of petitioner that the jurisdictional conditions prescribed under Sections 147, 148, 148A, 149, 151, and 151A of the Act have not been fulfilled by respondent no.1 before issuing the impugned notice under Section 148 of the Act. As jurisdictional conditions are not fulfilled by respondent no.1, the impugned notice can be challenged by petitioner before this Court. The counsel for respondent has failed to appreciate that petitioner has not argued the case on the merits but merely submitted that on merits deduction under Section 80JJAA of the Act has already been allowed in the earlier assessment years, i.e., Assessment Year 2013-2014 and 2014-2015 and the deduction in the Assessment Year 2015-2016 is only consequential as the eligibility to claim deduction was in the Assessment Year 2013-2014 and, therefore, there is no question of reopening the assessment for the relevant assessment to disallow the deduction under Section 80JJAA of the Act.

46 **As regards issue no.8**, it is submitted by Mr. Mistri that on the facts of the present case, no person properly instructed in law could have granted approval for passing the order under Section 148A(d) of the Act. It

is further submitted that the approval granted by respondent no.3 does not show application of mind by respondent no.3. Hence, the approval is invalid and bad in law. We are unable to agree with Mr. Mistri to hold, in the facts and circumstances of the case, there was non application of mind by the approving authority.

47 Therefore, the issues are answered as under:

Issue no.	Issue	Answered
01	Whether TOLA is applicable for Assessment Year 2015-2016 and whether any notice issued under Section 148 of the Act after 31st March 2021 will travel back to the original date?	**No**
02	Whether the notice dated 27th August 2022 issued under Section 148 of the Act is barred by limitation as per the first proviso to Section 149 of the Act?	**Yes**
03	Whether the impugned notice dated 27th August 2022 is invalid and bad in law as the same has been issued without a DIN?	**Yes**
04	Whether the impugned notice dated 27th August 2022 is invalid and bad in law being issued by the JAO as the same was not in accordance with Section 151A of the Act?	**Yes**
05	Whether the issues raised in the impugned order show an alleged escapement of income represented in the form of an asset or expenditure in respect of transaction in relation to an event or an entry in the books of account as required in Section 149(1)(b) of the Act?	**No**
06	Whether respondent no.1 has proposed to reopen	

	a. on the basis of change of opinion and; b. if it is permissible?	**Yes** **No**
07	When the claim of deduction under Section 80JJAA of the Act has been consistently allowed in favour of petitioner by the Assessing Officers/ Appellate Authorities in the earlier years, can the Assessing Officer have a belief that there is escapement of income?	**No**
08	Whether the approval granted by the Sanctioning Authority was valid?	**Yes**

48 Therefore, Rule made absolute in terms of prayer clause (a) which reads as under:-

> *"(a) that this Hon'ble Court be pleased to issue a Writ of Cetiorari or any other writ order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the issue of the impugned initial notice (Exhibit H) dated 25th May, 2022, passing of the impugned order (Exhibit L) dated 26th August 2022 and the issue of the impugned notice (Exhibit M) dated 27th August, 2022 and after going through the same and examining the question of legality thereof quash, cancel and set aside the impugned initial notice (Exhibit H) dated 25th May, 2022, passing of the impugned order (Exhibit L) dated 26th August 2022 and the issue of the impugned notice (Exhibit M) dated 27th August 2022."*

(DR. NEELA GOKHALE, J.) **(K.R. SHRIRAM, J.)**