

Reopening an assessment under Section 148 not allowed under pretext of “protective assessment”

Summary – The Mumbai High Court in a recent case of DHFL Venture Capital Fund, (the Assessee) held that the jurisdictional requirement for reopening an assessment under Section 148 is the formation of a reason to believe by the Assessing Officer that income has escaped assessment. The statute does not contemplate the reopening of an assessment under Section 148 on a hypothesis or a contingency of what would be the position in future should an appeal before the appellate authority, being the Tribunal or the High Court, result in a particular outcome which may emerge in the future even under the pretext of "protective assessment".

Facts

- The Petitioner is registered with the SEBI as a Venture Capital Fund under the SEBI (Venture Capital Fund) Regulations 1996.
- For Assessment Year 2008-09, which is the Assessment Year under consideration the Petitioner had an income of Rs.32.83 Crores. In computation of income, Petitioner claimed that the contributions by its investors constituted revocable transfers under the provisions of the Act and hence, the income accruing to the fund was not liable to tax in the hands of the Petitioner, but in the hands of the investors in proportion to their respective contributions.
- On December 2010 an order of assessment was passed under Section 143(3) by which the Assessing Officer stating that the contributors to the scheme have practically no control over it and hence, the provisions of Sections 61 and 63 were not applicable. In the circumstances, the total income of Rs.32.83 Crores was held to be exigible to tax.
- In appeal, the Commissioner (Appeals) came to conclusion that there was a revocable transfer within the meaning of Sections 61 to 63 and the income which arose to the trust was taxable in the hands of the contributors and not in the hands of the Petitioner.
- Against the order of the CIT (A) for Assessment Year 2008-09, the Revenue filed an appeal before the Tribunal.
- On 18 May 2012 a notice had been issued by the Assessing Officer under Section 148 for Assessment Year 2008-09. The notice was issued to "the AOP of the contributors of M/s. DHFL Venture Capital Fund" at the address of the Petitioner.
- The reasons on the basis of which the assessment is sought to be reopened for Assessment Year 2008-09 were "the income arising from the contributions made by the contributors to DHFL Venture

Capital Fund is taxable in the hand of Body of contributors whose members being companies and individuals is "Association of Persons of the contributors" if provisions of section 61 to 63 are attracted to the transactions between contributors and DHFL Venture Capital Fund as has been claimed by the DHFL Venture Capital Fund during the assessment proceedings for AY 2008-09 as per letter dated 25.12.2010. Therefore, the income of Rs.32,83,77,906/- arising from investment of contributions of the contributors to DHFL, which has been claimed as exempt in the hands of the DHFL Venture Capital Fund, has to be assessed as income in the hands of the "AOP of the contributors" of DHFL Venture Capital Fund." (emphasis supplied)

- The assessee challenged the reassessment notice by a writ petition before HC.

Held

- The reasons for the reopening of the assessment clearly postulate that the reopening is based on the contingency that the provisions of Sections 61 to 63 are held to be attracted to the transactions between the contributors and the Petitioner "as has been claimed" by the Petitioner.
- The formation of a reason to believe is "if" the provisions of Sections 61 to 63 are attracted.
- It is on this hypothesis that the Assessing Officer proceeds to record that the income of Rs.32.83 Crores arising from the investment of contributions of the contributors "which has been claimed as exempt in the hands of" the Petitioner has to be assessed as income in the hands of the AOP of the contributors of the Petitioner.
- Reading the reasons as they stand, it is evident that the Revenue has sought to reopen the assessment in exercise of powers conferred by Section 148 on the hypothesis that should the Tribunal accept the contention of the Petitioner and affirm the view of the Commissioner (Appeals), the income would be exempt in the hands of the Petitioner and in such an eventuality should be brought to tax in the hands of an AOP of the contributors of the Petitioner.
- The jurisdictional requirement for reopening an assessment under Section 148 is the formation of a reason to believe by the Assessing Officer that income has escaped assessment. The formation of the reason to believe and the existence of that reason must be in the present.
- 'Has escaped assessment' indicates an event which has taken place. Tax legislation cannot be rewritten by the Revenue or the Court by substituting the words 'may escape assessment' in future. Writing legislation is a constitutional function entrusted to the legislature.

- Recourse can be taken to the provisions of Section 148 where the Assessing Officer has a reason in present, meaning thereby, a reason which is present to his mind when he forms his reason to believe, that income has escaped assessment.
- Recourse to Section 148 cannot be founded in law on a hypothesis of what would be the position in future should an appeal before the appellate authority, being the Tribunal or the High Court, result in a particular outcome.
- The statute does not contemplate the reopening of an assessment under Section 148 on such a hypothesis or a contingency which may emerge in the future.
- To accept the contention of the Revenue in the present case would be to allow a reopening of an assessment under Section 148 on the ground that the Assessing Officer is of the opinion that a contingency may arise in future resulting an escapement of income. That would, be wholly impermissible and would amount to a rewriting of the statutory provision.
- Therefore the Writ petition was allowed and impugned notice of reassessment quashed and set aside.