

## **No reassessment when info on concealed income was already existing at time of assessment**

**Summary – The High Court of Allahabad in a recent case of Dr. Shiva Kant Mishra, (the Assessee) held that where information regarding long-term capital gain on sale of shares was already existing on file of assessee and did not come up as an issue for first time during reassessment proceedings, said amount could not be treated as an escaped income chargeable to tax under section 147**

### **Facts**

- The assessee filed his return declaring certain income under head 'long-term capital gains' arising from sale of shares. In said return, the assessee claimed deduction under section 54F indicating that said amount was invested in the construction of a house.
- Before the return could be processed, a search and seizure operation was carried out under section 132 at assessee's residence and business premises. Based on search operation, block assessment proceedings under section 158BC was initiated wherein assessing authority passed an order holding that the whole transaction was a sham transaction with regard to the claim of long-term capital gain and that it was merely an entry for claiming false exemption under section 54F. He thus added said amount to the income of the assessee as undisclosed income.
- The appellate authority held that said amount could not be added as an undisclosed income of the assessee as it was not based on the material seized during the course of search and seizure operation under section 132.
- The Tribunal upheld the order passed by Commissioner (Appeals).
- After the completion of the block assessment, the Assessing Officer issued a notice under section 148, reopening the assessment proceedings for the assessment year 2002-03 on the sole ground that certain amount was liable to be added to assessee's income under head deemed dividend.
- In course of reassessment proceedings, the Assessing Officer made further addition in respect of amount of long-term capital gains on protective basis.
- The appellate authority held that addition in question was beyond the purview of reassessment proceeding under section 147 because all the facts relating to the transaction of shares were already in the knowledge of the Assessing Officer even before initiation of reassessment proceedings.
- The Tribunal, however, held that once assessment was reopened on a particular issue and addition was made thereon, other issues which surfaced during the course of assessment proceeding could also be examined and addition could be made accordingly. The Tribunal thus held that there was no infirmity in the action of the Assessing Officer.
- On appeal:

### **Held**

- Explanation 3 to section 147 was inserted by Finance Act No. 2 of 2009, with effect from 1-4-1989. The Central Board of Direct Taxes (CBDT) issued a circular No. 5 of 2010 providing an Explanatory

Note to the provisions of Finance Act No. 2 of 2009 by which Explanation 3 to section 147 of the Act was inserted with effect from 1-4-1989.

- This clarificatory note was issued because some of the Courts held that the Assessing Officer had to restrict the reassessment proceedings only to the reasons recorded for reopening the reassessment proceedings and he was not empowered to decide any other issues for which reason had not been recorded. The explanatory note was, therefore, issued in order to clarify the legislative intent, namely, that the Assessing Officer may assess or reassess the income in respect of any issue which comes to his notice, subsequently in the course of proceedings under section 147 notwithstanding that the reasons for such issue has not been included in the reasons recorded under sub-section (2) of section 148.
- Explanation 3 to section 147 and the Explanatory note issued by the CBDT makes it apparently clear that even though the notice that had been issued under section 148 containing the reason for reopening the assessment does not contain a reference to a particular issue with reference to such income as escaped assessment, the assessing authority may assess or reassess the income in respect of any issue which has escaped assessment when such issue came to his notice, subsequently in the course of proceedings.
- The words 'such issue comes to his notice subsequently in the course of proceedings under this section' is of importance. The language is clear and there is no ambiguity, namely, that the issue which is being assessed and which has escaped assessment must come to the notice of the Assessing Officer subsequently in the course of reassessment proceeding under section 147, which in the instant case was lacking. The issue relating to long-term capital gains was already declared by the appellant in his returns filed under section 139. This issue was discussed in detail in the block assessment proceedings by the Assessing Officer in the assessment order passed under section 158BC. This block assessment order under section 158BC was passed prior to the issuance of reassessment notice under section 148 of the Act.
- Consequently, information regarding long-term capital gains was already existing on the file of the assessee and did not come up as an issue for the first time during reassessment proceedings under section 147 nor can it be said that such issue came to the knowledge or notice of the assessing authority subsequently in the case of reassessment proceedings. The Assessing Officer in the reassessment order under section 147 has clearly indicated that the matter was discussed and examined in detail in the block assessment order and an addition was made on a protective basis in order to protect the interest of revenue.
- It is apparently clear, that this issue relating to long-term capital gains had not come to the notice of the Assessing Officer subsequently in the course of reassessment proceedings. The Assessing Officer could not have made this addition in reassessment proceeding under the cover of 'protective basis'. The protective assessment could only be made at the stage when there was any doubt or dispute about the assessability of a particular sum either in relation to the assessment year and/or in relation to the assessee.

- Further, the assessing authority could only assess or reassess such income which has escaped assessment. In order to take an action under section 147 there must be a reason to believe that such income had escaped assessment which came to his notice subsequently in the course of re-assessment proceedings. In the instant case, the amount which is alleged to have escaped assessment was duly indicated by the assessee in his return under section 139 and was also considered in the block assessment order under section 158BC. In the block assessment order the assessing authority had assessed this amount on long-term capital gains as undisclosed income. The block assessment order was set aside on the ground that such amount was not an undisclosed income which finding was affirmed by the Tribunal. Once the Tribunal has given a categorical finding that the amount was not an undisclosed income, which order has attained finality, the said amount cannot be treated as an escaped income chargeable to tax under section 147.
- In view of aforesaid, the appeal is allowed. The order of the Tribunal is set aside.