A comparative analysis of the old reassessment regime vis-à-vis the new reassessment regime

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A. Background-

1. Justice Khanna had the following to remark[1] on what the connotations of reopening a concluded assessment are "*We have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.*" Similarly, it was held in *ITO vs. Lakhmani Mewal Das*[2] that reopening a concluded assessment is a 'serious matter' and should not be resorted to unless the prescribed conditions are fulfilled.

2. The underlying principle in both the judgements is that finality of an assessment is the norm, and reopening it constitutes an exception, and one which must not be lightly resorted to. As the provisions are extraordinary in nature, they must be strictly construed[3]. Therefore, the language of the section, its scope and more importantly, the restrictions to be imposed while invoking these provisions calls for a thorough analysis.

B. A brief history-

3. The provisions relating to reassessment are codified in sections 147 to 152 of the Income-tax Act, 1961 ('the Act'). Although susceptible to frequent amendments, these provisions have seen three major phases, each marked with transformative changes.

4. The provisions as originally introduced in the Income-tax Act, 1961 permitted Assessing Officers to reopen assessments in only two situations. The Assessing Officers either had to have a reason to believe that any income chargeable to tax had escaped assessment on account of a failure on the part of the assessees to disclose truly and fully all material facts or

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[1] Parashuram Pottery Works Co. vs. ITO (1977) (106 ITR 1

[2] (1976) (103 ITR 437) (SC)

[3] New Kaiser I Hind Spg. vs. CIT (1977) (107 ITR 760) (Bom)

the Assessing Officers had to have such a reason to believe in consequence of 'information' received after the original assessment.

5. The provisions then underwent drastic amendments by the Direct Tax Laws (Amendment Act), 1989. The resultant provisions *inter alia* gave a go-by to the concept of 'information' and placed the defense of the Assessing Officer having to show an assessee's 'failure to disclose' if he wished to reopen an assessment after a period of four years from the end of the relevant assessment year in the proviso. These provisions, in substance, stood largely in the same manner for more than two decades. During this period, the law on reassessments was judicially sculpted and streamlined. One crucial judgement was that of the Hon'ble Supreme Court in the case of *GKN Driveshafts (India) Ltd. v. ITO*[4], wherein a new procedure for how reassessments were to be done was put in place. The procedure so prescribed required the assessees to file a return of income in response to the notice issued under section 148 of the Act; to then ask the Assessing Officer for a copy of the reasons recorded by him prior to the issuance of the notice; the assessees would then be eligible to file their objections to the reasons; and the Assessing Officers were expected to dispose of such objections before proceeding with the actual assessment.

6. A plethora of amendments which were ushered in by the Finance Act, 2021 and then some 'corrective' amendments by the Finance Act, 2022 marked the beginning of the last of the three phases of the provisions. The breadth of these amendments and their departure from the provisions in the two earlier phases is the subject matter of this research paper.

C. Amendments by the Finance Act, 2021 and 2022-

The transition-

7. The transition of the provisions to how they stand today was anything but smooth. In March, 2020, almost an year before the amendments were made by the Finance Act, 2021, the country was hit by the COVID-19 pandemic that saw nationwide lockdowns. Understandably, tax compliances could not be made either by the assessees or by the Assessing Officers. This led to the promulgation of the Taxation and Other Laws (Relaxation

4 (2003) (259 ITR 19)

and Amendment of Certain Provisions) Act, 2020 ('the Relaxation Act') whereby certain limitations and due dates were relaxed and the Central Government was empowered to continue to grant such relaxations by way of notifications after taking stock of the prevailing circumstances.

8. Such extensions continued to come well into the second half of 2021, by which time the Finance Act, 2021 had also been promulgated and had brought about a sea change in the provisions dealing with reassessments. These amendments, per the Finance Act, 2021, were to take effect from 1st April, 2021. The Department took the view that in view of the extensions carried out pursuant to the Relaxation Act, the provisions of the erstwhile regime continue to stay in vogue till 30th June, 2021 (i.e., till the last of the extensions). On the other hand, it was argued by the assessees, that all notices issued under section 148 of the Act after 1st April, 2021 had to have been issued in terms of the law, as it stood, after the amendments by the Finance Act, 2021. This disharmony saw an unprecedent litigation as to the correctness of the 90,000 notices issued by the Department in the period beginning from 1st April, 2021 and ending on 30th June, 2021. Finally, the Supreme Court, in the case of *UOI vs. Ashish Agarwal*[5] brought the issue to rest by holding that although, in law, the notices should have been issued in terms of the amended provisions, nevertheless, a one-time concession could be granted to the Department by holding that the notices issued under section 148 of the Act in this period should be deemed to be notices issued under section 148A(b) of the Act.

Intention behind the amendments-

9. Looked at broadly, the amendments seek to achieve two broad objectives. Firstly, in view of the increasing use of automation in collecting and disseminating information in carrying out income-tax assessments, even the reassessment provisions are sought to be made information-driven, which can be sourced in line with certain pre-defined criteria. Secondly, having regard to the large scale litigation which ensued as a result of following the procedure prescribed in *GKN* (supra), the law, now seeks to modify that procedure and pre-pone it to a stage, prior to the issuance of the notice under section 148 of the Act. The aforesaid twin objectives are brought out in the Memorandum explaining the provisions of the Finance Bill,

5 (2022) (444 ITR 1)

2021 as well as in the judgement of the Hon'ble Supreme Court in the case of *Ashish Agarwal* (supra).

Fate of the provisions/principles of the erstwhile sections-

10. With the above background, the nature of these amendments can now be considered. The provisions as they stood prior to the Finance Act, 2021 ('the erstwhile regime') had certain key elements. Some of these have been retained in the Act as it stands today ('the new regime') and some have been omitted. The following analysis contains a discussion on these key elements.

I. Reason to believe (erstwhile section 147) -

11. As per section 147 of the erstwhile regime, an assessment could be reopened by an Assessing Officer only if he had a 'reason to believe' that any income chargeable to tax had escaped assessment. The import of the expression 'reason to believe' was understood in two ways. Firstly, it was held in *Lakhmani Mewal Das* (supra) and followed in a series of judgements thereafter, that this expression is used in contradistinction to the expression 'reasons to suspect' so as to suggest that an assessment cannot be reopened on the basis of a surmise and that the Assessing Officer issuing a notice must at least reach a prima facie conclusion that some income chargeable to tax has escaped assessment. Secondly, it was held in *ACIT vs. Rajesh Jhaveri Stock Brokers*[6] that at the stage of issue of the notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage.

12. This expression has not been used in the new regime. Such an omission could be interpreted in two ways. It could be argued by the assessees that since these words did not require the Assessing Officer to establish escapement of income at the stage of issuance of notice, the absence thereof, must be meant to now cast an obligation on the Assessing Officers to establish, as a matter of fact, that some income chargeable to tax has escaped assessment. On

6 (2007) (291 ITR 500) (SC)

the other hand, the Department could argue that the absence of this expression in the new regime would suggest that an Assessing Officer need not even show a prima facie escapement of income at the stage of issuance of notice and that such escapement may only be established in the course of the assessment. In the opinion of the author, the former view seems more reasonable. In view of the fact that the Assessing Officers are now empowered to carry out an exhaustive enquiry under section 148A (the details whereof will be discussed in the ensuing paragraphs), should come with a responsibility that at the end of such enquiry, the Assessing Officers would be in a position to conclude whether or not any income has escaped assessment, and not defer such conclusion to the very end of assessment.

II. Failure to disclose truly and fully all material facts (first proviso to erstwhile section 147)-

13. Under the erstwhile regime, where an assessment was reopened beyond a period of four years from the end of the relevant assessment year, an assessee would be entitled to call upon the Assessing Officer to demonstrate as to what was the failure of disclosure on the part of such assessee before the Assessing Officer could reopen its assessment. This defense has now been done away with in the new regime.

14. It is interesting to note, that of all the arguments available to the assessee under the old regime, this was the only argument which hinged on the conduct of the assessee itself, as opposed to other arguments which hinged on the conduct of the Assessing Officer. With the new regime now dropping this proviso, the intention is made clear that the manner in which the assessee participates in an assessment will not be determinative of whether or not an Assessing Officer will be entitled to reopen a concluded assessment.

III. Change of opinion (erstwhile section 147)-

15. While interpreting the erstwhile section 147 of the Act, the Hon'ble Supreme Court in the case of *CIT vs. Kelvinator of India*[7] held that the concept of 'change of opinion' must be considered as an in-built test to check abuse of power by the Assessing Officer, failing which Assessing Officers would be reviewing their assessments, in the garb of reopening, something which they cannot do. In the opinion of the author, the defense of alleging change

7 (2010) (320 ITR 561)

of opinion is still very much available to the assessees. This is for the reason that at the foundation of this concept, as propounded by the Hon'ble Supreme Court, was the use of the word 'reassess', as opposed to 'review' in the erstwhile section 147. Since the amended section 147 continues to use the word 'reassess', there is no good reason to hold that such defense can no longer be pressed into service.

16. In fact, while dealing with a case of reassessment under the new regime, the Hon'ble Delhi High Court in the case of *Ernst and Young LLP vs. ACIT*[8] has held that the defense of change of opinion was not available to the Petitioner as the original assessment in that case was completed with the issuance of an intimation under section 143(1) of the Act. A reasonable inference that can be drawn from the above would be that the defense of change of opinion would be available even under the new regime, provided the original assessment is completed under section 143(3) of the Act. The Hon'ble Supreme Court has also dismissed the SLP[9] against the High Court's judgement.

17. In another case[10] dealing with reassessment under the new regime, the Delhi High Court held that the since the issue, which was the subject matter of reassessment was examined in the course of the original proceedings, the same amounted to a case of change of opinion. However, interestingly, the Court remanded the matter back to the file of the Assessing Officer to proceed afresh. In the humble opinion of the author, such an approach perhaps needs reconsideration. Once the Court had come to the conclusion that it was a case of change of opinion, it ought to have either held that the test of change of opinion is not relevant under the new regime and dismissed the writ petition, or it should have held that the test is relevant and quashed the proceedings. Remanding the issue to the Assessing Officer's file, perhaps, did not serve any purpose.

IV. <u>Tangible material (erstwhile section 147)-</u>

18. Another test propounded in the case of *Kelvinator* (supra) in the context of the erstwhile section 147 was that of 'tangible material', which is closely connected with the concept of

8 (2022) (WPC 11862/2022)

9 SLA no. 17235/2022

10 Seema Gupta vs. ITO (2022) (140 taxmann.com 463) (Del)

change of opinion. It has been held in a series of judgements that the existence of 'tangible material' is a pre-requisite to reopening a concluded assessment. In the opinion of the author, this defense also continues to survive in the new regime since its genesis is in the concept of change of opinion.

19. In fact, while dealing with reassessment under the new regime, the Courts[11] seem to concur that the test is still relevant.

V. Principle of merger (third proviso to the erstwhile section 147 of the Act)-

20. Under the erstwhile regime, an Assessing Officer was precluded from reopening an assessment on an issue which was the subject matter of any appeal, reference or revision. The new regime has not retained the same. However, in the opinion of the author, an assessee may still be entitled to argue that if a higher authority, appellate or revisional, is seized of an issue, then applying the general principle of merger/ judicial discipline, an Assessing Officer may not be competent to comment upon/ assess the same.

VI. Cases of deemed escapement (Explanation 2 to erstwhile section 147)-

21. In a major departure from the erstwhile regime, the Legislature has chosen to not retain Explanation 2 to erstwhile section 147, which set out a series of cases in which it would be deemed that income chargeable to tax had escaped assessment. Again, this could be looked at in two ways. It could be argued by the assessees that cases of deemed escapement did not represent escapement in the real sense, so an Explanation had to be brought in and in the absence of such Explanation, it must be presumed that such deemed escapement cases are no longer within the purview of the reassessment regime. On the other hand, it could be argued by the Department that the Explanation was only clarificatory in nature and its absence does not take away from the power of the substantive provision to bring such cases within its fold. In the opinion of the author, the second view seems more reasonable because the erstwhile Explanation also covered those cases of escapement which clearly fall within the contours of the substantive provision. For instance, clause a) of the Explanation provided that where an assessment was made but income chargeable had been under assessed or excessive loss,

11 Ernst and Young LLP (supra), Abdul Majeed Son of Shri Ali Mohammed vs. ITO (2022) (140 taxmann.com 485) (Raj)

depreciation or other allowance had been claimed, it would be deemed to be a case of income chargeable to tax having escaped assessment. Similarly, clause b) provided that where a return of income had been furnished by the assessee but no assessment was made and it was noticed by the Assessing Officer that the assessee had understated the income or had claimed excessive loss, deduction, allowance or relief in the return, it would be deemed to be a case of income chargeable to tax having escaped assessment. Other clauses had the same tenor. It would not be unreasonable to say that in the absence of the aforesaid clauses, cases involving such circumstances would in any event have been covered under section 147. Therefore, the absence of the Explanation in the amended section 147 cannot be taken to mean that such cases are now outside the realm of reassessment.

VII. Discovery of new issues in the course of the reassessment (Explanation 3 to erstwhile section 147)-

22. The erstwhile section 147, read with Explanation 3 thereto, permitted the Assessing Officer to 'also' assess any income chargeable to tax which came to his notice in the course of the assessment, notwithstanding the fact that the recorded reasons did not allude to the same. Under the new regime, an Explanation to a similar effect can be found in section 147. However, it differs from the earlier provision in one significant manner inasmuch as the words 'and also' in the erstwhile section 147 are not to be found in the amended section. These words, in the erstwhile section 147, were interpreted by several High Courts[12] to mean that if the Assessing Officer accepts the contention of the assessee that the income which he had initially believed to had escaped assessment has, in fact, not escaped assessment, it is not open to him to independently assess another source of income. The absence of these words is suggestive of the fact, that under the new regime, an Assessing Officer's assessment of a new source of income is completely independent of his assessment of the income which formed the subject matter of the initial show cause notice issued under section 148A(b) of the Act.

12 CIT vs. Jet Airways (I) Ltd. (2011) (331 ITR 236) (Bom), Ranbaxy Laboratories Ltd. vs. CIT (2011) (336 ITR 136) (Del)

VIII. No reassessment to carry out enquiries (erstwhile section 147)-

23. Dealing with reopening under the erstwhile regime, the Courts[13] have held that reassessment proceedings cannot be initiated to carry out fishing and roving enquiries. In the author's opinion, the position under the new regime remains the same. The Assessing Officer must first ascertain for himself whether any income chargeable to tax has escaped assessment, and only then can he proceed with the reassessment. The contrary, i.e., initiating reassessment proceedings with the intent of carrying out enquiry with the hope of discovering an escaped assessment should not be permissible. The Hon'ble Rajasthan High Court[14] has held to the same effect.

24. However, the Delhi High Court in the case of *Divya Capital One P. Ltd. vs. ACIT*[15] has held that reopening can be done for carrying out verification, however, before doing so, a preliminary enquiry under clause (a) of section 148A must first be done.

IX. Independent satisfaction of the Assessing Office (erstwhile section 147)-

25. In the context of the erstwhile section 147 of the Act, Courts[16] have held that the material which leads to reopening an assessment may come to the Assessing Officer form any source, but it is the Assessing Officer who is required to form an independent belief that any income chargeable to tax has escaped assessment. He cannot reopen an assessment at the diktat of another authority, as the same would amount to a borrowed satisfaction, something which is not permissible under the reassessment regime.

26. In the opinion of the author, this principle will continue to hold the field even under the new regime of reassessment. Although, section 148 of the new regime defines what is information for the purpose of reassessment, and that information may come from the prescribed sources, however, the Assessing Officer having regard to such information must carry out the

13 Vipin Khanna vs. CIT (2000 (7) TMI 2 (P&H)), Amrinder Singh Dhiman vs. ITO (2003 (9)(TMI 19)

14 Abdul Majeed (supra)

15 (2022) (445 ITR 436)

16 Aroni Commercials Ltd. vs. DCIT (2014) (362 ITR 403) (Bom), PCIT vs. Shodiman Investments P. Ltd. (2020) (422 ITR 337) (Bom)

necessary enquiries before forming an independent belief that any income chargeable to tax has escaped assessment. The information, without independent satisfaction of the Assessing Officer, cannot *ipso facto* lead to a valid reassessment.

The new provisions-

27. Having examined the elements of reassessment under the erstwhile regime and their possible fate under the new regime, it may be apposite to now consider the elements which have been introduced under the new regime.

I. Preliminary enquiry under 148A(a)-

28. As discussed hereinabove, the new regime seeks to codify the procedure set out in *GKN* (supra) inasmuch as the Assessing Officer is now expected to carry out a pre-notice enquiry before determining whether the case is fit for the issuance of a notice under section 148 of the Act. The first step in such pre-notice enquiry is that provided under clause (a) of section 148A of the Act. Under this clause, the Assessing Officer, having regard to the information which suggests that the income chargeable to tax has escaped assessment, conducts an independent enquiry without issuing a notice to the assessee. The provision, however, does not mandate the Assessing Officer to carry out such preliminary enquiry and the decision is left to his discretion.

II. Granting the assessee an opportunity of being heard-

29. Having carried out an independent preliminary enquiry the Assessing Officer is required to provide an opportunity of being heard to the assessee, by serving upon him a notice to show cause as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment. The assessee, in response thereto, under clause (c) of section 148A is entitled to oppose the initiation of the proceedings and submit as to why a notice under section 148 of the Act should not be issued. With the introduction of these provisions, the legal position[17] under the erstwhile regime that

17 CIT vs. Mahaliram Ramjidas (1940) (8 ITR 442) (PC)

no opportunity of being heard is required to be given at the time of issuance of the 148 notice has been done away with.

III. Passing of an order under section 148A(d)-

30. The Assessing Officer, has to then decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148, by passing an order to the above effect. This order, if passed against the assessee, becomes a precursor to the issuance of the notice under section 148 of the Act and the validity or otherwise of the Assessing Officer's jurisdiction to carry out reassessment would stand and fall on the basis of the validity of this order, as it is the last step in the proceedings before issuance of the notice under section 148 of the Act.

31. An interesting question which arises is whether, while passing the order under this clause, is the Assessing Officer restricted to dealing only with the assessee's rebuttal to his initial show cause notice issued under clause (b) or can he allege in the order, something which was not the subject matter of the initial notice. In this regard, the Calcutta High Court[18] has held that the Assessing Officer's powers while passing an order under section 148A(d) are circumscribed to the extent of his allegations in the initial show cause notice. He does not have jurisdiction, at this stage, to venture into any issue, which was not the subject matter of the initial notice. Similar is the finding of the Rajasthan High Court[19] which holds that as the order has to be passed on the basis of the 'material available on record', a fetter has been put on the powers of the Assessing Officer from referring to anything but the material on record, which would comprise only of the initial notice and the assessee's response thereto.

32. Experience would show that the Assessing Officers often argue that at the stage of passing a 148A(d) order, they need not comment upon the escapement of income as at this stage the only question to be decided is whether or not a 148 notice is to be issued. In the opinion of the author, this stand of the Assessing Officers is misaligned with the scheme of section 148A. It is submitted that at every stage of the proceeding, right from the enquiry under 148A(a) to the passing of the assessment order under section 147 read with section 143(3),

18 Excel Commodity and Derivative Pvt. Ltd. vs. UOI (2022) (APOT 132/22)

19 Abdul Majeed (supra)

regard has to be had to the escapement of income chargeable to tax. Under clause (a) of section 148A, an Assessing Officer conducts enquiry with respect to the information which suggests that the income chargeable to tax has escaped assessment. Under clause (b), the Assessing Officer provides an opportunity of being heard to the assessee as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment. After considering the assessee's reply, the Assessing Officer passes an order under clause (d) to decide on the basis of material available on record whether or not it is a fit case to issue notice under section 148 and then the assessment is completed bringing such income to tax. The Assessing Officers' assertion that they need not have regard to escapement of income at the stage of section 148A, would reduce these proceedings to an empty ritual. This sentiment has also been echoed by the Rajasthan High Court in the case of *Abdul Majeed* (supra).

33. It is also important to note that the aforesaid procedure set out in section 148A of the Act is mandatory in nature, as evidenced from the usage of the word 'shall'. In the opinion of the author, not following the same should vitiate the proceedings and not be considered a curable defect. In order to bolster this argument, one may draw support from the judgements of various High Courts[20], which, in the context of the erstwhile regime, had held that not following the *GKN* (supra) procedure would be fatal to the assessment.

Exceptions to 148A proceedings-

34. The proviso to section 148A has carved out two categories of cases, where the proceedings under section 148A will not have to be carried out, and a notice under section 148 can be issued, subject to the satisfaction of other conditions.

IV. Information to suggest (section 148)-

35. Perhaps, one of the most significant facets of the new regime is the revival of the concept of 'information' as it stood in section 147 of the Act, prior to its amendment by Direct Tax

20 Bayer Material Science P. Ltd. vs. DCIT (2016) (382 ITR 333) (Bom), KSS Petron Pvt. Ltd. vs. ACIT (2016) (ITA 224/14), Fomento Resorts & Hotels Ltd. vs. ACIT (2019) (TA no. 63 of 2007)

Laws (Amendment Act), 1989. Having said so, it is important to note that the context in which 'information' was used in the first phase of section 147 and the context in which it is used in the present regime are entirely different. In the first regime, the provisions did not contain any definition of the word 'information'. The only requirement was that it must come after the completion of the original assessment. On the hand, the new regime, gives a precise definition of the word and does not specify as to at what stage should such information emerge. The components of the definition of the word 'information' are discussed hereunder-

36. The definition contemplates five categories of 'information'.

a. Information in accordance with the risk management strategy for the relevant assessment year formulated by the Board from time to time- The precise outline of what would constitute a risk management strategy ('RMS') is yet to be made available by the Board. However, the fact that there would be different RMS for each year, and that the same would be formulated from time to time gives a touch of dynamism to the provision. Having said so, this also gives unregulated and unbridled powers to the Board to prescribe by itself, without any legislative control, as to what information is, and basis such prescription, assessments can be reopened. Perhaps, the constitutional validity of this provision would, at some stage, have to tested before the High Court.

The limited guidance on the contours of RMS comes from Instruction No. 225/135/2021/ITA-II dated 10th December, 2021, wherein it was stated that for effective implementation of risk management strategy, the Assessing Officers would identify the following categories of information pertaining to Assessment Year 2015-16 and Assessment Year 2018-19, which may require action under section 148 of the Act, for uploading on the Verification Report Upload (VRU) functionality on Insight portal- Information from any other Government Agency/Law Enforcement Agency; Information arising out of Internal Audit objection, which requires action u/s 148 of the Act; Information received from any Income-tax Authority including the assessing officer himself or herself; Information arising out of search or survey action; Information arising out of FT&TR references; Information arising out of any order of court, appellate order, order of NCLT and/or order u/s 263/264 of the Act, having impact on income in the assessee's case or in the case of any other assessee; Cases involving addition in any assessment year on a recurring issue of law or fact.

b. Audit objection- In complete repugnancy to the erstwhile regime, wherein the Supreme Court in the case of *Indian and Eastern Newspaper Society vs. CIT*[21] had held that an audit objection cannot form the basis of reassessment, the new regime, explicitly provides to the contrary. Therefore, under the new regime, any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act would constitute information for the purpose of reassessment.

c. Information received under an agreement referred to in section 90 or section 90A of the Act- This category would cover information received under both, Tax Information Exchange Agreements (TIEAs) as well as the information received under the Article dealing with 'Exchange of Information' under a Double Taxation Avoidance Agreement ('DTAA'). It may be worthwhile to note that the scope of exchange of information under these agreements is quite wide. A typical agreement would permit the competent authorities of the Contracting States to exchange any information, which is foreseeably relevant for carrying out the provisions of either the agreement or for the administration or enforcement of the domestic laws concerned taxes of every kind and description.

d. Information made available to the Assessing Officer under the scheme notified under section 135A of the Act- Section 135A of the Act empowered the Central Government to make a scheme for the purpose of calling for information from various sources in a faceless manner. Such scheme, titled 'e-verification scheme, 2021' was notified vide notification no. 137/2021 dated 13th December, 2021 which permits gathering of information in a faceless manner by taking recourse to sections 133, 133B, 133C, 134 and 135 and to corroborate it with the information received from certain other reporting agencies. In case there is a mismatch, the information can be used to initiate reassessment proceedings.

e. Information which requires action in consequence of the order of a Tribunal or a Court- The last category of information is that which would require action in consequence of an order passed by a Tribunal or a Court. Some possible instances which could attract this

21 (1979) (119 ITR 996)

limb are if the Tribunal or a Court in the appeal for a particular assessee gives a direction for the income to be assessed in the hands of another assessee, or where in an appeal arising out of a particular assessment year, it gives a direction for the income to be assessed in a different assessment year.

37. A very crucial aspect, which is often lost sight of by the Assessing Officers is that the existence of information, by itself, is not sufficient for issuing a notice under section 148A(b). In the proviso to section 148, the word 'information' is qualified by the words 'which suggests that the income chargeable to tax has escaped assessment'. In the opinion of the author, given the scheme of section 148A, the proper course of action to be adopted by the Assessing Officers on receipt of information would be to apply their mind and conduct enquiry under clause (a) to determine whether the information is suggestive of escapement. If the answer is in the affirmative, only then should a notice under clause (b) be issued. However, one would see in practice, that notice under clause (b) is issued immediately upon receipt of information, completely disregarding the requirement of establishing a nexus of some degree with the escapement of any income. In this light, the Delhi High Court[22] has held that "w*hether it is "information to suggest" under amended law or "reason to believe" under erstwhile law the benchmark of "escapement of income chargeable to tax" still remains the primary condition to be satisfied before invoking powers under section 147 of the Act."*

General principles of 'information'-

38. While Explanation 1 to section 148 defines 'information', there is sufficient obscurity in the definition which has necessitated the Courts to set out the parameters in line with which the definition has to be considered. The Hon'ble Delhi[23] and Calcutta High Court[24]have held that the definition of information in Explanation 1 cannot be lightly resorted to so as to reopen an assessment. If so done, it would give unbridled powers to the Department.

22 Divya Capital One (supra)

23 Divya Capital One (supra)

24 Excel Commodity (supra)

39. Further, the Hon'ble Orissa High Court[25] has adopted the meaning of the word 'information' from the judgement of the Hon'ble Supreme Court in the case of *Larsen & Toubro Limited v. State of Jharkhand*[26] for the purpose of Explanation 1. In the aforesaid judgement, the Hon'ble Supreme Court had held that the word 'information' is of the widest amplitude and should not be construed narrowly. Therefore, there is an apparent dichotomy between the Delhi and Calcutta High Court on the one hand, and the Orissa High Court on the other.

40. Although, in the context of section 147, as it originally stood in the 1961 Act, the Hon'ble Supreme Court in *Lakhmani Mewal Das* (supra) has held that 'information' cannot be wholly vague, indefinite, far-fetched or remote. These parameters, in the opinion of the author, would apply with equal force while construing the definition of 'information' under Explanation 1.

Cases of deemed information-

41. Explanation 2 to section 148 carves out certain exceptional circumstances, wherein reassessment can be done without having 'information' as defined in Explanation 1. Such exceptions can be put in two categories- a) where a search under section 132 or a survey under section 133A is initiated in the case of an assessee on or after 1st April, 2021 or b) where in the course of a search on any other person on or after 1st April, 2021, the Assessing Officer is satisfied that any money, bullion, jewelry or other valuable article or thing or any books of account or documents, seized or requisition pertain to or relate to the assessee.

V. <u>Assessments pursuant to search subsumed in reassessments-</u>

42. A very crucial aspect of the new regime is the unification of assessments pursuant to a search under section 132 of the Act with reassessment under sections 147 to 152 of the Act. To ensure such merger, a spate of amendments was made by the Finance Act, 2021. Firstly, sections 153A and 153C were amended to provide that nothing contained therein will apply in a case where a search is initiated on or after 31st March, 2021 ('the cut off date').

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25 Stewart Science College vs. ITO (2022) (143 taxmann.com 80) (Orissa) and Auroglobal Comtrade Pvt. Ltd. vs. The Chairman, CBDT (2022) (143 taxmann.com 120) (Orissa)

26 (2017) 13 SCC 780

Secondly, as mentioned hereinabove, in a case where search is initiated on or after the cut-off date, the Assessing Officer would be deemed to have 'information' for the purposes of section 148 of the Act. Thirdly, second proviso to section 148A carves out cases of search after the cut-off date from having to go through the procedure of pre-notice enquiry prescribed under section 148A of the Act. Finally, the second proviso to section 149 states that the provisions of that section will not apply in a case where a notice under section 153A or 153C is required to be issued in relation to a search initiated before the cut-off date. A combined effect of all these amendments is that the assessments pursuant to a search initiated after the cut-off date has to be done in terms of sections 147 to 152 of the Act. Additionally, two relaxations have also been provided to such search cases inasmuch as they do not require 'information' and the procedure under section 148A does not have to be followed.

43. The rationale for the above merger as borne out from the Memorandum explaining the provisions of the Finance Bill, 2021 is that the procedural issues in the provisions of sections 153A/153C were resulting in a lot of litigation. However, it is interesting to note that the Finance Act, 2021 has done more than just move the search assessments from sections 153A/153C to sections 147 to 152. A series of substantive changes have also been made in the process. Unlike the assessments under sections 153A/153C which recognised the concept of abated (pending) and unabated assessments, no such distinction is drawn in the new regime, which would mean that the defense of the existence of 'incriminating material' is also sought to be legislatively derecognized. The second major difference is that unlike assessments under sections 153A/153C which mandated the assessment of 6 years, extendable to 10 years in specified circumstances, there is no such compulsion in the new regime. Under the new regime, it is for the Assessing Officer to decide which assessment years are to be reopened pursuant to a search. Furthermore, Explanation 2 to section 148 which deems the existence of 'information' in search cases does not say that the search should result in the discovery of any income that has escaped assessment. In terms of the said explanation, the very factum of search is deemed to be 'information which suggests that income chargeable to tax has escaped assessment'. Therefore, wider powers are sought to be conferred on the Assessing Officers carrying out assessments pursuant to a search under the new regime.

VI. Changes in limitation under section 149-

44. The standard limitation under the erstwhile 149 of the Act was 4 years from the end of the relevant assessment year, which could be extended to 6 years if the income escaping assessment was more than Rs. 1 lac, and further extendable to 16 years where the income was in relation to an asset located outside India. As opposed to the quantitative test of limitation in the earlier regime, the new regime has an amalgam of quantitative and qualitative tests. The standard limitation is reduced to 3 years from the end of the relevant assessment year, which is extendable to 10 years in case the income that has escaped assessment is more than Rs. 50 lacs and the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax is represented in the form of i) an asset, ii) expenditure in respect of a transaction or in relation to an event or occasion, or iii) an entry or entries in the books of account. Section 149, as amended by the Finance Act, 2021 only covered representation in the form of an asset, the other two categories were inserted only by the Finance Act, 2022.

45. In order to appreciate the import of the extended period of limitation provided in section 149(1)(b), it may be appropriate to consider the legislative history of the provision. Section 149(1)(b) as amended by the Finance Act, 2021 used the same language as the fourth proviso to section 153A which extended the limitation from 6 years to 10 years in search cases. The said fourth proviso was introduced by the Finance Act, 2017. While introducing the proviso, late Mr. Arun Jaitley, the then Finance Minister explained the rationale behind the proviso in his budget speech, wherein he stated that he proposed to omit section 197(C) of the Finance Act, 2016 which provided for assessment of *undisclosed income* relating to any period prior to commencement of the Income Declaration Scheme, 2016. However, in search cases, it was proposed to provide that in case tangible evidence is found during the search, the Assessing Officer can assess income upto ten years preceding the year in which search took place. The same rationale was echoed in Circular no. 2 of 2018, which contains the Board's explanatory notes to the provisions of the Finance Act, 2017 and the Memorandum explaining the provisions of the Finance Bill, 2017 wherein it was stated that where tangible evidence(s) are found during a search or seizure operation (including 132A cases) and the same is represented in the form of *undisclosed investment* in any asset, assessment under section 153A can be made. It can be gleaned from aforesaid legislative history, that extension of limitation to ten years as well representation in the form of an asset, the two elements of the

fourth proviso to section 153A which are also present in section 149 are meant to cover only those cases where certain undisclosed income is discovered. It is trite law that amending provisions may be considered in the light of the previous history of the legislation. Justice Cardozo in Duparquet Co. v. Evans[27] said that in questions relating to construction, "history is a teacher that is not to be ignored". In a similar vein, Chief Judge Learned Hand said that "statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"[28]. [Quoted with approval in ACIT vs. Ahmedabad Urban Development Authority (2022) (143 taxmann.com 278)]

46. There is also a transitionary provision, i.e., the first proviso to section 149 which states that for the A.Y. 2021-22 and earlier years ('the earlier assessment years'), if a notice under sections 148 or 153A or 153C could not have been issued in terms of the provisions of the respective sections as they stood prior to the amendments, then a notice can also not be issued in terms of the amended law. This recognizes the taxpayer's vested right of finality of assessment, which was hitherto recognised only in judgements. In this regard, it was held in KM Sharma vs. ITO[29] and SS Gadgil vs. Lal & Co.[30] that when limitation is extended by an amendment, the amended provision will not apply to those cases where the limitation under the erstwhile provision had come to an end. In view of the above legal position, the limitation for the earlier assessment years will be determined in this manner. If the conditions of the amended section 149(1)(b) (which extends the limitation to ten years) are not met, then the limitation would be three years under section 149(1)(a) and the proviso will not apply. On the other hand, if the conditions of section 149(1)(b) are met, then the proviso will spring into action and put a ceiling of six years (i.e., limitation under the erstwhile 149) as opposed to ten years provided in 149(1)(b). In fact, when the erstwhile section 149 was amended by the Finance Act, 2012 to extend the limitation of 6 years to 16 years where escapement of income was related to assets located outside India, it was clarified by way of an Explanation that the amended provisions providing for an extended period of limitation will also apply to

27 (297 U.S. 216 (1936)) 105
28 Cabell v. Markham (1945) 148 F 2d 737106

29 (2002) (254 ITR 772)

30 (1964) (53 ITR 231)

assessment years beginning on or before 1st April, 2012, which is principally contrary to what the first proviso now provides.

47. By way of the third and fourth proviso, the section also provides that while computing the limitation under section 149, the time granted to the assessee under clause (b) of section 148A and the period during which the proceedings under section148A were stayed by a Court are to be excluded and if after such exclusion, the period available to an Assessing Officer to issue a 148 notice is less than 7 days, the limitation would be extended to seven days.

48. Sub-section (1A) provides that for the purposes of section 149(1)(b), where the investement in asset or expenditure in relation to an event or occasion of more than Rs. 50 lacs is spread over more than 1 previous year within the period prescribed under section 149(1)(b), then the 148 notice is to be issued for each of those years.

49. The new regime retains as it is section 150 of the erstwhile regime which gives a go by to limitation under section 149 in cases where a notice under section 148 is to be issued in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the Act by way of appeal, reference or revision or by a Court in any proceeding under any other law.

VII. <u>Sanction of the prescribed authority-</u>

50. Under the erstwhile section 151, where a notice was issued within a period of four years from the end of the relevant assessment year, sanction of Joint Commissioner of Income-tax was required to be obtained and if it was to be issued after the end of four years, sanction of Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner of Income-tax was required to be obtained.

51. Under the new regime, where a notice is to be issued within a period of three years from the end of the relevant assessment year, sanction of Principal Commissioner or Principal Director or Commissioner or Director is required to be obtained and where a notice is to be issued after a period of three years, sanction of Principal Chief Commissioner or Principal Director

General or where there is no Principal Chief Commissioner or Principal Director General, Chief Commissioner or Director General is required to be obtained.

D. Parting comments-

52. While the new regime is certainly well intentioned, but given the fact that the principles under the erstwhile regime had become well settled and that the new regime puts in place an entirely new procedure, it is only natural to expect that it would lead to even more litigation, in its formative years at the very least.

53. The Hon'ble Supreme Court in the case of *Ashish Agarwal* (supra) lauded the new regime and observed that the same is 'a game changer' with an aim to achieve the ultimate object of simplifying the tax administration, ease compliance and reduce litigation. Only time will tell how far will this statement hold good.