


Recent amendments in provisions relating to re-assessment proceedings and impact of the Hon'ble Supreme Court's decision in Ashish Agarwal (Civil Appeal No. 3005/ 2022 dated 3 May 2022)



Provisions governing
proceedings under section
147 - old and new regime

Introduction to reassessment proceedings

- ▶ The provision for assessment of income escaping assessment was initially part of Income Tax Act, 1922 and after various amendments from time to time, the same has been in present form, before being substituted by new provisions in Finance Act, 2021.
- ▶ The earlier provisions relating to reassessment in the Income Tax Act, 1961 provided that if the Assessing Officer ('AO') has "reason to believe" that any income chargeable to tax has escaped assessment for any assessment year, he may assess or reassess or re-compute the total income for such year.
- ▶ The Memorandum explaining Finance Bill, 2021, mentions the intention of Parliament to introduce new provisions for reassessment wherein it is stated that due to advancement of technology, the department is now collecting all relevant information related to transactions of taxpayers from third parties under section 285BA of the ITA (statement of financial transaction or reportable account).
- ▶ Similarly, information is also received from other law enforcement agencies. Thus, in order to empower Tax Authority to reopen the assessment in such a situation, bring in the new provisions, the Tax Authority has been allowed to reopen the assessment on the basis of the information so collected by the Tax Authority.
- ▶ In view of the above, we would like to discuss some of the important facets of the old and new provisions of reassessment proceedings and also the comparative analysis between old and new provisions of reassessment proceedings.

Provisions after amendments made by the Finance Act, 2022

Section 148:

- ▶ As per new regime the Tax Authority can reassess the escaped income only if it has “information” which “suggests” escapement of income. In this regard, the two essential conditions which postulates that information suggests escapement of income are as under:
 - ▶ Information in taxpayer’s case for relevant AY in accordance with risk management strategy formulated by CBDT from time to time. (reference to the word “flagged” which was inserted by Finance Act, 2021 has been removed)
 - ▶ any audit objection in case of assessee (Prior to amendment scope was limited to final audit objection issued by C&AG)
 - ▶ any information received from a foreign jurisdiction under an agreement entered into under Section 90 or section 90A (**Introduced by Finance Act, 2022**)
 - ▶ Information received under a scheme notified under section 135A (Dealing with information collected by tax authority electronically under different provisions of the Act. The scheme yet to be notified) (**Introduced by Finance Act, 2022**)
 - ▶ Any information requiring action in consequence of a tribunal/court order (**Introduced by Finance Act, 2022**)

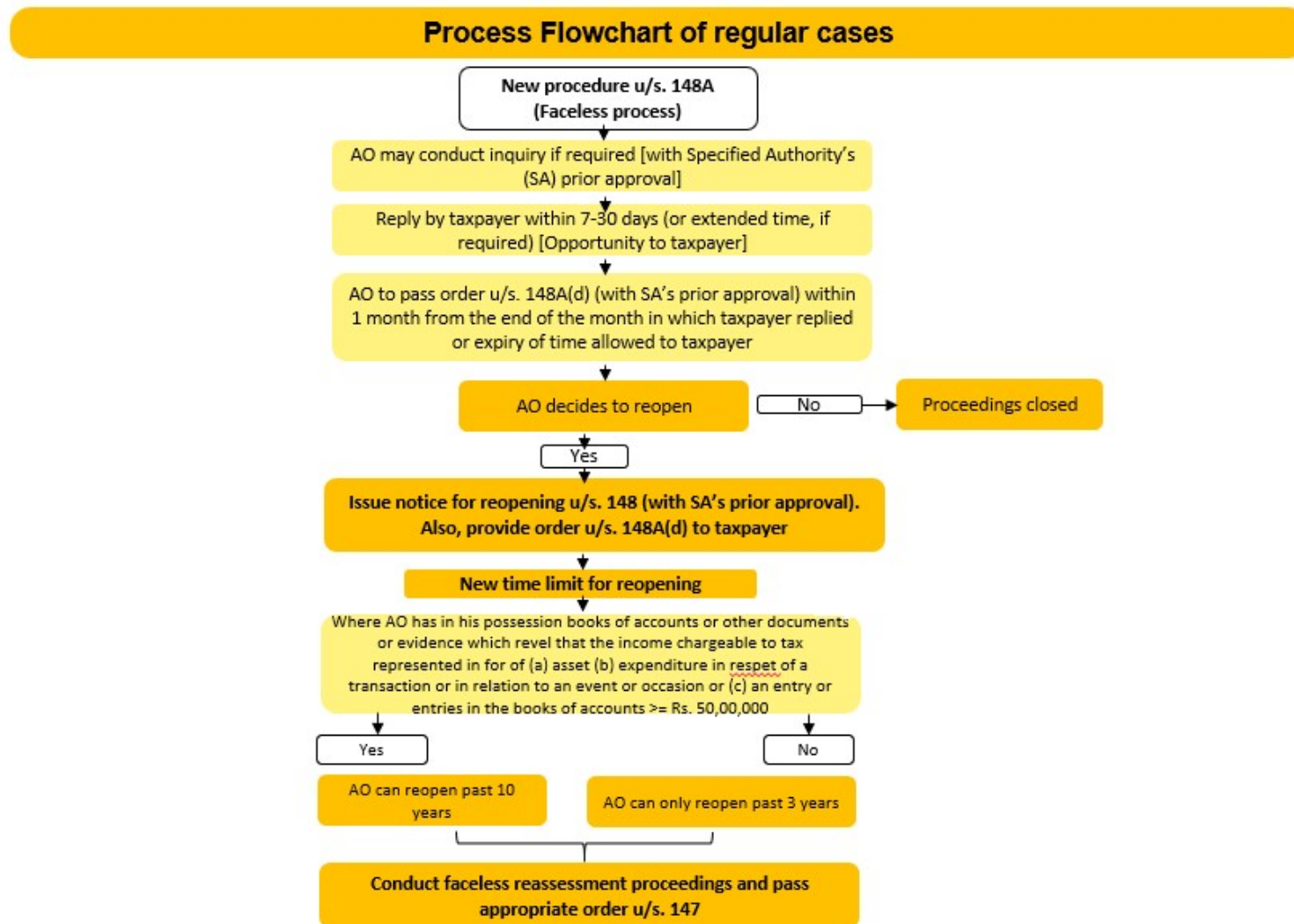
- ▶ Explanation 2 to section 148:

The assessing office shall be deemed to have information which suggests that income chargeable to tax has escaped assessment in the following cases:

 - Search initiated under section 132 or requisition under section 132A in case of the assessee
 - Survey conducted under section 133A in case of the assessee [other than 133A(2A)]
 - Any valuable article or thing requisitioned under section 132 or 132A in case of any other person belonging to assessee (prior approval of PCIT/ CIT)
 - Any books of accounts or documents requisitioned or seized in case of any other person contains information related to assessee (prior approval of PCIT/ CIT)

Provisions after amendments made by the Finance Act, 2022 (Contd.)

Section 148A:



Specified Authority means (a) PCIT/PDIT/CIT/DIT in case of reopening upto 3 years or (b) PCCIT/PDGIT/CCIT/DGIT in case of reopening upto 10 years

Provisions after amendments made by the Finance Act, 2022 (Contd.)

Section 148B:

Finance Act, 2022 has introduced section 148B to provide that the no officer below the Rank of JCIT shall pass an order without the prior approval of Add'l CIT/ Add'l DGIT/ JCIT/ JDIT where search, survey or requisition is involved.

Section 149:

Time limit to issue notice:

- 3 Years
 - Beyond 3 Years but upto 10 Years
 - Assessing officer has in his possession books of account or other documents or evidence which reveal that the income represented in the following form and exceeding Rs. 50,00,000 escapes assessment:
 - in form of an asset ;
 - Expenditure in relation to transaction; **(Introduced by Finance Act, 2022)**
 - Expenditure in relation to an event or occasion; **(Introduced by Finance Act, 2022)**
 - an entry or entries in books of accounts **(Introduced by Finance Act, 2022)**
- (If income escapes assessment in more than one previous year, notice shall be issued for each assessment year involved)

Section 151 (not amended) - Sanction for issue of notice:

- Upto 3 Years: PCIT/PDIT/CIT/DIT
- Beyond 3 Years: PCIT/PDIT, or where there is no PCIT /PDIT, CCIT/ DGIT

Sections 150, 151A and 152 too remain unchanged.

Old Regime vs. New Regime (Contd.)

Particulars	Old Regime	New Regime 2021	Amendments by Finance Act, 2022
Primary reason for assuming jurisdiction for reassessment	<ul style="list-style-type: none"> ▶ Reason to believe that income has escaped assessment 	<p>The AO has information which suggests that income has escaped assessment. The scope of the information is as follows:</p> <ul style="list-style-type: none"> ▶ Any information flagged in accordance with the risk management strategy(RMS) ▶ Final Audit objection raised by C&AG 	<p>The Finance Act 2022 has increased the scope of the information as follows:</p> <ul style="list-style-type: none"> ▶ Removed the reference to the word 'flagged' and now entire RMS data base may become basis for reopening. ▶ Expanded the scope to also include 'any audit objections' as against only "Final objection by C&AG" i.e. This means that any kind of audit objection (whether internal audit objection, revenue audit objection, objections by C&AG, etc.) raised could be used to reopen the assessment ▶ any information received from a foreign jurisdiction under an agreement entered into under Section 90 or section 90A

Old Regime vs. New Regime (Contd.)

Particulars	Old Regime	New Regime 2021	Amendments by Finance Act, 2022
Primary reason for assuming jurisdiction for reassessment			<ul style="list-style-type: none"> ▶ Information received under a scheme notified under section 135A (Dealing with information collected by tax authority electronically under different provisions of the Act. The scheme yet to be notified) ▶ Any information requiring action in consequence of a tribunal/court order. <p>Can earlier assessments be reopened on the basis of new amended provisions?</p> <p>Relevance of timing of information - what if available during assessment proceedings or received subsequently?</p> <p>Will it Overlap provisions of Section 150?</p> <p>Whether an assessee's case be re-opened due to the order of another year?</p> <p>Whether proceedings maybe initiated due to the order of a third party?</p>

Old Regime vs. New Regime (Contd.)

Particulars	Old Regime	New Regime 2021	Amendments by Finance Act, 2022
<p>Procedure up to issuance of notice under section 148A of the Act</p>	<p>Step 1: Obtain approval from JCIT/PCIT/ CCIT/CIT (as the case may be) [Refer German Remedies Ltd (152 Taxman 269) (Bombay HC)]</p> <p>Step 2: Formally record reasons to believe that the income has escaped assessment [The reasons must be recorded in detail and not based on borrowed satisfaction. Change of opinion cannot be basis of reopening. Further, the fresh information (i.e. tangible material) available with the assessing officer should reasonably indicate evasion of tax]</p>	<p>Step 1: Conduct an inquiry with a prior approval of the authority under section 151 [The approval should be speaking order]</p> <p>Step 2: Issue of SCN granting taxpayer an opportunity of being heard after approval of the authority under section 151</p>	<p>Finance Act 2022 now provides that no prior approval of the authority under section 151 would be required prior to issuing SCN to provide the assessee an opportunity of being heard.</p>

Old Regime vs. New Regime (Contd.)


Particulars	Old Regime	New Regime 2021	Amendments by Finance Act, 2022
<p>Procedure up to issuance of notice under section 148 of the Act</p>	<p>Step 3: Issue a notice under 148</p> <p>[Refer GKN Driveshafts (India) Ltd (259 ITR 19) (SC)]</p> <p>[Refer Asian Paints (296 ITR 90)]</p>	<p>Step 3: Consider the reply of the Assessee and decide if the case is fit for reopening by passing an order with prior approval of the authority under section 151.</p> <p>Step 4: Issue of notice under 148 with prior approval of the authority under section 151.</p> <p>▶ It is pertinent to note in the above procedure, there is no remedy available with Taxpayer in the ITA to contest the order under section 148A(d) of ITA. Thus, the Taxpayer has an option to file writ against the said order before High Court.</p>	<p>Finance Act 2022, provides that no separate approval would be required to issue notice under section 148 if a speaking order is passed by the AO holding that the case is fit for reassessment [2nd proviso to section 148]</p> <p>If notice is issued at pre selection stage then separate approval under Section 151 of the Act for issue of notice under Section 148 is not required.</p>

Old Regime vs. New Regime (Contd.)

Particulars	Old Regime		New Regime 2021		Amendments by Finance Act, 2022
Period of limitation for initiating proceedings	Up to 4 years		Upto 3 years		
	After 4 years but up to 6 years	<ul style="list-style-type: none"> ▶ Where income escaping assessment exceeds Rs. 1,00,000 ▶ Where income has been assessed under section 143(3) of the Act, income escapes assessment due failure of Assessee to file return of income or disclose fully all material facts during assessment 	Beyond 3 years but up to 10 years	Where income chargeable to tax escaping assessment amounts to or is likely to amount to Rs. 50,00,000 or more represented in form of an asset for the year	Finance Act 2022 now provides that if the aggregate value of investments in assets/expenditure incurred in multiple years exceeds Rs. 50,00,000, then reassessment notice are required to be issued for all such years thereby including it in 10 years limit.
	Up to 6 years	Where there has been assessment, reassessment or recomputation incase of any person in the capacity of agent of a non-resident.			Finance Act 2022 has expanded this scope and now it covers the following and has removed the expression "for the year".
	Up to 16 years	Income in relation to any asset (including any financial interest) located outside India and chargeable to tax, has escaped assessment.			Where income chargeable to tax escaping assessment amounts to or is likely to amount to Rs. 50,00,000 or more represented: a) in form of an asset ; b) Expenditure in relation to transaction; c) Expenditure in relation to an event or occasion; d) an entry or entries in books of accounts
				<p style="color: red;">It needs to be analysed that the deletion of the word " for the year" means that the Rs. 50,00,000 limit should be now computed in aggregate for all the years.</p> <p style="color: red;">Whether the time limit under section 149 is for notice under section 148 or 148A?</p> <p style="color: red;">Course of action if notice under section 148A received March?</p>	

Old Regime vs. New Regime (Contd.)

Particulars	Old Regime		New Regime	
	Requirement of prior approval under section 151	Upto 4 years	JCIT	Upto 3 years
Beyond 4 years		PCCIT/CCIT/PCIT/CIT	Beyond 3 years	PCIT/PDIT, or where there is no PCIT/PDIT, CCIT/ DGIT
Period of limitation for complete Assessment proceedings	12 months (24 months if reference made to TPO)		12 months (24 months if reference made to TPO)	
Can Tax authority reassess items of income not indicated in reasons so recorded	Yes		Yes	
Is taxpayer required to furnish ROI in response to notice u/s. 148 of the ITA?	Yes		Yes	
Whether recording of reasons is required?	Yes		No	

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Ashish Agarwal (Civil
Appeal No. 3005/ 2022
dated 3 May 2022) (SC)

Controversy surrounding notices under section 148 issued between 1 April 2021 to 30 June 2021

- ▶ Due to the COVID-19 pandemic and the ensuing national lockdowns, the Government of India enacted the Taxation and Other Laws (Relaxation and Amendment Of Certain Provisions) Act, 2020 ('TOLA') (first introduced by way of an ordinance dated 31 March 2020) extending timelines under various laws.
- ▶ The time limits prescribed under section 149 for issuance of reassessment notices under section 148 were extended by various notifications issued under TOLA as under:

Notification/ Ordinance Dated	Notification Number	Original limitation for issuance of notice under section 148	Extended Limitation
31 March 2020	Taxation and Other Laws (Relaxation and Amendment Of Certain Provisions) Ordinance, 2020	20 March 2020 to 29 June 2020	30 June 2020
24 June 2020	Notification No.35/ 2020	20 March 2020 to 31 December 2020	31 March 2021
31 March 2021	Notification 20/ 2021	31 March 2021	30 April 2021
27 April 2021	Notification 38/ 2021	30 April 2021	30 June 2021

- ▶ In the meantime, the Finance Bill, 2021 proposing to revamp the proceedings under section 147 received the assent of the Hon'ble President on 28 March 2021 and the new regime of 147 proceedings became operative from 1 April 2021 onwards.
- ▶ Consequent to the enactment of the Finance Act, 2021, the notifications dated 31 March 2021 and 27 April 2021 stipulating that the provisions, as existing prior to enactment of the Finance Act, 2021 shall apply to the reassessment proceedings initiated by way of notices under section 148 issued between 1 April 2021 to 30 June 2021 ('impugned period') were under challenge before various High Courts under writ jurisdiction.

Controversy surrounding notices under section 148 issued between 1 April 2021 to 30 June 2021 (Contd.)

Dispute regarding noticed issued in extended period

- ▶ Due to such stipulation, a question arose regarding whether the approximately 90,000 notices issued during the period between 1 April 2021 to 30 June 2021 can be deemed to be governed by the old provisions by TOLA by superseding the Finance Act, 2021 which provided for the new provisions being applicable from 1 April 2021.
- ▶ Approximately 9,000 writs were filed by assesseees before various high courts, out of which certain writs were disposed and their decisions are tabulated as under:

Sr. No.	High Court	Lead Appeal	Decision on validity of notice
1.	Allahabad High Court	Ashok Kumar Agarwal [Writ Tax No. 524/2021 dated 30.09.2021]	Notices set aside. However, It is left open to the respective assessing authorities to initiate reassessment proceedings in accordance with the substituted provisions of the Act as amended by Finance Act, 2021, after making all compliances, as required by law.
2.	Rajasthan High Court	Bpip Infra Pvt. Ltd. [S.B. Civil Writ Petition No. 13297/2021 dated 25.11.2021]	
3.	Delhi High Court	Mon Mohan Kohli [W.P.(C) No. 6176/2021 dated 15.12.2021]	
4.	Calcutta High Court	Bagaria Properties & Investment Pvt. Ltd. [W.P.O No. 244/2021 dated 17.01.2022]	
5.	Madras High Court	Vellore Institute of Technology [W.P. No. 15019/2021 dated 04.02.2022]	
6.	Bombay High Court	Tata Communications Transformation Services [Writ Petition No. 1334 of 2021 dated 29.03.2022]	
7.	Gujarat High Court	DG Patel Constructions Private Limited [R/Special Civil Application No. 12621 of 2021 dated 6 May 2022]	
8.	Karnataka High Court	Mohammed Mustafa [W.P. No. 22348 of 2021 (T-IT) dated 18 April 2022]	
9.	Chhattisgarh High Court	Palak Khatuja [W.P.(T) No. 149 of 2021 dated 23.08.2021]	

Controversy surrounding notices under section 148 issued between 1 April 2021 to 30 June 2021 (Contd.)

- ▶ The High Courts (other than the Hon'ble Chhattisgarh High Court) have set aside the impugned notices issued under section 148 on the ground that the same are bad in law since TOLA only provides a general relaxation of limitation granted on account of general hardship existing upon the spread of pandemic COVID -19 and the Finance Act, 2021 does not enable the Central Government to issue any notification to reactivate the pre-existing law. The exercise made by the delegate/Central Government would be de hors any statutory basis.
- ▶ The Hon'ble Chhattisgarh High Court's sustained the validity of the notices holding that TOLA and subsequent notifications extending the due date for issuance was held covered by the doctrine of Conditional Legislation whilst also observing that TOLA and subsequent notifications extended the due dates for payment of taxes for taxpayers and also protected the interest of the Income-tax Department at parity and therefore the provisions of Section 148 which was prevailing prior to the amendment of Finance Act, 2021 was also extended.
- ▶ Aggrieved by this decision of the various High Courts, the Revenue preferred to file appeals before the Hon'ble Supreme Court (lead case against Allahabad High Court).

Union of India vs. Ashish Agarwal (Civil Appeal No. 3005/ 2022 dated 3 May 2022)

- ▶ The Hon'ble Apex Court upon hearing the arguments of the Revenue as well as the taxpayers has, at Para 7 of its order, agreed with the views adopted by the various High Courts.
- ▶ However, it has taken cognizance of the fact that approx. 90,000 notices under section 148 have been issued by the Revenue during the impugned period against which approx. 9,000 writs were filed before the various High Courts and that the notices were issued by the Revenue under bona fide mistake.
- ▶ Accordingly, the Hon'ble Supreme Court, to ensure complete justice, has tried to *“strike a balance between the rights of the Revenue as well the respective assessee’ s because of the bona fide belief of the officers of the Revenue in issuing approx. 90,000 such notices, the Revenue may not suffer as ultimately it is the public exchequer which would suffer.”*
- ▶ It has done so, by modifying the judgments and orders passed by the Allahabad High Court as under whilst also extending its applicability to PAN India for all writs passed/ pending by various High Courts by invoking Article 142 of the Constitution of India:
 - (i) *The impugned section 148 notices issued to the respective assessees which were issued under unamended section 148 of the IT Act, which were the subject matter of writ petitions before the various respective High Courts shall be deemed to have been issued under section 148A of the IT Act as substituted by the Finance Act, 2021 and construed or treated to be show-cause notices in terms of section 148A(b). The assessing officer shall, within thirty days from today provide to the respective assessees information and material relied upon by the Revenue, so that the assessees can reply to the show-cause notices within two weeks thereafter;*
 - (ii) *The requirement of conducting any enquiry, if required, with the prior approval of specified authority under section 148A(a) is hereby dispensed with as a one-time measure vis-à-vis those notices which have been issued under section 148 of the unamended Act from 01.04.2021 till date, including those which have been quashed by the High Courts.*

Union of India vs. Ashish Agarwal (Civil Appeal No. 3005/ 2022 dated 3 May 2022) (Contd.)

Even otherwise as observed hereinabove holding any enquiry with the prior approval of specified authority is not mandatory but it is for the concerned Assessing Officers to hold any enquiry, if required;

(iii) The assessing officers shall thereafter pass orders in terms of section 148A(d) in respect of each of the concerned assesseees; Thereafter after following the procedure as required under section 148A may issue notice under section 148 (as substituted);

(iv) All defences which may be available to the assesseees including those available under section 149 of the IT Act and all rights and contentions which may be available to the concerned assesseees and Revenue under the Finance Act, 2021 and in law shall continue to be available."

- ▶ Since, the judgements and orders passed by the Hon'ble Allahabad High Court is modified and its applicability extended, the Hon'ble Supreme Court has consequently set aside all judgements and orders of the other High Courts.

Article 142 of the Constitution of India, 1949 - Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc

- 1. The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.*
- 2. Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.*

Key takeaways from the Hon'ble Apex Court's order

- ▶ Notices issued under section 148 issued during the impugned period shall be deemed to be notices under section 148A(b).
 - ▶ Whether proceedings would be governed by provisions as amended by the Finance Act, 2021 or the Finance Act, 2022?
 - ▶ Would the assessing officer have to justify the reasons recorded or information/ material gathered and satisfy the conditions under the amended section 148?
 - ▶ What if the conditions under the amended section 148 are not satisfied?
- ▶ A one time relief has been provided to the Revenue from the requirement to conduct enquiry (after seeking approval from the authority referred to in section 151 as required under section 148A(a).
 - ▶ Whether enquiry (after approval of the authority under section 151) under section 148A(a) is mandatory or discretionary?
- ▶ Assessing officers shall be required provide to the assessee the information and material relied upon, within 30 days.
 - ▶ Is it that AO has to furnish reasons recorded or AO will have to satisfy the conditions laid down in provisions of Section 148 for issuance of notice i.e. information flagged in case of assessee as per Risk Management Strategy or Final Audit objection raised by C&AG
- ▶ Assessee to reply to the notices within two weeks.
 - ▶ Whether the time limit of two weeks start from the date of receipt of information/ material or from the end of 30 days from the Hon'ble Apex Court's order?
- ▶ Assessing officer shall pass the order under section 148A(d). Thereafter after following the procedure as required under section 148A may issue notice under section 148 (as substituted).

Key takeaways from the Hon'ble Apex Court's order (Contd.)

- ▶ All the defences available to the assessee under section 149 (i.e. 2nd proviso to section 149) and/or which may be available under the Finance Act, 2021 and in law and whatever rights are available to the Assessing Officer under the Finance Act, 2021 are kept open and/or shall continue to be available.
 - ▶ What if income chargeable to tax represented in the form of assets and which has escaped assessment does not or is likely not to exceed Rs. 50,00,000 for particular year?
 - ▶ What if income chargeable to tax represented in the form of assets and which has escaped assessment exceeds or is likely to exceed Rs. 50,00,000 and the assessment year involved is AY 2013-14 or prior? (then will it be within 3 years or 10 years)
 - ▶ What if the asset involved is located outside India? (Sixteen years time limit applicable or not?)
 - ▶ At para 8(iv), the Supreme Court has made the following the following observation:

“(iv) All the defences which may be available to the assessee under section 149 and/or which may be available under the Finance Act, 2021 and in law and whatever rights are available to the Assessing Officer under the Finance Act, 2021 are kept open and/or shall continue to be available and;”

However, at para 10(iv), the Supreme Court has held as under:

“(iv) All defences which may be available to the assesses including those available under section 149 of the IT Act and all rights and contentions which may be available to the concerned assesseees and Revenue under the Finance Act, 2021 and in law shall continue to be available.”

Implication due to the change in wordings [“including those available under section 149 of the IT Act and all rights and contentions which may be available to the concerned assesseees and Revenue under the Finance Act, 2021 and in law” at para 10(iv) as against “under section 149 and/or which may be available under the Finance Act, 2021 and in law and whatever rights are available to the Assessing Officer under the Finance Act, 2021” at para 8(iv)] ?

CBDT Instruction F. No. 225/135/2021 dated 10 December 2021

For effective implementation of RMS, CBDT has directed the assessing officers to identify the following categories of information (pertaining to AY 2015-16 and AY 2018-19 and which may require action under section 148) for uploading on the Verification Report Upload (VRU) functionality on Insight Portal:

- ▶ Information from any other Govt. agency/law enforcement agency;
 - ▶ Information arising out of internal Audit objections which requires action under section 148;
 - ▶ Information received from any Income-tax Authority including the AO himself;
 - ▶ Information arising out of search or survey action;
 - ▶ Information arising out of Foreign Tax & Tax Re-search ('FT&TR') references;
 - ▶ Information arising out of any order of court has an impact on income of assessee or any other assessee;
 - ▶ Case involving additions on a recurring issue of law or fact:
 - ▶ Exceeding Rs. 25 lakhs in eight metro cities while at other charges, quantum of addition should exceed Rs. 10 lakhs;
 - ▶ Exceeding Rs. 10 crores in transfer pricing cases
- and where such addition:
- ▶ Has become final as no further appeal has been filed against the assessment order; or
 - ▶ Has been confirmed at any stage of appellate process in favour of revenue and assessee has not filed further appeal; or
 - ▶ Has been confirmed at the 1st stage of appeal in favour of revenue or subsequently; even if further appeal of assessee is pending against such order.

Further, the CBDT has also directed that the information pertaining to AY 2015-16 which requires action under section 148 shall be identified and uploaded only as per the provisions of the amended section 149(1)(b).

Income Tax Gazetted Officer's Association's representation to the Chairperson, Central Board of Direct Taxes

- ▶ Pursuant to the pronouncement of the Order, various Officers via. the Income Tax Gazetted Officer's Association have vide letters dated 6 May 2022 and 11 May 2022 (available online) have provided their interpretation of the Supreme Court's decision and raised their concerns with the Central Board of Direct Taxes ('CBDT').
- ▶ Their interpretation of the order (relevant) is summarized as under:
 - ▶ Only those cases can be revisited which qualify for issue of show cause notice under section 148A(b) during FY 2021-22. Only those cases that could have been reopened under amended section 148 can be revisited;
 - ▶ Assessing officers to communicate the information based upon which notices under section 148 was issued by 2 June 2022 (considering the order date i.e. 4 May 2022 as day 1);
 - ▶ Assessee to reply within 2 weeks from the receipt of the communication from the assessing officer;
 - ▶ For AYs up to 2017-18 - orders under section 148A(d) to be passed with prior approval of PCIT;
 - ▶ Only cases for AYs 2015-16, 2016-17 and 2017-18 can be revisited as these cases are within the limitation of 6 years
 - ▶ Out of the above, only those cases can be re-opened where the quantum of escapement in the form of assets exceeds or is likely to exceed Rs. 50,00,000.
 - ▶ Out of the above, only those cases can be re-opened in which revenue audit objection was final or information was received from insight portal (i.e. flagged in accordance with RMS) during the issue of notices under the unamended section 148.
 - ▶ Out of the above, all cases needs to be revisited, even if the assessee had not raised any objection and filed return as all the notices under unamended section 148 are deemed to be show cause notices under section 148A(b).
 - ▶ In few cases for AY 2015-16 and AY 2016-17, information from the insight portal was received after issuance of notices under the unamended section 148. For AY 2015-16, no action can be due to unavailability of information at the time of issuing the notice. For AY 2016-17, earlier notices can be dropped and fresh notice under section 148A can be initiated. The judgement will not have any effect on cases pertaining to AY 2016-17.
 - ▶ In many cases, 'material relied upon' inter alia has information about other assessees. Supplying such material therefore may lead to disclosure of information about third party(ies) to the assessee.
 - ▶ Information and material to be supplied to the assessee are presently in the custody of the Jurisdictional Assessing Officers who are bound by the judgement unless CBDT specifies otherwise.

Income Tax Gazetted Officer's Association's representation to the Chairperson, Central Board of Direct Taxes (Contd.)

- ▶ Further, the concerns (relevant) are summarized as under:
 - ▶ Whether the proceedings would be handled by officers from the Faceless Jurisdiction or the Physical Jurisdiction in view of the e-Assessment of Income Escaping Assessment Scheme, 2022 (Notification No. 18/ 2022)?
 - ▶ During the impugned period, notices were issued based on information from the following 4 sources:
 - from other AOs;
 - from other agencies;
 - from investigation wing; and
 - insight portal.

Other than the information received from insight portal no other source qualify for the criterion of flagged in accordance with the risk management strategy. Will the AO proceed in these cases where information is not flagged in accordance with the risk management strategy?

- ▶ Fate of proceedings for AYs 2015-16, 2016-17 and 2017-18 where the escaped income does not exceed Rs. 50 Lakhs as these are beyond the 3 year limit as on 1 April 2021?
- ▶ Under the erstwhile law, reassessment notices could be issued upto six years from the end of the assessment year. For AY 2013-14 and AY 2014-15, the limitation period was 31 March 2020 and 31 March 2021 respectively which was extended by the Taxation and Other Laws (Relaxation and Amendment Of Certain Provisions) Act, 2020 to 30 June 2021.

Accordingly, whether validity of notice issued for AY 2013-14 and AY 2014-15 can be challenged in light of the **first proviso to amended section 149** which provides that no notice can be issued in respect of an assessment year prior to AY 2021-22 if such notice could not have been issued under the erstwhile provision (as they stood before commencement of Finance Act 2021) on account of the same being time barred under the pre-amended section 149(1)(b) i.e. 6 years from the end of the relevant assessment year where income chargeable to tax escaping assessment amounts to or likely amounts to Rs. 1,00,000 or more.

CBDT Instruction No. 01/ 2022 dated 11 May 2022

In order to implement the decision of the Hon'ble Apex Court, CBDT, exercising its powers under section 119, has issued a set of instructions which the AOs may take into consideration.

- ▶ In case where the assessment years involved are 2013-14, 2014-15 and 2015-16 and notice under section 148 was not issued - Fresh notice can be issued with the approval of the specified authority only if the case is covered by section 149(1)(b) as amended by the Finance Act, 2021.
- ▶ In case where the assessment years involved are 2016-17 and 2017-18 and notice under section 148 was not issued - Fresh notice can be issued, with the approval of the specified authority, under section 149(1)(a).
- ▶ In case where the assessment years involved are 2013-14, 2014-15 and 2015-16 and income escaping assessment, in that case and that year, amounts to or likely amounts to less than Rs. 50 Lakhs - AOs may not provide the information and material and separate instruction shall be issued regarding procedure for disposing such cases.
- ▶ CBDT has re-iterated the one-time procedure laid down by the Hon'ble Supreme Court and the procedure laid down under section 148A(c) and onwards.

Other Issues:

In case where the taxpayers did not file any writs (approximately 81,000 cases):

- ▶ Whether AOs need to send the information and consequently pass order under section 148A(d) followed by issuance of notice under section 148 for such cases too?
- ▶ What if proceedings are concluded and the issue now lies at the CIT(A), DRP or ITAT level?

General Issues (irrespective whether writ filed or not):

- ▶ What if conditions warranting re-assessment beyond 4 year but within 6 years are not fulfilled in case of AY 2015-16 and 2016-17?
- ▶ Whether the decision of the Hon'ble Supreme Court in the case of Apex Laboratories Pvt. Ltd. v. Deputy Commissioner of Income Tax [Special Leave Petition (Civil) No. 23207 of 2019 dated 25 February 2022] be relied upon by the assessing officer in the order under section 148A(d) in pursuance of this Supreme Court Order?



Case Studies

Case Study 1

Transfer Pricing and scope of re-assessment proceedings:

- ▶ CBDT's Instruction No. 3/ 2016 requires mandatory reference to be made to the TPO in the following cases:
 - Report under section 92E of the Act has not been filed or where the impugned international transaction/ specified domestic transaction has not been reported;
 - Transfer pricing adjustments exceeding Rs. 10 crores or more have been made in an earlier assessment and the same has either been upheld or is under appeal; or
 - In case of search and seizure or survey operations
 - One of the reasons for selection of the case for scrutiny was TP Risk Parameter
- During the proceedings of A Ltd., the assessing officer failed to refer the case to the TPO despite it being covered by CBDT's Instruction No. 3/ 2016.
- The lapse was brought to the notice of the assessing officer by way of audit objections received after conclusion of the assessment proceedings.
- The assessing officer has now issued notice under section 148 of the Act on A Ltd. with a view to refer the case to the transfer pricing officer to assess the arm's length price. Is the re-assessment valid?
- What if the lapse was intimated to the assessing officer by way of RMS instead of audit objections?
- Does RMS strategy change every year? Is this RMS strategy available in public domain or can the Taxpayer ask for same under RTI? Or it is to be supplied along with 148A(a) Show Cause Notice?
- Can RMS strategy be a trigger point of reopening for 10 years?

Case Study 2

147 Proceedings vs. 263 Proceedings:

- ▶ It is a settled position of law that proceedings under section 147 and 263 of the Act are mutually exclusive. Where section 263 of the Act can be invoked, section 147 of the Act cannot be invoked and vice-versa. Will the said position still hold good, since on the basis or information or audit objection the Commissioner may initiate 263 proceedings for the years which are not time barred and for the remaining years the AO may initiate reassessment proceedings leading to duplication of the proceedings due to the amendments.
- ▶ In the facts of case study 1, prior to Finance Act, 2022, section 263 of the Act could be invoked. Can, after amendment, proceedings under section 147 be initiated?
- ▶ As per the amendments by Finance Act, 2022, Section 263 proceedings can be initiated even by Commissioner of Transfer Pricing Officer. Thus, in cases where Commissioner of TPO has initiated proceedings under section 263 of the Act before 1 April 2022 (i.e. prior to amendment to section 263 of the Act) will be valid since the said amendment is applicable from 1 April 2022? [Refer decision of the Hon'ble Hyderabad ITAT in the case of Agrotech Foods Limited [(2021) 124 taxmann.com 517] wherein it has been held that TPO's order (passed in consequence of DRP's directions) is also part of assessment records, and can be revised u/s. 263.
- ▶ Whether the SC decision extending time limits during pandemic would be applicable for orders to be passed under Section 263 also?
- ▶ **Hon'ble Mumbai Tribunal** decision in case of **Barclays Bank PLC (ITA No. 827/Mum/2021) dated 3 January 2022** wherein it is held that 263 proceedings cant be initiated against the final order passed after DRP direction.

Case Study 3

- During the proceedings under section 143 of the Act, in case of A Ltd, the AO requested submissions on deduction claimed under section 32AC of the Act. A Ltd complied with the request and submitted exhausted documents and submissions to support its claim. Upon conclusion of the assessment proceedings, the AO did not disallow the claim of the Assessee under section 32AC of the Act.
- Subsequently, basis information (in terms of RMS formulated by CBDT) available with the AO, proceedings under section 147 of the Act were initiated proposing to disallow the claim of A Ltd under section 32AC of the Act vide notice under section 148 of the Act dated 7 April 2022.
- Are the proceedings justified and can the assessee claim 'change of opinion'?
- Whether assessment can be reopened under the revamped reassessment regime basis the information under RMS which was already available with the AO during the assessment proceedings?
- What if information was available at the time of the original assessment proceedings but was not questioned? Whether correct proceedings are those under section 147 or under section 263?
- Subsequently, reassessment notice under Section 148 of the Act was issued for disallowance of the said provision. Whether it will lead to change of opinion by AO? Whether 'change of opinion' continues to be a good defence for taxpayer to resist reassessment under the new regime?
- The validity of the entire reassessment proceedings was dependent upon existence of 'reason to believe' which was judicially explained to mean satisfaction reached by Tax Authority on the basis of materials which showed live link with the escapement of income. What is the fate of 'reason to believe' under the new regime?

Case Study 4

Mr. A has given cash loans during previous year 2010-11 relevant to assessment year 2011-12. Interest on cash loan was received is as follows:

- ▶ AY 2011-12: Rs. 10,00,000
- ▶ AY 2015-16: Rs. 10,00,000
- ▶ AY 2016-17: NIL
- ▶ AY 2017-18: Rs. 30,00,000

Here, the income escaping assessment is Rs. 50,00,000 on a consolidated level but let's say proceedings under section 147 of the Act can be initiated only from AY 2015-16 onwards. The income escaping assessment from AY 2015-16 onwards is Rs. 40,00,000 which is below the monetary limit specified under section 149(1)(b) of the Act. Can the AO also include the income escaping assessment for the AY 2011-12 i.e. Rs. 10,00,000 (whose time limit to initiate reassessment proceedings has lapsed) to the total income escaping tax and initiate proceedings under section 148 from AY 2015-16 onwards?

Section 149(1)(b) provides that the AO can initiate proceedings beyond 3 years when income escaping assessment in certain forms amounts to or is likely to amount to Rs. 50,00,000. Time limit for 10 years is to be viewed from the point of view of relevant AY. However, clarity is required as how to compute income escaping assessment of Rs. 50,00,000. Whether to determine the quantum of income escaping assessment, the AO can consider years beyond time limit specified and open the proceedings for relevant year which falls within time limit?

Case Study 5

Non failure on the part of Assessee to disclose fully and truly all material facts necessary for assessment

- ▶ Mr. P had filed the return of income for AY 2015-16 within the due date. Mr. P's case was selected for scrutiny and assessment was concluded by issuing order under Section 143(3) of the Act.
- ▶ Subsequently, the AO issued notice under Section 148 of the Act on the issue 'A'. Mr. P during the course of original assessment proceedings under Section 143(3) of the Act had disclosed and submitted all details to the AO in respect of issue 'A'. However, no addition was made by AO on account of issue 'A' in original assessment.
- ▶ Thus, in the present case whether the reassessment proceedings can be challenged when Mr. P has disclosed fully and truly all material facts necessary for the assessment with respect to issue 'A'?
- ▶ Will it be good defence for Mr. P to resist reassessment where original assessment was concluded u/s 143(3) and reassessment is sought to be initiated after 3 years under new regime?

Case Study 6

Controversy on the issue that if Tax Authority does not make addition in respect of issues identified for initiating reassessment, whether it can still go ahead and make additions in respect of other issues coming to his notice in the course of reassessment

- ▶ The AO had issued notice under Section 148 of the Act to Mr. D. In the reasons of reopening, the AO had stated that income had escaped assessment on the issue that software expense has been treated as revenue by Mr.D.
- ▶ However, during the course of reassessment proceedings, the AO understands that disallowance under Section 14A of the Act has not been made inspite of having incurred expense in relation to the exempt income.
- ▶ Whether AO can make disallowance under Section 14A of the Act which was not part of reasons for reopening and had subsequently come to the notice of AO during reassessment proceedings?
- ▶ The pre-amended section 147 of the Act was in two parts - (a) reassessment of income which Tax Authority has 'reason to believe' that it has escaped assessment; (b) any other income which has escaped assessment and comes to Tax Authority's notice in the course of assessment.
- ▶ Punjab & Haryana HC in case of Jagan Nath Maheshwary (1957) (32 ITR 418) held that the above provision did not preclude Tax Authority from entering into issues other than those identified for reopening the assessment.

Case Study 6 (Contd.)

- ▶ Hon'ble SC in case of Mewalal Dwarka Prasad (1989) (176 ITR 529) reiterated the legal proposition laid down in earlier SC ruling in case of V. Jaganmohan Rao (1970) (75 ITR 373) that once reassessment is validly reopened, the original assessment to the extent of underassessment is set aside and the entire assessment is open before Tax Authority.
- ▶ Explanation 3 to section 147 of the Act was inserted by Finance Act 2009 w.r.e.f. 1 April 1989 to explicitly provide that Tax Authority can enter upon new issues coming to his notice during reassessment proceedings without recording reasons.
- ▶ However, the controversy as to whether Tax Authority can make additions in respect of other issues coming to his notice in the course of reassessment where the issue identified for initiating reassessment has been dropped, still survives even after insertion of explanation 3 to section 147 of the Act.
- ▶ What is the fate of this limb of controversy under the new regime?
- ▶ What if the AO has applied mind and dropped the reassessment proceedings?

Case Study 7

Whether ratio of CIT vs. Sun Engineering (198 ITR 297) (SC) will continue to apply to reassessment under new regime?

- ▶ The Hon'ble SC, in the case of Sun Engineering (198 ITR 297) made following key observations:
 - the reassessment proceedings are for the benefit of the Revenue;
 - the assessee cannot make any fresh claims or reagitate claims which got rejected in the original assessment;
 - the reassessed income cannot be lower than originally assessed income. The Hon'ble SC held that the original assessment is set aside only to the extent of underassessment.

- ▶ Whether the aforesaid ratio laid down by SC in case of Sun Engineering still holds true under the new regime?

Case Study 8

Reopening assessment in case of third person on the basis of information in case of assessee

- ▶ For the purpose of reassessment “income chargeable to tax has escaped assessment” means:
 - Any information in the case of the assessee in accordance with the risk management strategy formulated by the Board from time to time;
 - Any audit objection to the effect that the assessment in the case of the assessee has not been made in accordance with the provisions of this Act.

Example 1:

- ▶ Information was in case of ‘Mr. A’, indicating a receipt of cash by him for purchase of land for his group companies. There was simply an apportionment of this cash among various companies of the group in the ratio of recorded price of the land purchased by those companies.
- ▶ Now, if the AO presumes that these companies must have paid cash to that extent to Mr. A.
- ▶ On that basis can AO initiate reassessment proceedings on group companies for proposing addition under Section 69C of the Act like it could be done in case of 153C of the Act?

Example 2:

- ▶ Further if information was in case of ‘A Ltd. indicating a receipt of cash loan by it from 5 shareholders and 3 concerns. Can proceedings under section 148 of the Act be initiated incase of the 5 shareholders and 3 concerns basis the information pertaining to A Ltd?

Case Study 9

Reopening assessment on the basis of any audit objections raised

- ▶ Mr. K' s case was selected for reassessment on the basis of audit objection raised that Mr. K's original proceedings was not conducted in accordance with provisions of the Income Tax Act, 1961.
- ▶ Does initiating re-assessment proceedings on the basis of determination by AO amounts to overriding the wisdom of income tax authorities? Would the AO still be in a position to decide independently on the basis of representation by the assessee?

Case Study 10

New reassessment regime on non-resident taxpayer

- ▶ What will be the situation in case of Mr. A, non-resident taxpayer (say in relation to indirect transfer of assets), the department want to apply the extended limit of 16 years under the old law or 10 years under the new law.



Thank You!