

REASSESSMENT IN THE CALENDAR YEAR 2021: VALIDITY OF NOTICES - TWO SET OF LAWS & THREE TIME ZONES

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Abstract

The Article aims at resolving the ambiguities and queries on applicability of law and period of limitations on a Notice issued under section 148 of the Income-tax Act, 1961(**Act**). On account of a Nationwide lockdown in March 2020, [The Taxation and Other Laws \(Relaxation of Certain Provisions\) Ordinance, 2020 \(2020\) 422 ITR \(St\) 116 \(Ordinance\)](#) extended the period of limitation for issuance of Notice under section 148 of the Act with subsequent Notifications. On the other hand, The Finance Act, 2021 changed the regime of Income escaping assessment with effect from April 01, 2021. This Article aims at providing the much-needed clarity on the above mentioned issues and explains the specific grounds to challenge the jurisdiction Notice based on date of issuance of Notice.

This Article is relevant to Lawyers, Charter Accountants, Tax Practitioners, Income-tax Authorities and Taxpayers. The Article has divided the calendar year 2021 into three parts wherein a Notice under section 148 of the Act can be issued, and explains the applicable law and grounds for challenging the same, *inter alia*.

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1. Introduction

A Nationwide lockdown was ordered in March 2020 on account of the pandemic. The Ministry of Law and Justice vide Ordinance dated March 31, 2020, *inter alia*, extended the period of limitation for issuance of Notices which falls between March 20, 2020 and June 29, 2020 to June 30, 2020. Thus, a Notice under section 148 of the Act, whose period of limitation expired on March 31, 2020 (Assessment Year 2013-14) was **extended to June 30, 2020**.

Subsequently, The Central Board of Direct Taxes (**CBDT**) vide [Notification No. 35 of 2020 dated June 24, 2020](#), **(2020) 425 ITR (St) 26** *inter alia*, extended the period of limitation for issuance of Notice under section 148 of the Act to **December 31, 2020**.

Subsequently, the CBDT vide [Notification No. 93 of 2020 dated December 31, 2020](#) **(2020) 430 ITR (St) 30** *inter alia*, extended the period of limitation for issuance of Notice under section 148 of the Act to **March 31, 2021**.

Subsequently, on account of the second wave and disruption of normalcy, the CBDT vide [Notification No. 20 of 2021 dated March 31, 2021](#), **(2021) 432 ITR (St) 141** *inter alia*, extended the period of limitation for issuance of Notice under section 148 of the Act to **June 30, 2021**.

On the other hand, the [Finance Act, 2021](#) **(2021) 432 ITR (St) 52** proposed to change the regime of re-assessment by introducing section 148A of the Act with effect from **April 01, 2021**.

This gives rise to three scenarios for issuance of Notice under section 148 of the Act, they are as under:

1. Notice issued on or before March 31, 2021,
2. Notice issued between April 01, 2021 to June 30, 2021, and

3. Notice issued on or after July 01, 2021.

The applicability of law is different for each period. Further, the period of limitation also differs for each time zone. The same are simplified and clarified for the convenience of the readers.

2. Time Zones

As mentioned above, the Finance Act, 2021 and the Notice extending the issuance of Notice under section 148 of the Act has given rise to two laws and three time zones. The same are dealt with in detail.

2.1. Notice issued on or before March 31, 2021

Issuance of Notice for AY 2013-14 : **Valid**
and subsequent years

Applicable law : **Erstwhile Reassessment regime**

The issuance of a Notice under section 148 of the Act for AY 2013-14 would have been time barred after March 31, 2020 i.e., 6 years from the end of the Assessment Year (assuming not a case where assets are located outside India, wherein the period is extended up to 16 years instead of 6). However, with the Ordinance and the subsequent Notifications, the same could be validly issued and the erstwhile regime of reassessment i.e., before the amendments introduced by the Finance Act, 2021, would apply.

All old case laws pertaining to prior recording of reasons, accord of sanction, non-application of mind of the Assessing Officer, mechanical sanctioning, borrowed satisfaction, reasons to 'suspect' and not reasons to 'believe', et cetera will hold good.

2.2. Notice issued between April 01, 2021 to June 30, 2021

This is the grey area amongst the three time zones.

Issuance of Notice for AY 2013-14 : **Valid**
and subsequent years

Applicable law : **Disputed**

As per the *Explanation* to A(a) to CBDT Notification No. 20 of 2021 dated March 31, 2021 it has been clarified that the erstwhile regime of income escaped assessment i.e., reassessment shall apply. The explanation is usefully extracted as under:

“Explanation— For the removal of doubts, it is hereby clarified that for the purposes of issuance of notice under section 148 as per time-limit specified in section 149 or sanction under section 151 of the Income-tax Act, under this sub-clause, the provisions of section 148, section 149 and section 151 of the Income-tax Act, as the case may be, **as they stood as on the 31st day of March 2021, before the commencement of the Finance Act, 2021, shall apply.**”

(Emphasis supplied)

However, assessee-Petitioners have challenged the non-applicability and non-adherence to the new provisions of law. The Hon’ble High Court of Bombay in the case of **Armada D1 Pte. Ltd. v. DCIT WP(L) No. 11766 of 2021 dated June 03, 2021** has stayed the proceedings of reassessment on account of non-adherence to the new procedure laid down under section 148A of the Act.

Similarly, The Hon’ble High Court of Bombay in the case of **Tata Communications Transformation Services Limited v. ACIT WP No. 1334 of 2021 dated 05 July, 2021** wherein the Petitioner has contended that section 3 of the Ordinance and *Explanation* in Notification No.20 of 2021 and *Explanation*

in [Notification No. 30 of 2021 dated April 27, 2021 \(2021\) 434 ITR \(St\) 11](#) are ultra-vires the Income Tax Act, 1961 and the Finance Act, 2020 and are unconstitutional, posing challenge to them urges for striking them down. The Court has stayed the proceedings in this case as well.

The finality of the Petitions cannot be decided at this stage. However, it can be inferred that the Hon'ble Bombay High Court is likely to grant a stay on Notices issued under section 148 of the Act between April 01, 2021 to June 30, 2021, without following the procedure laid now under the new law i.e., 148A of the Act.

This raised the question of validity of the CBDT Notifications vis-à-vis Notice issued under section 148 of the Act after March 31, 2021 without following the amendment vide Finance Act, 2021 and whether the CBDT is empowered to issue such Notifications in exercise of Delegated Legislation.

Firstly, the Finance Act, 2021 amended the provisions pertaining to reassessment with effect from April 01, 2021. Thereby, the erstwhile provisions cease to exist.

The Hon'ble Supreme Court in the case of **Bhagat Ram Sharma vs. Union of India (UOI) and Ors. (13.11.1987 - SC) : MANU/SC/0611/1987** observed that It is a matter of legislative practice to provide while enacting an amending law, that an existing provision shall be deleted and a new provision substituted. Such deletion has the effect of repeal of the existing provision. Such a law may also provide for the introduction of a new provision. There is no real distinction between 'repeal' and an 'amendment'.

Secondly, the CBDT is a statutory authority functioning under the Central Board of Revenue Act, 1963. The issuance of Notification extending the due date for issuance of Notice under the Act beyond the existence of relevant provisions of such act would amount to *excessive delegation*.

The Hon'ble Supreme Court in the case of **Addl. District Magistrate (Rev.) Delhi Admn. vs. Siri Ram (05.05.2000 - SC) : MANU/SC/0369/2000** held that it is a well recognised principle of interpretation of a statute that conferment of rulemaking power by an Act does not enable the rule making authority to make rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

Further, the Hon'ble Supreme Court in the case of **State of Tamil Nadu and Ors. vs. P. Krishnamurthy and Ors. (24.03.2006 - SC): MANU/SC/1581/2006** wherein it was held that there is a presumption in favour of constitutionality or validity of a sub-ordinate Legislation and the burden is upon him who attacks it to show that it is invalid. Further, the court considering the validity of a sub-ordinate Legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate Legislation conforms to the parent Statute. It was also observed that, where a Rule is directly inconsistent with a mandatory provision of the Statute, then, of course, the task of the court is simple and easy.

Therefore, in the given case, the amendment to the laws governing Re-assessment has been brought vide Finance Act, 2021 which is an act of the Legislature. The CBDT vide Notifications has resurrected the erstwhile law which has ceased to exist from the April 01, 2021. The validity of Notices issued according to the erstwhile regime during this time zone will be decided by the Hon'ble High Courts and the Hon'ble Supreme Court.

2.3. Notice issued on or after July 01, 2021

Issuance of Notice for AY 2011-12 : **Valid**
and subsequent years

Applicable law : **New Regime**

The Department will have to follow the procedure laid down under section 148A of the Act before issuance of Notice under section 148 of the Act. Before issue of notice under section 148 of the Act, the Assessing Officer shall conduct enquiries, if required and provide an opportunity of being heard to the assessee. Before Conducting an enquiry, the Assessing Officer has to obtain approval of the authorized person. Subsequently, after receiving the reply the assessing Officer shall pass an order and serve the order along with the notice to the assessee, with the approval of the specified authority. Thereafter the regular proceedings will be initiated.

The ratio laid down by the High Courts that after passing the order disposing of the objections the Assessing Officer may have to wait four weeks to proceed with regular assessments. **Allana Cold Storage Ltd v ITO 287 ITR 1 (Bom) (HC)**, **Kamlesh Sharma (Smt) v. B.L. Meena, ITO (2006) 287 ITR 337 (Delhi) (HC)** should still hold good.

Further, the objections are not properly dealt with as held in the case of **Scan Holding P Ltd v. ACIT (2018) 402 ITR 290 (Delhi) (HC)**, **Ankita A.Chokssey v. ITO (2019) 402 ITR 207 (Bom) (HC)**, **Swastic Safe Deposit and Investments Ltd (2019) 263 Taxman 303 (Bom) (HC) (SLP rejected (2020) 270 Taxman 8 (SC)** may still be good law.

The Hon'ble Bombay High Court in the case of **Gernman Remedies Ltd v. Dy CIT (2006) 287 ITR 494 (Bom) (HC)** and **CIT v. Suman Waman Chaduahry (2010) 321 ITR 495 (Bom) (HC)**, and the Hon'ble Delhi High Court in the case of **Central India Electricity Supply Co Ltd v. ITO (2011) 333 ITR 237 (Delhi) (HC)** have held that while giving the sanction the prescribed Authority has to apply their mind i.e., Sanction granted by writing "Yes, I am satisfied" is not sufficient to comply with the requirement of section 151 of the Act. This law may also hold good with respect to the provision of section 148A of the Act.

The Hon'ble Bombay High Court in the case of **CIT v. Jet Airways (I) Ltd. [2011] 331 ITR 236 (Bom)(HC)** held that if after issuing a notice under section 148,

the Ld. AO accepts contention of assessee and holds that income, for which he had initially formed a reason to believe that it had escaped assessment, has, as a matter of fact, not escaped assessment, it is not open to him to independently assess some other income. This proposition should continue to hold good under the new law as well.

3. Dénouement

The Constitutional validity of reassessment has been challenged and tested. The Hon'ble High Court of Madras in the case of **Bhagat Estates Pvt. Ltd. v. CIT (1964) 53 ITR 683 (Mad)(HC)** and the Hon'ble High Court of Rajasthan in the case of **Vimal Chandra Golecha v. ITO (1982) 134 ITR 119 (Raj.)(HC)** have upheld the Constitutional validity. The courts have observed that sections contain built in safeguard for assessee and the other checks and control on power of Assessing authorities, thereby eliminating room for abuse of this power by the Assessing Officer.

The Landmark decision in the case of **GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC)** laid down the procedure for re-assessment which is adopted in the law.

It is imperative for checks and balances to ensure there is no abuse of law. As rightly observed in judicial pronouncements, there are built in mechanisms in the re-assessment procedure to ensure there is no abuse of power. In the new regime, the Department is empowered to open file up to 10 prior assessment years where the conditions are satisfied. Further, there is no necessity for recording of reasons in the case of a "search and seizure" case. Such vast powers should be conferred along with responsibilities. Fetters should be in place to ensure that the powers are use responsibly.

A summary of the validity of the Notices under section 148 of the Act is as under:

Period of issuance of Notice under section 148 of the Act.	Applicable Reassessment regime	Prior Assessment years for which a Notice can be issued
On or before March 31, 2021	Old regime of reassessment	For AY 2013-14 and subsequent years
Between April 01, 2021 to June 30, 2021	Disputed*	For AY 2013-14 and subsequent years (according to the Department)
On or after July 01, 2021	New regime of reassessment	For AY 2011-12 and subsequent years

With respect to the time zones, the validity of Notices issued under section 148 of the Act between April 01, 2021 to June 30, 2021 which is under dispute can only be settled by the judicial pronouncements in times to come.