

**THE NEW REGIME OF REASSESSMENT PROCEEDINGS UNDER SECTION  
148A OF THE INCOME-TAX ACT, 1961: A 20-POINT CHECKLIST FOR  
REPRESENTATION**

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*Abstract*

*The Article aims at providing a detailed guide for advocates, chartered accountants, tax practitioners, tax officials and Taxpayers for addressing the notices issued under the new regime of reassessment proceedings which was introduced vide Finance Act, 2021 (2021) 432 ITR (St) 52 and certain provisions were amended retrospectively vide Finance Act 2022 with effect from April 01, 2021. The Article provides a **20-point checklist** to be considered while addressing statutory notices under the reassessment regime to ensure that the reassessment proceedings are as per law. **Violation of these checks could be challenged by filing a Writ Petition before the Hon'ble jurisdictional High Court.** The Article considers important judicial pronouncements from the erstwhile reassessment regime, that shall, in principle, hold good in the new reassessment regime as well.*

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## 1. Introduction

The Finance Act, 2021 **(2021) 432 ITR (St) 52** proposed to change the regime of reassessment by introducing section 148A of the Income-tax Act, 1961 **(Act)** with effect from April 01, 2021.

However, on account of the Nationwide Pandemic, The Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 **(2020) 428 ITR (St) 29**, extended the last date for issuance of Notice under section 148 of the Act, i.e., the erstwhile reassessment regime.

The last date was extended from time to time; the CBDT on account of the second wave and disruption of normalcy, the 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.

Therefore, the Notices issued after June 30, 2021 have to undisputedly follow the procedure laid down vide the Finance Act, 2021.

It is pertinent to note that several Writ Petitions are filed where the Ld. Assessing Officers have not followed the due process of law while issuing the notices, failure to follow the principle of natural justice, proper obtaining sanction from wrong authority et cetera. Last year amassed a lot of litigation before various High Courts only on account of reassessment proceedings. An attempt has been made in this article to explain the new provision so that it may benefit the taxpayers as well as the tax administration.

## 2. Distinction between Old regime & New regime

In the new reassessment regime, the decision of the Hon'ble Supreme Court in the case of **GKN Driveshafts (India) Ltd. v. ITO 259 ITR 19 (SC)** appears to be included in the statute. In the erstwhile regime, where the

assessee had to ask for a copy of the “recorded reasons” and file objections against the same which were disposed of by a speaking order. The same has been included in the statute as section 148A of the Act.

Further, the concept of “recorded reasons”, is substituted with information. The period of 4 & 6 years has been changed to 3 & 10 years with different pecuniary limits and other conditions. Et cetera.

There have been several amendments in section 148 to section 151A of the Act, including introduction of new sections like section 135A, 148B and section 151A of the Act. This Article is restricted to the procedural aspects of reassessment.

The new provisions pertaining to the procedure will be dealt with in detail in the later part of the Article

### **3. Validity of Notices**

#### **3.1. Notices issued between April 01, 2021 to June 30, 2021**

The issue of validity of Notices issued between April 01, 2021 and June 30, 2021 has been a subject matter of major litigation in the past year. More than 5000 Writ Petitions were filed across the country challenging the constitutional validity of the Notice issued under the section 148 of the Act.

The Hon’ble Chhattisgarh High Court in the case of **Palak Khatuja v. UOI [2021] 438 ITR 622 (Chh)(HC)** held that the Notices were valid and were covered by the *Doctrine of Conditional Legislation*.

Subsequently, the Hon’ble Allahabad High Court in the case of **Ashok Kumar Agarwal & Ors v. UOI (2021) 439 ITR 1 (All)(HC)** held the Notices to be invalid observing, *inter alia*, that a delegated legislation can never overreach any Act of the principal legislature.

Subsequently, the Hon'ble Delhi High Court in the case of **Mon Mohan Kohli v. ACIT & Anr [2022] 441 ITR 207 (Del)(HC)** Explanations A(a)(ii)/A(b) to the Notifications dated 31st March, 2021 and 27th April, 2021 which extended the period of issuance of Notices beyond March 31, 2021 are declared to be ultra vires the TOLA and are therefore the Notices issued under section 148 of the Act on or after April 01, 2021 are bad in law, and null and void. The revenue is permitted to take further steps as per law.

Subsequently, the Hon'ble Rajasthan High Court – Jodhpur Bench in the case of **Bpip Infra Private Limited and Ors v. ACIT and Ors [2021] 133 taxmann.com 48 (Raj)(HC)** followed the decision of the Hon'ble Allahabad High Court in the case of **Ashok Kumar Agarwal (Supra)**

Pursuant thereto, the Hon'ble Calcutta High Court in the case of **Manoj Jain v. UOI [2022] 134 taxmann.com 173 (Cal)(HC)** held that the impugned notices under Section 148 of the Income Tax Act are quashed with liberty to the Assessing Officers concerned to initiate fresh re-assessment proceedings in accordance with the relevant provisions of the Act as amended by Finance Act, 2021 and after making compliance of the formalities as required by the law.

Thereafter, the Hon'ble High Court of Rajasthan – Jaipur Bench in the case of **Sudesh Taneja v. ITO [2022] 135 taxmann.com 5 (Raj)(HC) (Raj)(HC)** held that the subordinate legislation could not have travelled beyond the powers vested in the Government of India by the parent Act and quashed all the impugned Notices.

Similarly, the Hon'ble Bombay High Court in the case **Tata Communications Transformation Services v. ACIT [2022] 137 taxmann.com 2 (Bom) (HC)** and High Court of Madras (Division Bench) in **Vellore Institute of Technology v. CBDT and Anr. [2022] 135**

**taxmann.com 285 (Mad)(HC)** followed the above-mentioned decisions and held the issue in favour of the assessee.

The Revenue filed a Special Leave Petition before the Hon'ble Supreme Court against the order of the Hon'ble Allahabad High Court in the case of **UOI v. Ashish Agarwal [2022] 138 taxmann.com 64 (SC)** where in it was held that Reassessment notice if issued on or after April 01, 2021 under unamended section 148 of the Act, needs to be set aside; however, same being a *bona fide* mistake, notice should not be set aside, rather deemed to have been issued under substituted section 148A of the Act.

The following guidelines were laid down by the Court:

- (i) The respective impugned section 148 notices issued to the respective assesseees shall be deemed to have been issued under section 148A of the Act as substituted by the Finance Act, 2021 and treated to be show-cause notices in terms of section 148A(b) the Act. The respective assessing officers shall within thirty days from today provide to the assesseees the information and material relied upon by the Revenue so that the assesseees can reply to the notices within two weeks thereafter;
- (ii) The requirement of conducting any enquiry with the prior approval of the specified authority under section 148A(a) the Act be dispensed with as a one-time measure vis-à-vis those notices which have been issued under section 148 the Act of the unamended Act from 1-4-2021 till date, including those which have been quashed by the High Courts;
- (iii) The assessing officers shall thereafter pass an order in terms of section 148A(d) the Act after following the due procedure as required under section 148A(b) the Act in respect of each of the concerned assesseees;
- (iv) All the defences which may be available to the assessee under section 149 the Act 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;

- (v) The present order shall substitute/modify respective judgments and orders passed by the respective High Courts quashing the similar notices issued under unamended section 148 the Act of the Act irrespective of whether they have been assailed before this Court or not.

Further, The Hon'ble Bombay High Court in the case of [Sai Cylinders Private Limited v. ACIT WP No. 3555 of 2021 dated May 05, 2022](#) while giving effect to the decision of the Hon'ble Supreme Court's order in the case of **Ashish Agarwal (Supra)** held that wherever assessment order has been passed those orders will stand quashed and set aside.

### **3.1.1. Status of Assessee's who didn't file a Writ Petition**

All Assessee's including the ones that did not file a Writ Petition will be covered by the decision of the Hon'ble Supreme Court by virtue of Article 142 of the Constitution of India.

### **3.1.2. Impact of the decision of the Hon'ble Supreme Court**

The decision of the Hon'ble Supreme Court has opened a Pandora's box of interpretations and potential litigation.

The Income-tax Gazetted Officer's Association vide letter dated [May 06, 2022](#) and [May 11, 2022](#) raised several concerns and issues before the CBDT regarding the interpretation of the decision of the Hon'ble Supreme Court.

The CBDT vide [Instruction No. 1 of 2022 dated May 11, 2022](#) has *inter alia* held that, that AY 2013-14, 2014-15 & 2015-16 will be reopened under the new law where the income escaping assessment is exceeding Rs. 50

lakhs. Further held that AY 16-17 and AY 17-18 will be considered as cases falling within 3 years from the end of the AY.

This has raised a lot of concerns amongst the Tax payers and Tax practitioners. The CBDT has not implemented the first proviso to section 149 of the Act while interpreting the decision of the Hon'ble Supreme Court. There is a possibility of a second round of litigation challenging the validity of **CBDT Instruction No 1 of 2022**.

### **3.2. Notices issued on or after July 01, 2022**

There is no dispute regarding the Notices issued on or after July 2022. Reassessment Notices issued on or after July 01, 2022 have to be as per the new Law i.e., Notice under section 148A of the Act have to be issued.

## **4. Procedure for Reassessment**

The Procedure for Reassessment has been divided into 5 important correspondences with the Department. They are as under:

### **4.1. Notice received under section 148A of the Act**

Upon receipt of Notice under section 148A of the Act, the following points must be checked

**Check 01: The Notice is pertaining to Assessment Year (AY) 2015-16 and subsequent years.**

*Albeit*, vide Finance Act, 2021, the Department can reassess up to a period of 10 AYs, by virtue of amendment to section 149 of the Act, it will apply to AYs 2015-16 and onwards.

Therefore, reopening of any AY prior to AY 2015-16 would be time barred and bad in law.

Reference is drawn to the decision of the Hon'ble Delhi High Court in the case of **Nestle India Ltd. v. DCIT [2016] 384 ITR 334 (Delhi) (HC)** where reopening beyond the period six years was held to be invalid and barred by limitation.

This logic will continue to hold good.

**Check 02: Whether the concerned AY is within 3 years, or beyond 3 years but within 10 years.**

As per section 149 of the Act, No Notice shall be issued beyond 3 years unless, Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax is represented:

- (a) in form of an asset,
- (b) expenditure in respect of a transaction or in relation to an event or occasion; or
- (c) an entry or entries in the books of account,

which has escaped assessment amounts to or likely to amount to fifty lakh rupees or more.

Further, as per explanation to section 149(1), "asset" shall include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account.

Further, where the income chargeable to tax represented in the form of an asset or expenditure has escaped assessment and the investment in such asset or expenditure in relation to such event or occasion has been made or

incurred, in more than one previous year relevant to the assessment years notice under section 148 shall be issued for every such assessment year.

**Check 03: The Notice is issued with the prior approval of the specified authority means the specified authority referred to in section 151 of the Act.**

<b>Assessment Years</b>	<b>Sanctioning Authority</b>
3 or less than 3 years	Principal Commissioner or Principal Director or Commissioner or Director
More than 3 years	Principal Chief Commissioner or Principal Director General or Chief Commissioner or Director General

Sanction by an unauthorized authority would render the approval as bad in law. Further, there is no provision which states that the powers of a lower authority can be exercised by a higher authority.

The Hon'ble Bombay High Court in the case of **DSJ Communication Ltd. v. DCIT [2014] 41 taxmann.com 151 (Bom)(HC)** held that Notice issued under section 148 after obtaining approval of Commissioner would be of no consequence as said approval is contrary to provisions of section 151 of the Act.

**Check 04: Sanction should be obtained prior to issuance of Notice.**

The Ld. Assessing Officer has to bring on record documents to demonstrate that he had obtained a sanction from the appropriate authority before issuance of Notice under section 148/148A of the Act. If the Assessing Officer issues the notice for reopening the assessment before obtaining the sanction, the reopening proceeding is void *ab initio*.

The Hon'ble Bombay High Court in the case of **CIT v. Smt. Suman Waman Chaudhary [2010] 321 ITR 495 (Bom) (HC)** held that where Tribunal had recorded a finding of fact that ITO had recorded reasons on December 06, 1989, and on same date notice was issued and contention of assessee that approval of Deputy Commissioner was not obtained by ITO before issuance of notice had not been controverted by Departmental representative, in view of section 151(2) of the Act, the notice was without jurisdiction.

**Check 05: Providing an opportunity of hearing to the assessee being not less than seven days and but not exceeding thirty days from the date on which such notice is issued.**

There are instances where less than 7 days have been given to the assessee to respond to the Notice issued under section 148A of the Act. This results in violation of the procedure laid down by law.

Violation of Principles of Natural Justice is not a curable defect in appeal. The Hon'ble Supreme Court in the case of **Tin Box Co. v. CIT (2001) 249 ITR 216 (SC)** had observed that the Court held that the failure to observe the principles of natural justice cannot be made good in appeal. Lack of opportunity before the Assessing officer cannot be rectified by the appellate authority by giving such opportunity.

#### **4.2. Order passed under section 148A(d) of the Act**

The Ld. Assessing Officer on the basis of material available on record including reply of the assessee, pass an order, with the prior approval of specified authority, within one month from the end of the month in which the reply of the assessee.

**Check 06: The Assessing Officer to pass a detailed order considering the reply of the Assessee.**

It is a well settled law that the Ld. Assessing Officer is required to pass a speaking Order disposing of the objections and where the order is without elucidating and dealing with the contentions and issues raised in the objection.

The Hon'ble Bombay High Court in the case of **Ankita A. Choksey v. ITO (2019) 411 ITR 207 (Bom.)(HC)** observed that, Order on disposal of objections must deal with the objection. The mere fact that the return is processed under section 143(1) of the Act does not give the Ld. AO a carte blanche to issue a reopening notice. The Reassessment notice was quashed.

The Hon'ble Bombay High Court in the case of [Hitech Corporation Ltd v. ACIT WP\(L\) No 6861 of 2022 dated March 09, 2022 \(Bom\)\(HC\)](#) held that the order of disposal of objections runs into 21 pages and referring 68 case laws without referring the issue under consideration the Ld. Assessing Officer has only wasted his time in writing unsustainable orders on objections. The order disposing of objections was quashed.

Further, The Hon'ble Bombay High Court in the case of **Zuari Foods and farms Pvt. Ltd. v. ACIT (2018) 408 ITR 279 (Bom)(HC)** wherein observed that even for reopening the assessment within four years there are certain jurisdictional requirements that must exist before the power of reassessment is exercised. Strictures passed against the Ld. Assessing Officer for making comments which are highly objectionable and bordering on contempt and for being oblivious to law.

**Check 07: The Order passed under section 148A (d) of the Act should contain sanction of the specified authority.**

Refer to **Check 03.**

**Check 08: The Order passed under section 148A (d) of the Act should be passed within one month.**

Where the order under section 148A(d) of the Act is passed after a period of one month, the same would be considered time barred and bad in law.

It is pertinent to note that, the Hon'ble Allahabad High Court in the case of **CIT v. Munnalal Shrikishan [1987] 167 ITR 415 (All)(HC)** wherein it was held that the term "month" does not mean consisting of 30 days. It would mean one calendar month.

**Check 09: Whether the information recorded was with the Assessee during the original assessment and does it suggest that income has escaped assessment.**

It is a settled position in law that no authority has the power to review its own order. Therefore, the concept of "Change of Opinion" should continue to hold good in the new reassessment regime as well.

Therefore, where the initial assessment was done under section 143(3) of the Act, and a question on the said "information" was put to the Assessee, the Assessee responded to the same, irrespective of the fact that the observations of the Ld. Assessing Officer pertaining to the issue is contained in the Order under section 143(3) of the Act or not; Reassessment on the same issue would amount to "change of opinion" i.e., a review of its own order.

The Hon'ble Supreme Court in the case of **Lily Thomas v. UOI & Ors. (2000) 6 SCC 224** observed that the dictionary meaning of the word "review" is "the act of looking; offer something again with a view to correction or improvement. It cannot be denied that the review is the creation of a statute. The power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication.

The Scheme of Income-tax Act, 1961 has not expressly conferred upon the Ld. Assessing Officer a power of review. It can only rectify apparent mistakes by way or rectification under section 154 of the Act.

Therefore, where a Ld. Assessing Officer on perusal of the documents and explanations submitted by the Assessee during assessment, concluded that the same is not taxable, and cannot change its view without any tangible information or material.

**Further, the information should suggest that income has escaped assessment.**

The Hon'ble Bombay High Court in the case of [Nirmal Bang Securities Pvt Ltd v. ACIT WP. No. 671 of 2022 dated February 08, 2022 \(Bom\) \(HC\)](#) observed that reasons recorded not indicated anywhere or any stretch of imagination the income has escaped assessment. There was non-application of mind by the sanctioning authority. Court further observed that the Ld. Assessing Officers could record better reasons for reopening and the Authority granting the approval will also apply their mind sincerely before granting approval. Re assessment proceeding was quashed.

Similarly, the Hon'ble Bombay High Court in the case of **Sharvah Multitrade Company (P.) Ltd. v. ITO [2022] 134 taxmann.com 134 (Bom)(HC)** where AO issued a reopening notice against assessee company, namely, SMCPL on ground that assessee had received accommodation entries from several bogus entities managed and controlled by company SMCPL, in view of fact that name of company which alleged to have provided accommodation entries to assessee and name of assessee company was found to be same, thus, there was a complete non-application of mind by AO as a company could not provide an accommodation entries to itself, impugned reopening notice issued against assessee was to be set

aside. Further, CBDT was directed to frame a scheme to train the Ld. Assessing Officer on how to apply mind while recording reasons.

**Check 10: Section 148A of the Act is not applicable for certain cases.**

No Notice under section 148A of the Act is required for search cases, search connected matters, cases where information has been obtained pursuant to a search and cases where information has been received under section 135A of the Act.

However, in search matters (assessment under erstwhile 153A of the Act) search connected matters (assessment under erstwhile 153C of the Act) and cases where information has been obtained pursuant to search (assessment under 147 of the Act), the Ld. Assessing Officer has to obtain prior approval of the sanctioning authority. Refer to **Check 03**.

The litigative issue of whether assessment is to be done under section 153C of the Act or under section 147 of the Act, in cases where information has been found pursuant to a search action was settled by the Hon'ble Madras High Court in the case of **Karti P. Chidambaram v. PDIT [2021] 436 ITR 340 (Mad)(HC)** wherein it was held that where pursuant to receipt of information from AO of searched person regarding receipts of cash payments by assessee pertaining to sale of land, proceedings under section 147 of the Act were initiated against assessee and thereafter, when seized documents were received, jurisdictional Assessing Officer on recording of satisfaction initiated proceedings under section 153C of the Act, in such case pending proceedings under section 147 of the Act would stand abated and there were no procedural irregularity to establish legal malice with reference to actions initiated by Assessing Officer.

In the new reassessment regime, this issue will not arise, as there is no separate assessment regime for search & search related cases for search

actions taken on or after April 01, 2021. They would be covered under the new reassessment regime.

**Check 11: Survey cases will be deemed information, but a Notice under section 148A of the Act has to be issued.**

As per **Check 10**, Section 148A of the Act will not attract certain cases. However, as per *Explanation 2* to section 148 of the Act, in certain cases including survey cases under section 133A of the Act, the Ld. Assessing Officer would be deemed to have information which suggests that income has escaped assessment.

Therefore, in survey cases, section 148A of the Act is attracted and the Ld. Assessing Officer shall issue a Notice under the said Act.

#### **4.3. Notice received under section 148 of the Act**

Pursuant to the Order under section 148A(d) of the Act, the Ld. Assessing Officer shall serve the assessee with a Notice under section 148 of the Act asking the assessee to file their return of Income.

**Note: Penalty** - As per section 270A(2)(c) of the Act, a person shall be considered to have under-reported his income, if the income reassessed is greater than the income assessed or reassessed immediately before such reassessment.

Therefore, disclosing of income in the return in compliance with section 148 of the Act may not protect the assessee from penalty proceedings.

**Check 12: Issuance of Notice under section 148 of the Act along with a copy of the Order under section 148A(d) of the Act.**

As per amended section 148 of the Act, the Ld. Assessing Officer has to serve a Notice under section 148 of the Act along with a copy of the order passed under section 148A (d) of the Act.

**Check 13: Sanction to be obtained before issuance of Notice under section 148 of the Act.**

The Notice issued under section 148 of the Act should mention that the same has been issued after obtaining the requisite sanctions. Refer to **Check 03.**

However, no such approval shall be required where the Ld. Assessing Officer has passed an order under section 148A(d) of the Act stating that it is **a fit case** to issue a Notice under section 148 of the Act.

**Check 14: What is meant by “information which is flagged in accordance with the risk management strategy formulated by the Board”.** (The word ‘flagged’ has been omitted vide Finance Act, 2022)

**Note:** As per **CBDT Instruction dated December 10, 2021 bearing no F.NO. 225/135/2021/ITA-II**, the Assessing Officers shall identify the following categories of information pertaining to Assessment Year 2015-16 and Assessment Year 2018-19:

- (i) Information from any other Government Agency/Law Enforcement Agency
- (ii) Information arising out of Internal Audit objection, which requires action under section 148 of the Act
- (iii) Information received from any Income-tax Authority including the assessing officer himself or herself
- (iv) Information arising out of search or survey action
- (v) Information arising out of FT&TR references

- (vi) Information arising out of any order of court, appellate order, order of NCLT and/or order under section 263/264 of the Act, having impact on income in the assessee's case or in the case of any other assessee
- (vii) Cases involving addition in any assessment year on a recurring issue of law or fact:
  - a) Exceeding Rs. 25 lakhs in eight metro charges at Ahmedabad, Bengaluru, Chennai, Delhi, Hyderabad, Kolkata, Mumbai and Pune while at other charges, quantum of addition should exceed Rs. 10 lakhs;
  - b) Exceeding Rs. 10 crores in transfer pricing cases. and where such an addition:
    - 1. has become final as no further appeal has been filed against the assessment order; or
    - 2. has been confirmed at any stage of appellate process in favor of revenue and assessee has not filed further appeal; or
    - 3. has been confirmed at the 1<sup>st</sup> stage of appeal in favor of revenue or subsequently; even if further appeal of assessee is pending, against such order.

**Check 15: What else suggests that information is with the Ld. Assessing Officer:**

- (ii) An audit objection stating that the assessment is not in accordance with the Act.

**Note:** The Hon'ble Supreme Court in the case of **Indian & Eastern Newspaper Society v. CIT (1979) 119 ITR 996 (SC)** that the opinion of the Internal Audit party of the Income Tax Department on a point of law cannot be regarded as information within the meaning of section 147(b) of the Act. In view of the decision of the Supreme court now the audit objection as well as the note of the Ministry of Law cannot be regarded as information for the purpose of reopening.

This view may not hold good because of the specific amendment.

- (iii) Any information received under an agreement referred to in section 90 or section 90A of the Act.
- (iv) Any information made available to the Ld. Assessing Officer under the scheme notified under section 135A of the Act i.e., **Faceless collection of information.**
- (v) Any information which requires action in consequence of the order of a Tribunal or a Court.

#### **4.4. Notice under section 143(2) read with section 147 of the Act**

**Check 16: The Notice under section 143(2) of the Act cannot be issued prior to issuance of Notice under section 148 of the Act.**

Issuance of Notice under section 143(2) of the Act before issuance of Notice under section 148 or before passing of Order under section 148A(d) would demonstrate the prejudice of the Ld. Assessing Officer to proceed with reassessment. This will render the reassessment procedure as bad in law. This has been held in the case of **Asian Paints Ltd. v. DCIT [2008] 296 ITR 90 (Bom)(HC).**

**NOTE:** It is pertinent to note that, on receipt of Notice under section 148 of the Act, if the assessee is of the opinion that there is a blatant & *prima facie* **violation of Checks 1 to 16** the same has to be challenged by filing a Writ Petition before the Hon'ble High Court.

This is akin to the erstwhile procedure, where upon disposal of objections, the assessee had the liberty to file Writ Petition, similarly in the new regime, a Writ Petition can be filed on issuance of Notice under section 148 of the Act along with an order under section 148A(d) of the Act.

**4.5. Draft Order under section 147 read with section 143(3) read with section 144B (xvi) of the Act**

**Check 17: Non-issuance of Draft Assessment Order under section 144B of the Act will render the assessment proceedings bad in Law. The final Order might be either set aside or held as *non-est*.**

The Hon'ble Delhi High Court in the case of **RMSI (P.) Ltd. v. National Faceless Assessment Centre [2022] 440 ITR 245 (Delhi)(HC)** & The Hon'ble Bombay High Court in the case of **Parull Isharani v. ACIT WP No. 2187 of 2021 (Bom)(HC)** held that where in faceless assessment, NFAC passed a final assessment order in case of assessee, without issuing a Show Cause Notice and a draft assessment order which was mandated under section 144B(1)(xvi)(b) of the Act, assessment order not made in accordance with procedure laid down in section 144B of the Act would be *non-est*.

**Check 18: Sufficient time must be given to the assessee to respond to a Draft Assessment Order.**

**Request for time i.e., Adjournment applications are to be considered before passing the final Order.**

A short period of 1 to 2 days would be held to be in violation of Principles of Natural Justice i.e., *Audi Alteram Partem*.

The Hon'ble Madras High Court in the case of **Swapna Manuel v. ACIT [2021] 133 taxmann.com 312 (Mad)(HC)** held that here reasonable time was not given to assessee to respond to show cause notice, it tantamount to infraction of principle of natural justice and, therefore, matter was to be remanded back to Assessing Officer for de novo assessment from show cause notice stage.

The Hon'ble High Court of Himachal Pradesh in the case of **Preethi Himachal & Co v. UOI [2022] 135 taxmann.com 265 (HP)(HC)** where reasons given by assessee in his application seeking further time to file reply to notice containing draft assessment order were not considered by Assessing Authority before passing impugned assessment order, order was to be set aside to be passed afresh.

**4.6. Order passed under section 147 read with section 143(3) of the Act.**

**Check 19: All submissions to be considered and a personal hearing to be granted (if sought for) while passing the Order.**

Non-consideration of submission or not granting an assessee a personal hearing in spite of requesting for the same would amount to violation of principles of Natural Justice.

The Hon'ble Bombay High Court in the case of **Piramal Enterprises Ltd. v. ACIT [2021] 129 taxmann.com 18 (Bom) (HC)** held that where during assessment proceedings show-cause notice had been issued to assessee, to which assessee had responded to from time-to-time, requesting for personal hearing, however, personal hearing had not been provided as incorporated in section 144B of the Act, thus, assessment not made in accordance with procedure laid down under section 144B of the Act being *non est* was to be set aside.

**Check 20: If additions are not made on the "information" which suggests that income has escaped assessment albeit additions/disallowances are made on some other ground.**

Where no addition is made on the "information" with the Ld. Assessing Officer, but the Ld. Assessing Officer proceeds to assess and make

addition/ disallowances on other grounds, the same would render the reassessment invalid.

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 of the Act, the Ld. Assessing Officer 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; if he intends to do so, a fresh notice under section 148 of the Act would be necessary, legality of which would be tested in event of a challenge by assessee.

## **5. Dénouement**

### **When to file a Writ:**

Where there is any **lapse or violation in Checks 1 – 16**, the same can be challenged by filing a Writ Petition on receipt of the Notice under section 148 of the Act along with an Order under section 148A(d) of the Act.

Where there is **any violation or lapse in Checks 17-20**, the same may be challenged by filing a Writ Petition on receipt of the Order under section 147 read with section 143(3) read with section 144B (xvi) of the Act.

Further, the Hon'ble Bombay High Court in the case of **Tata Capital Financial Services Limited v. ACIT WP NO. 546 OF 2022 dated February 15, 2022 (Bom.)(HC)** *inter alia* directed the revenue to adhere to certain guidelines to be followed for reassessment proceedings (erstwhile reassessment regime), they are:

(a) While communicating the reasons for re-opening the assessment, a copy of the standard form/request sent by the Assessing Officer for obtaining approval of the Superior Officer should itself be provided to the assessee.

This would contain comment or endorsement of the Superior Officer with his name, designation and date. The Assessing Officer shall not merely state the reasons in the letter addressed to the assessee.

(b) If the reasons make reference to any other document or a letter or a report, such document or letter or report should be enclosed to the reasons. Such a portion as it does not bear reference to the assessee concerned could be redacted.

(c) The order disposing of the objections should deal with each objection and give proper reasons for the conclusion.

(d) A personal hearing shall be given and minimum seven working days advance notice of such personal hearing shall be granted.

(e) If the Assessing Officer is going to rely on any judgment/order of any Tribunal or Court reference/ citation of these judgments/orders shall be provided along with notice for personal hearing so that the assessee will be able to deal with/distinguish these judgments/ orders.

Further stated that a copy of the Order to be placed before the CBDT to issue guidelines to all its officers based on these directions with clear instructions that they shall be strictly followed.

The guidelines are still awaited from the CBDT.

Earlier, the Hon'ble Gujarat High Court in the case of **Sahkari Khand Udyog Mandal Ltd v. ACIT [2015] 370 ITR 107 (Guj)(HC)** had issued guidelines for reassessment and instructed the Chief Commissioner of Income Tax and Cadre Controlling Authority of the Gujarat State, shall issue a circular to all the Assessing Officers for scrupulously carrying out the directions contained in this judgment.

Similarly, The Hon'ble Bombay High Court in the case of **CIT v. TCL India Holdings (P.) Ltd. [2016] 71 taxmann.com 216 (Bom)(HC)** observed that the Revenue on affidavit stated that their website would take steps to maintain consistency in appeals and would upload cases in the "legal corner" of their website. However, this has not been done until date.

It is desired that the CBDT provides detailed guidelines for the Ld. Assessing Officers for conducting reassessment under the new reassessment regime.

From an Assessee's standpoint, they are also under an obligation to prepare robust submission at the first stage i.e., before the National Faceless Assessment Centre/Assessing Officer, which will help assessees in their case before the High Court (in case of a Writ Petition) or in appellate proceedings, certain points to be kept in mind while preparing the submissions are:

1. The Assessee should file their return (under protest) in response to Notice under section 148 of the Act rather than asking the Ld. Assessing Officer to consider the earlier return for compliance under Notice issued under section 148 of the Act. Non filing of return in spite of receipt of Notice under section 148 of the Act may attract prosecution proceedings under section 276CC of the Act.
2. Notices should be promptly replied to, within the time stipulated in the Notice.
3. The submissions should discuss the issue on the facts, merit and the non-applicability of the cases relied on by the Ld. Assessing Officer.
4. The submissions should be brief and to the point. There are instances where upon response to a draft assessment order the Ld. Assessing Order has accepted the return filed by the assessee or dropped certain

proposed additions. Therefore, the quality the submissions should not be compromised upon.

5. Where the issue is covered by the decision of the Hon'ble Supreme Court or the Hon'ble Jurisdictional High Court, the same must be mentioned. The Assessee should only cite relevant case law and refrain from citing several case laws where the facts do not match. The Hon'ble Supreme Court in the case of **CIT v. Sun Engineering Works (P.) Ltd [1992] 198 ITR 297 (SC)** held that it is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by the Court. Therefore, citing several cases which do not have relevance or does not fit as per the factual matrix will not help the assessee.
6. If the assessee is approaching the Hon'ble High Court by filing a Writ Petition, the assessee should come with *clean hands*. The Hon'ble Delhi High Court in the case of **OPG Metals & Finsec Ltd. v. CIT [2014] 41 taxmann.com 21 (Delhi)(HC)** observed that where the requirement of full and true disclosure was not satisfied as assessee had not specifically pointed out at time of first reassessment that there were other transactions between amalgamated companies and entry operator, assessee did not come with *clean hands* and, therefore, second reassessment was justified.
7. The assessee's must note that a Writ Petition before the Hon'ble High Court is different from an appeal before the Hon'ble High Court. One cannot file the writ in routine manner when an alternative remedy is available. The Hon'ble Supreme Court in the case of **Radha Krishan Industries v. State of Himachal Pradesh 2021 SCC Online SC 834** held that though a High Court can entertain a petition under Article 226 of the Constitution, it must not do so when the aggrieved person has an effective alternate remedy available in law. However, certain

exceptions to this “rule of alternate remedy” include where, the statutory authority has not acted in accordance with the provisions of the law or acted in defiance of the fundamental principles of judicial procedure; or has resorted to invoke provisions, which are repealed; or where an order has been passed in violation of the principles of natural justice.

The New Reassessment regime if implemented properly can reduce Litigation and smoothen the reassessment proceedings. It is important that, both, the Tax Officers and Taxpayers including their consultants are well versed with the law and procedure. In light of several judicial pronouncements, it is hoped that the CBDT issues some guidelines or provides training to its Assessing Officers for the reassessment proceedings.

**XXX**

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