"Reassessment Proceedings, Statutory Remedy vs. Writ of Certiorari"

Introduction Income-tax Act, 1961 is a self-contained code which not only provides for the machinery for assessment of income but also, provides for the machinery for appeals against the assessments so finalized which is popularly known as statutory appeals. Apart from the statutory appellate jurisdiction of High Court conferred under Section 260A of the Income Tax Act the Taxpayer also has a right to represent tax litigations straight before High Court by filing writ petitions under Article 226 & 227 of the Constitution.

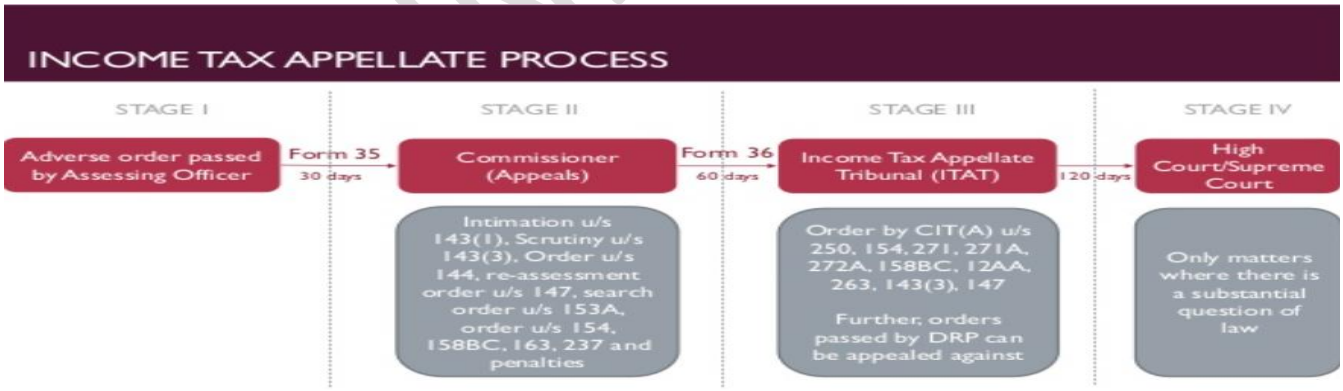
Reassessment of Income & Concept of Finality of Assessment

Sec. 147 of the IT Act,1961 empowers the AO to reassess the escaped income if he has "reasons to believe" that income has escaped assessment.

The term Reassessment probably was coined, as the original assessment would have been concluded and thereafter, the AO wishes to reassess the income. Re-assessment proceedings are initiated by issuance of notice u/s. 148 of the Act by the AO within a period of six years from the end of the relevant AY. It is however in interest of state that Finality to assessment must be recognized as matter of principle and reopening should be an exception.

Against a notice issued u/s 148 of act following Course of Actions are available to the assessee:

Option-1 After Assessment is completed u/s 147. Aggrieved assessee may prefer an appeal to CIT(A) then ITAT, then HC & then SC



Option-2 However, where one considers that the very notice issued u/s 148 issued is challengeable on jurisdictional grounds or is violative of statutory requirements of law, or principles of natural justice one may consider a recourse to High court vide writ petition. Nevertheless, if a person seeks for immediate remedy granted under Article 226 or 227, a strong case is to be made out, providing enough reason to the Court to entertain writ petition & make an exception to the general rule.

Stages Involved in Reassessment in ITA NO.2910/Mum/2013 Motilal R. Todi, stages involved in framing of reassessment u/s. 147 by the AO are discussed as below:

1. Availability of the fresh tangible material indicating escaped income
2. When reopening after 4 years & original assessment made u/s 143(3) then reasons can't be recorded unless there was failure on assessee's part to disclose material facts.
3. Recording of "reasons to believe" by the assessing officer.
4. Obtaining the sanction for issuance of notice u/s. 151 of the Act,
5. Actual issuance of notice u/s. 148 requiring the taxpayer to file the tax return,
6. Filing of tax return in pursuance of such a notice.
7. Seeking of "reasons to believe" from the assessing officer; (AO is duty bound to provide a certified and verbatim copy to the assessee).
8. Filing of preliminary objections against assumption of jurisdiction u/s. 147.
9. Disposal of preliminary objections filed by the taxpayer.
10. Notice u/s. 143(2) & 142(1) of Act
11. Passing of re-assessment order u/s. 147 of the Act.

For reassessment there are some pre-requisites u/s 147 to 153 of the act. Compliance of aforesaid provisions is mandatory to make the reassessment proceedings jurisdictional.

1. Reason to Believe vs. Reason to suspect

In **CIT v. Chintoo Tomar ITA no.790/2014 dated 23.12.2014 [Para 5]** it was held that

- There must be some Fresh-Tangible Information
- Live nexus or rational connection between reasons recorded & formation of belief
- Due application of mind is made thereon and not in mechanical manner
- Reasons should be cogent, speaking, germane, genuine, non-cryptic
- Reasons should specify the fact that income has escaped assessment.
- Reasons must disclose basis for reasons to believe
- Reasons should be recorded by AO only.
- Formation of belief should be rational, coherent and not contrary to what is on record.

2. Reason to believe vs. Information available

- Legislation has used term 'reasons to believe' & not information available with AO.
- Due application of mind by AO to convert information into reason to believe
- Information must be a credible one
- AO cannot place reliance on a roving information having no reliable source or intent.
- A half-baked or piecemeal information cannot be reason to believe
- There must be application of mind by AO on basis of information supplied to them by investigation wing etc

In **Phool Chand Bajrang Lal v. ITO (S.C) [1993] 203 ITR 456** it was held that AO acquires jurisdiction to reopen an assessment under Sec. 147 r.w.s 148 of the Act only if on the basis of specific, reliable & relevant information coming to his possession subsequently, he has recorded reasons to believe that, by failure on that part of the assessee to make a true and full disclosure of material facts necessary for his assessment during the concluded assessment his income which was chargeable to tax has escaped assessment.

3. Expiry of Time Limit for issue of notice u/s 148

Hon'ble HC of Karnataka in case of **Novo Nordisk India (P.) Ltd. v. DCIT**, WP No.21206/2014 [Para 15] held that if notice u/s 148 is issued after the time limit prescribed u/s 149 of the Act. In such a scenario notice would be barred by limitation and hence non-jurisdictional.

4. Approval u/s 151 of the Act

Hon'ble HC of Chhattisgarh in the case of **Maruti Clean Coal & Power Ltd. v. ACIT**, 400 ITR 397 (C.G) [2018] [Para 21] held that As per section 151 if the AO wants to issue notice u/s 148 after

the expiry of 4 years, he has to take a prior approval from PCIT or CCIT. Where, such an approval is not taken from the specified authority, the notice would lose its validity, being not in consonance with the statutory requirement of law.

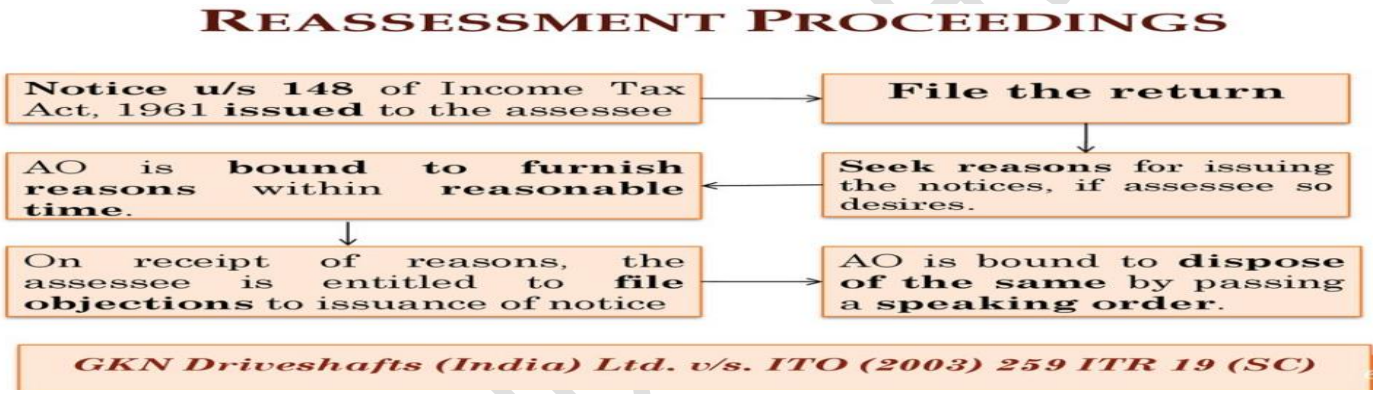
5. Mechanical Approval

Hon'ble Bombay HC in case of **My Car (Pune) (P.) Ltd. v. ITO** 179 DTR 236 [2019] [Para 8] held that the approval to be granted by the prescribed authority as mentioned u/s 151 of the Act, must be after due application of the mind. A mechanical approval would not serve the purpose of the Act. The intention for getting the prior approval is to provide a safeguard against reopening of case to ensure that the assessee is not troubled with reopening issues based out of whims and fancies of the tax officer.

6. Approval after issuance of notice u/s 148

As prescribed u/s 148 and 151, the approval from specified authority is to be obtained prior to Issuance of notice u/s 148. Accordingly, Assessee needs to have a cautious observance of the approval form. If the date of approval is after the date of issue of notice, the notice would lose its legal validity. In such case, the notice would be violative of statutory requirement of the Act.

7. Disposal Order of Objections



8.Re-opening vs. Review

In **CIT v. Kelvinator of India Ltd. 320 ITR 561 SC [2010]** it was held that "Where a particular claim/transaction was already subject matter of assessment and the AO has taken a view initially thereon, the same cannot be altered in absence of any new facts or information coming to the notice of AO. The Act does not allow the AO to alter the view initially taken, in the grab of re-opening the assessment".

- There is conceptual difference between power to review & power to reassess.
- The Assessing Officer has power to reassess and not power to review.
- Concept of "change of opinion" is in-built test to check abuse of power by AO

Relief by Way of Writ

Even though there are statutory remedies in IT Act,1961. there are also constitutional provisions to represent to tax litigations before the High Court by way of writ petition under Article 226 & 227 of the Constitution. It is a very speedy & efficacious remedy where legal rights have been infringed. This provides basic safeguards to the people to ensure that the rule of law prevails. However, it has to be noted that the writ jurisdiction is not only discretionary but equitable in nature. A Court need not interfere just because it is lawful to do so.

Meaning of Writ: A writ is a formal written order issued by a Court providing an immediate relief to the affected parties. A writ petition is an application filed before HC or SC requesting it to issue a specific writ. Orders, warrants, directions, summons etc. are types of writs.

Fundamentally Writ under article 226 is to correct patent errors of law or of facts. If an authority purports to take any action which is prima facie shown to be null and void and if it is shown to be devoid of any jurisdiction, the proceedings would be liable to be quashed even at the stage of show-cause notice. There are many precedents where the writ petition of the assessee was allowed & the impugned notice under section 148 was quashed.

When the High Court in exercise of power conferred under article 226 had quashed or set aside an order, the said order stands quashed and it is never deemed to have been made and it is no longer on file and it is no longer in existence. A defect in the prayer made in the writ petition should not disentitle to the relief in law.

High Court can interfere, exercising its power of superintendence under article 227 of the Constitution in order to keep the Tax authorities to perform quasi-judicial functions within the bounds of their authority and to ensure they do their duty in a legal manner. Although for acceptance of writ petition the jurisdiction of the Court is discretionary, yet the exercise of discretion is not arbitrary. If somebody approaches the High Court without availing Statutory remedy it should ensure that there exist good grounds to invoke the extraordinary jurisdiction.

Writ of Certiorari

'Certiorari' means to 'certify'. It is a curative writ issued for correcting gross errors of jurisdiction. It is a direction to produce the records on the basis of which the decision under challenge in the writ petition has been taken. By looking into these records, if the Court is of the opinion that the authority has passed order, which is beyond its powers or committed an error of law then, through this writ, it may transfer the case to itself or quash the order passed by the Authority.

Assessee may file writ petition in the following circumstances:

- Non- jurisdictional Order.
- Order is violative of statutory requirements of the Act
- Where the benefits granted under the Act are denied
- Where the Constitutional Validity of a provision is under challenge or the provision is already repealed
- Error of law Apparent on face of record.
- Based on extraneous or mala fide considerations.
- Statutory remedy not adequate or was onerous.
- Existence of alternate remedy would an exercise in futility.
- Infringement of fundamental right of the party.
- AO didn't act in accordance with the provisions of the enactment in question
- AO has acted in defiance of the fundamental principles of judicial procedure
- AO has passed a high-handed or palpable illegal order
- Resort to the statutory remedy would cause irreparable injury to the petitioner
- AO reached an unreasonable decision
- AO abused its powers.

SELF-IMPOSED LIMITATION

It is well recognised that where a governing statue provides for a special remedy, normally the H.C shall not entertain a writ petition circumventing the statutory remedy. Courts have therefore evolved certain self-imposed restrictions for exercise of their powers under article 226.

Under article 226 the High Court has certain self-imposed limitations such as,

- Court would not act as a Court of appeal or revision to correct mere errors of law or facts;
- Writ jurisdiction is not intended as an alternate remedy for relief which can be obtained by suit or other modes prescribed by the statutes;

- High Court will not generally entertain determination of questions which demand elaborate examination of evidence and will not decide abstract or academic or hypothetical questions.

However, the High Court can entertain a petition under Article 226 if there exist good and sufficient grounds to why the Court should make an exception to the general rule, in every case wherein the petitioners have effective alternate remedy, they need to justify the existence of any of the above exceptional circumstances in order to enable the Hon'ble High Court to entertain the writ petition.

Article 226 does not impose any limitations. However, this rule of self-imposed limitation is essentially a rule of policy, convenience & discretion rather than a rule of law.

In **D. R. Enterprises v. Asst Collector of Customs (S.C.)** held that the powers of the High Court under Article 226 while issuing appropriate writs, are very wide. Even if there is an alternate remedy that may not preclude the High Court from exercising the jurisdiction in a particular case. In the face of alternate statutory remedies, when the High Court declines to exercise the jurisdiction under Article 226 of the Constitution, it is a self-imposed restriction only. (Para 21)

In **Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya(S.C),** held that it is well established that an alternative remedy is not an absolute bar to the maintainability of a writ petition. When an authority acted wholly without jurisdiction the H.C shouldn't refuse to exercise its jurisdiction under Article 226 of the Constitution. (Para 12).

Hon. Apex Court, while quashing the re-assessment order passed under the Income-tax Act, in **Calcutta Discount Co. Ltd. v. ITO 1961(S.C) 41 ITR 191** held that the existence of alternative remedy is not always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such an action.

In **Calcutta Discount Co. Ltd. (supra)** clearly held that a writ petition would be maintainable to challenge invocation of proceedings for reassessment, even though it was also open to the assessee to challenge the same before the AO during the assessment, as also to challenge the same before the appellate authorities after the reassessment proceedings were completed.

The decision of Calcutta Discount *Co. Ltd.* (*supra*)was reaffirmed by constitution bench of the Supreme Court in **Whirlpool Corp. v. Registrar of Trade Marks [1998] 8 SCC 11,**

> "Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a Writ Petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, especially in a case where the authority against whom the Writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation".
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> In **State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd.,** the Supreme Court explained alternate remedy as a rule of policy, convenience and discretion and never a rule of law.
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> In **Harbans Lal Sahnia v. Indian Oil Corpn. Ltd. SC** the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion & not one of compulsion.
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> In **Ram & Shyam Co. v. State of Haryana** (SC) held When the High Court had entertained a writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition was palpably unsound & irrational.
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> In **Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya** (SC) the Supreme Court held that if an impugned order has been passed in violation of principles of natural justice, the existence of an alternative remedy will not be a bar under Article 226.

In **Rabindra Nath Bose v. Union of India** the Apex Court held a statutory remedy cannot be said to be an alternative remedy where the remedy is discretionary & the petitioner cannot be said to have an adequate alternative remedy or would involve inordinate delay.

In **Khurshed Mody v. Rent Controller** (S.C)- it was held that the HC would not refuse to issue a writ of *certiorari* merely because there was a right of appeal. It was recognized that ordinarily the HC would require the petitioner to have recourse to his ordinary remedies, but if it found that there had been a breach of fundamental principles of justice, the HC would certainly not hesitate to issue the writ of *certiorari*.

In **Asst Collector of Customs v. Soorajmull Nagarmull** it was held "There can, I think, be no doubt that Court can refuse to issue a *certiorari* if the petitioner has other remedies equally convenient and effective. But it appears to me that there can be cases where the court can and should issue a *certiorari* even where such alternative remedies are available. Where a Court or Tribunal, which is called upon to exercise judicial or quasi-judicial functions discards all rules of natural justice and arrives at a decision contrary to all accepted principles of justice then it appears to me that the court can and must interfere."

In **State of U.P v. Mohd Nooh** - the Hon'ble SC held as under: "The existence of another adequate remedy may be taken into consideration in the exercise of the discretion. If an inferior Court or tribunal of first instance acts without jurisdiction or in excess of it or contrary to the rules of natural justice, the superior Court may quite properly issue a writ of *certiorari* to correct the error, even if an appeal to another inferior Court or tribunal was available, whether recourse was or was not had to it. This would be so all the more in the case of departmental tribunals composed of persons without adequate legal training and background."

Conclusion

The existence of alternate remedy is not generally a bar to the issuance of a writ but applicant has to demonstrate total absence of jurisdiction to on the part of the officer complained against.

Having regard to the established law that non-entertainment of petitions under the writ jurisdiction by the High Court upon existence of efficacious remedy is a self-imposed limitation, and is a matter of convenience and discretion rather than a rule of law, no straight jacket formula can be worked out. This rule of self-imposed limitation is essentially a rule of policy, convenience and discretion, rather than a rule of law.

Therefore, there is no absolute bar in entertaining a writ petition under Article 226 and 227 of the constitution despite available of an alternative efficacious remedy under statutory provisions. Where there was grave injustice to the taxpayers, statutory remedies are entirely ill-suited and the petitioner questioned the vires of Notification / circulars the High Court allowed the writ petition for consideration and gave relief to the assessee.

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