AO couldn't issue second reassessment notice without withdrawing first one: Gujarat HC

Summary – The High Court of Gujarat in a recent case of Marwadi Shares & Finance Ltd., (the Assessee) held that A notice of reopening which is once issued would remain in operation unless it is specifically withdrawn, quashed or gets time barred

Facts

- The assessee-company was engaged in share broking. For relevant year the assessee had filed the return of income which was taken in scrutiny. Thereupon, Assessing Officer passed order of assessment under section 143(3).
- Subsequently, the Assessing Officer issued a notice under section 148 seeking to reopen the assessment on ground that information had been received by his office in respect of fictitious losses created by some brokers by misusing the client code modifications facility in F&O segment on NSE during March 2010. The assessee was reported to be one of the beneficiaries of such fictitious losses by misuse of client code modification facility. This fictitious loss had been adjusted by the assessee against the profits which resulted in suppression/reduction of taxable income.
- The assessee challenged validity of said notice on technical grounds by filing a writ petition. In the course of proceedings, the Assessing Officer agreed to issue a fresh notice for reopening of assessment. Thereupon a subsequent notice was issued to assessee under section 148 for reopening of assessment.
- The assessee filed instant petition challenging validity of reassessment proceedings on ground that first notice issued under section 148 was never withdrawn and without withdrawal of such notice, it was not permissible for the revenue to issue a fresh notice.

Held

- It was noted from records that the department previously issued a notice dated 31-3-2015. This notice was challenged by the assessee before this Court. After some discussion at the bar, the Revenue, under instructions, stated that the notice of reopening of the assessment would be withdrawn by the Assessing Officer with a view to issuing a fresh notice after recording fresh reasons. Thereupon, fresh notice came to be issued on 29-3-2017. In the previous notice, the reasons recorded merely stated that the information was received by the office in response to fictitious losses created by some broker by misusing client code modifications facility. The assessee was reported to be one of the beneficiaries of misuse of such facility. Such fictitious losses had been adjusted by the assessee against the profits of other years. Thus, it could be argued that the Assessing Officer had merely proceeded on the information received by him. His approach was therefore possible of being faulted as having acted on bare information without his own application of mind and thus relying on borrowed satisfaction. In the fresh reasons, he gave some background

facts which, to be honest, were highly jumbled up. He referred to the past litigation and recorded that the High Court had directed recording of fresh reasons. This obviously was a clear error.

- In any case, the order of the High Court nowhere records any such direction. However, this by itself would not be fatal to the cost of the Revenue. The background facts are clearly severable from the reasons which succeed which formed the core of the recorded reasons by the Assessing Officer. Thus, the reasons summarized the information available with the Assessing Officer principally suggesting that there was systematic misuse of the client code modification facility with a view to buy losses to be offset against the profit of the year. The Assessing Officer has taken a note of the investigation report and, in particular, cited instance of such exercise in case of the assessee. He formed a belief that the assessee had claimed fictitious losses crores (rounded off) through this process.
- Clearly the Assessing Officer having recorded his reasons which were based on information supplied to him, this is not a case where the Assessing Officer had mechanically proceeded on the basis of the borrowed satisfaction. Even beyond the period of four years, the reasons recorded were good enough to sustain a notice of reopening. At this stage, when the Court is examining the validity of notice of reopening, the Court would only *prima facie* consider the reasons recorded by the Assessing Officer. It is not necessary for the Assessing Officer to demonstrate beyond doubt that invariably and unfailingly additions will be made in the hands of the assessee. What is required to be seen is whether the Assessing Officer had some tangible material at his command permitting him to form a *bona fide* belief that income chargeable to tax had escaped assessment. The assessee's contentions of the previous reasons and the fresh reasons being identical that there was lack of application of mind on part of the Assessing Officer; he having acted on borrowed satisfaction; that notice could not have been issued beyond the period of four years since there was no failure on part of the assessee to disclose truly and fully all material facts or that the reasons are invalid, must fail.
- The law on subject is sufficiently clear. There can be only one process of assessment or reassessment. Pending any such assessment or reassessment, there cannot be a notice of reopening. The Courts have held that there cannot be reopening of assessment which is not yet complete.
- In the present case the first notice of reopening of assessment was not withdrawn, there was no scope, nor permissible in law to issue fresh notice of reopening. The Revenue, however, vehemently contended that such withdrawal of notice of reopening must be deduced from facts and attendant circumstances. The contention was that the revenue had, all along, intended to withdraw the notice and the fact, that such notice was abandoned, was sufficient to establish withdrawal thereof.
- This contention cannot be accepted. A notice of reopening which is once issued would remain in operation unless it is specifically withdrawn, quashed or gets time barred. First instance would be at the volition of the Assessing Officer as the person who had issued the notice. He can recall the notice for valid reasons and may even issue a fresh notice which is not impermissible in law. Nevertheless, there has to be an action of withdrawal. Mere intention, a stated intention or even an

intention which is otherwise put in practice cannot be equated with withdrawal of the notice. By mere intention to abandon the proceedings arising out of the notice, the Assessing Officer cannot bring about the desired result of withdrawing the notice. The notice was either withdrawn or is stood as it is, may be without any follow up action on part of the Assessing Officer.

- The material on record would clearly demonstrate that the Assessing Officer in the present case did not travel beyond expressing his clear intention to withdraw the notice. At no stage, either he passed and communicated the order of withdrawal of the notice to the assessee. Even the files do not show any such formal withdrawal of the notice with or without communication thereof to the assessee. The conclusion that would invariably result in frustrating the revenue's attempt to reopen the assessment and may have been seen to be based on somewhat technical reasons. Having succeeded on all other grounds, the revenue may legitimately feel somewhat disappointed. Nevertheless, duty of the Court is to give effect to the legal principles. The law does not recognize two parallel assessments. In absence of withdrawal of the first notice of reassessment, the proceedings would survive making the subsequent notice of reopening invalid.
- Petition is allowed.