Nani Palkhivala Memorial Research Paper Competition 2022

Topic: A comparative analysis of the old reassessment regime vis-a-vis the new reassessment regime

Authored by
Istiyak Ahmad
Email: ca.istiyakahamd@gmail.com
Cell: 7045821744

Contents

1. Brief background of income escaping assessment

1.1. Income escaping assessment is also known as reassessment, reopening, s. 147 assessment etc. These words are used interchangeably in this article.

1.2. Under the scheme of the Income-tax Act, 1961 ('the Act'), Tax Authorities ("TA") has the general power the assess the income of the or the tax return (ITR) filed by the taxpayer u/s 143(2) of the Act.

1.3. Apart of general assessments, TA has also various other remedial measures viz. reopening, rectification and revision for taking appropriate actions to plug revenue leakages when they come to notice of TA. Reopening is perhaps the most preferred remedial measure.

1.4. The objective of carrying out reopening u/s 147 of the Act is to bring any income which has escaped assessment in the original assessment under the tax net.

1.5. It is well accepted that the proceedings u/s 147 are for the benefit of the revenue and not taxpayer[1]. The same cannot be allowed to be converted as 'revisional' or 'review' proceedings at the instance of the taxpayer.

1.6. The law governing reopening has more or less remained same since 1961. Prior to 1989, there were 3 distinct conditions which were required to be fulfilled before the TA could exercise jurisdiction to reopen viz.

i. TA must have reason to believe that income has escaped assessment;

ii. TA must have reason to believe that such escapement is a result of failure on the part of the Assessee to make a return or to disclose fully and truly all material facts necessary for his assessment for the relevant year;

iii. Reason to believe should be in consequence of information received after the original assessment.

1.7. With effect from 1989, the law has undergone a major change. However, the spirit and substance of the provisions were retained. Under the amended provision, if the assessing officer has '**reason to believe'** that any income chargeable to tax has escaped assessment, he could exercise the powers of reopening. Concept of information was discarded.

[1] CIT v Sun Engg Works 198 ITR 297 (SC); Sudhakar v ITO 241 ITR 865

i. The scope of the expression ‘reason to believe’ has always been a subject matter of litigation. Generally, courts have taken a position that ‘change of opinion’ cannot be considered as valid reason to believe[2]. Also, there should be some tangible material.

1.8. Under the erstwhile provision, there was no specific procedure included in the Act to be followed by the TA and taxpayer in relation to reassessment notice. However, the SC in the case of GKN Driveshafts India Ltd v. ITO[3] has provided specific procedure to be followed by taxpayers and TA for reassessment proceedings. The Hon'ble SC has laid that when a notice for reopening of assessment u/s 148 of the Act is issued, the proper course of action for the assessee is to file the return and, if he so desires, to seek reasons for issuing the notices. The TA is bound to furnish reasons within a reasonable time. On receipt of reasons, the assessee is entitled to file objections to issuance of notice and the TA is bound to dispose the same by passing a speaking order.

1.9. Further, reassessment proceedings, often, have been challenged in writ proceedings before the High Courts (HC) on the ground that the notice for reassessment lacks legal validity on account of failure by the TA to follow due process of law enshrined in the provisions and established under common law. Rather than the merits of concealment, courts are overwhelmed with cases to decide upon the sustainability of the core issue of initiation of reassessment i.e. whether the TA had ‘reasons to believe', did he ‘record his reasons' appropriately, did the assessee fail to ‘disclose fully and truly all material facts necessary for his assessment', was proper ‘sanction' of the appropriate authorities taken, ‘whether notice was issued in time’, etc.

1.10. Now, w.e.f. 01 April 2021, the law governing the provisions of reopening has been completely overhauled. Finance Act, 2021, introduced a new procedure for reassessment. These provisions were further modified by Finance Act, 2022 so as to expand its scope, take care of some anomalies and iron out some interpretational issues.

[2] Illustratively refer Phoolchand v ITO 196 ITR 302; Pancharatna Cement P. Ltd. v UOI 317 ITR 259; Siemens Information System Ltd v ACIT 295 ITR 333; CIT v Eicher Ltd 294 ITR 310; Transworld International Inc. v JCIT 273 ITR 242; ICICI Prudential Life Insurance Co. Ltd. v ACIT 325 ITR 471;
[3] (2002) 125 Taxman 963

1.11. Under the new regime, out of other things,

i. the system of writing reasons of reopening before initiating the proceedings has been done away with.

ii. Inquiries and proceedings prior to issuance of notice u/s 148 have been introduced.

iii. "Reason to believe" is omitted.

iv. Search cases are covered under the provisions of reopening.

v. Time limit to reopen is modified in a major way. Unlike the old regime, limitation period for reopening of the assessment is curtailed substantially. Now reopening is permitted generally for 3 years and in exceptional case fulfilling specified conditions, reopening can be made upto 10 years. However, reopening of assessment of past years upto AY 2021-22 is grandfathered to maximum 6 years as per old law.

vi. Additional protection in the cases of scrutiny assessment not allowed to be reopened beyond a period of 4 years from the end of the relevant AY unless there is failure in disclosing fully and truly all material facts necessary is now taken away.

vii. Information that could trigger reopening is specially defined.

viii. New regime specifically provides for checks on TA actions. It require TA to obtain prior approval of specified authority at different stages of proceedings.

The above differences have been dealt in detail below.

1.12. Like in case of erstwhile regime, under the new regime as well, power to reassess is only in case where the income chargeable to tax has escaped assessment.

1.13. It may be noted that, law on the earlier provisions of reopening was to a great extent settled. However, with the introduction of completely new provisions, lot of uncertainty is now created.

In the paper, I have tried to bring out the key differences and issues arising pursuant to introduction of new reassessment regime. It may be noted that as the topic for the paper is comparative analysis of the old v. new regime, I have restricted my analysis only of finding out the key differences. I have not analysed the new regime and issues arising under the new regime except wherever required for comparative analysis.

2. Comparison chart of erstwhile v. new regime (snapshot view)

Below table captures broad comparison of old v. new regime

Particulars	Old regime	New regime	Para reference where the issue is dealt in detail
Applicability date	Applicable for notice of reassessment issued on or before 31 March 2021	Applicable for notice of reassessment issued from 1 April 2021	Refer para 5
Relevant sections	ss. 147 to 153	ss. 147, 148, 148A, 148B, 149 and 151 (provisions of s. 150, 152 and 153 are unamended and will continue to apply as is)	-
Basis for reassessment	• TA has 'reason to believe' that income has escaped assessment	• TA should possess 'information which suggests that income chargeable to tax has escaped assessment'	Refer para 3
Recording of reasons	• TA is required to record reasons for reopening before initiating the reassessment proceedings	• Technically, there is no requirement to record reasons separately. Order u/s 148A(d) of the Act itself will be treated as reasons. • However, there may be internal requirement of	Refer para 4

Particulars	Old regime	New regime	Para reference where the issue is dealt in detail
		recording reasons for seeking approval of higher authority at various stages of proceedings.	
Procedure to be followed by TA before issuance of reassessment notice	• No formal provisions in the Act except that TA was required to issue notice to file ROI and record reasons for reopening. • However, SC in the case of GKN Driveshafts (Supra) has laid certain procedures viz a viz supply of information, disposal of objection by TA etc.	• Procedures are prescribed separately u/s 148A	Refer para 4
Time limit for issue of notice of reassessment	• 4 years - if escaped income is less than Rs. 1,00,000. • 6 years- if escaped income is more than Rs. 1,00,000 • 16 years - If escaped income is associated with	• 3 years- if not covered below • 10 years – where quantum of escaped income is more than INR 50L and TA has in his possession books of accounts/ other documents	Refer para 5

Particulars	Old regime	New regime	Para reference where the issue is dealt in detail
	any assets located outside India	/evidence which reveals that escaped income is represented in the form of assets/ expenditure/ entries in books.	
Prior approval from higher authority	• If reopening is for 4 years or less – JCIT • If reopening is for more than 4 years – PCCIT/ CCIT/ PCIT/ CIT	• If reopening is for 3 years or less – PCIT/ PDIT/ DIT • If reopening is for more than 3 years – PCCIT/ PDGIT (or in case where there is no PCCIT/ PDGIT, approval of CCIT/ DGIT) Above approval will be required at different stages as under- • For conducting pre – notice enquiry with respect to information in possession of TA which suggest that income has escaped assessment	-

Particulars	Old regime	New regime	Para reference where the issue is dealt in detail
		• While providing opportunity to taxpayer u/s 148A • Passing an order u/s 148A(d) • Before issuance of notice u/s 148	
Is taxpayer required to furnish ROI in response to notice u/s 148?	Yes	Yes	-
Whether TA is required to provide the taxpayer reasons for reopening?	Yes. Taxpayer may demand reasons of reassessment from TA. The TA is duty bound to provide the copy of reason recorded within the reasonable time as per guidelines of Hon'ble SC. If such reasons are not demanded by the taxpayer, the TA can proceed to complete assessment.	Yes. TA is required to supply reasons as prescribed u/s 148A(b)	Refer para 4
Once reopening is validly made, can TA reassess	Yes, but judicial conflict of view on whether reassessment will survive if	Yes. [explanation to s. 147 of the Act]	Refer para 6

Particulars	Old regime	New regime	Para reference where the issue is dealt in detail
items of income not indicated in reason so recorded by TA	no addition is made on primary issue identified for reassessment [explanation 3 to s. 147 of the erstwhile Act]		
Challenge of reopening notice or the order passed disposing the objections against the notice	Reopening notice u/s 148 was not made specifically an appealable order. Thus, writ before the HCs used to be filed against the notice/order. However, in case taxpayer fails to file writ, as a practice, taxpayer used to challenge the notice by including as one of the ground in the appeal filed against the reassessment order.	Since order u/s 148A(d) is not an appealable order, only writ can be filed against such order. However, as per the previously followed practice, taxpayer may include as one of the ground in the appeal filed against the reassessment order.	Refer para 4
Time limit for completion of reassessment	Within 12 months from end of the FY in which notice was served [s. 153(2) of the Act]	Same	-
Whether reassessment can be done where the taxpayer has	• Proviso to s. 147 provided that no reassessment can be done beyond 4 years unless taxpayer fails to disclose	No such provision is there in the new regime. Thus, if the issue is highlighted under any of the limb of Explanation 1	-

Particulars	Old regime	New regime	Para reference where the issue is dealt in detail
disclosed all material necessary for the assessment u/s 143(3)?	fully and truly all material facts. • Proviso to s. 147 reads as under - *"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section* ***after the expiry of four years*** *from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or* ***to***	to s. 148 then TA may reopen the case.	

Particulars	Old regime	New regime	Para reference where the issue is dealt in detail
	disclose fully and truly all material facts necessary for his assessment, for that assessment year" • Explanation 1 to s. 147 provided an exception to the above that mere production of books of accounts or other evidence from which material interference could have been drawn by the AO with due diligence will not necessarily amount to disclosure. • In respect of the above, following principles have been laid down by the courts o The onus on proving that the taxpayer has failed to disclose all material facts is on the tax authority[4]		

[4] Illustratively refer, Tantia Construction Co Ltd [2002] 129 taxman 971 (Calcutta)

Particulars	Old regime	New regime	Para reference where the issue is dealt in detail
	○ The facts refer to only those facts within the knowledge of the taxpayer at the material time[5] ○ Taxpayer has to only disclose the primary facts and he is not required to indicate what factual or legal interference should properly be drawn from the primary facts[6] • Thus, reassessment was restricted under the old regime where the original assessment has been done u/s 143(3) and the taxpayer has disclosed all material necessary for the assessment.		
Assessment in case of search,	• Under the erstwhile regime, search	Where search, survey conducted after	Refer para 7

[5] Illustratively refer, Canara Sales Corpn. Ltd (1989) 176 ITR 340 (Kar)
[6] Refer Calcutta Discount Co. Ltd (1961) 41 ITR 191 (SC)

Particulars	Old regime	New regime	Para reference where the issue is dealt in detail
survey and seizure	assessments were governed by separate scheme of provisions (s. 153A to s. 153D)	01.04.2021, new regime provides for assessment/ reassessment under normal provisions of s/ 143(3)/147 of the Act. Operation of s. 153A to s. 153C are suspended.	
Maintenance of books of accounts	Before 01.04.2021, the taxpayers used maintain books for 7-8 years. Rule 6F Income-tax rules, 1962 also required to maintain the books for six years.	Now the taxpayer will be compelled to maintain the books and vouchers for ten years requiring him to incur expenditure on their maintenance and preservation.	-

3. Information required in possession with the TA to form the basis for valid reopening

3.1. Under the erstwhile regime, reassessment was permitted if TA had 'reason to believe' that income has escaped assessment.

i. The scope of the expression 'reason to believe' has always been a subject matter of litigation. Various courts[7] have taken a position that

- 'change of opinion' cannot be considered as valid reason to believe.
- Subsequent judicial developments may be one of the reason for reopening
- There should be some tangible material with the TA for exercising the power of reopening.
- Further, the material should have 'live link' with the reason to believe that income has escaped assessment.
- Reopening not permissible for roving and/or fishing inquiries
- Reopening on the basis of assumption or surmise or conjectures was considered as bad-in-law.
- Reopening cannot be made on mere suspicion, gossip or rumour.

3.2. Further, certain instances of deemed escapement was provided under explanation 2 to erstwhile s. 147 i.e.,

i. where no return of income has been furnished by the assessee although his total income exceeded the maximum amount which is not chargeable to income-tax;

ii. where a return of income has been furnished but no assessment has been made and it is noticed by the TA that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

iii. where the assessee has failed to furnish a report in respect of any international transaction u/s 92E;

iv. where an assessment has been made, but—

[7] Refer illustratively Gujrat HC decision in Desai Bros. (240 ITR 121); SC decision in Barium Chemicals Ltd. v. Company Law Board AIR 1967 SC 295; CIT vs. Kelvinator of India Ltd. [2010] 187 Taxman 312 (SC); Krupesh Ghanshyambhai Thakkar vs DCIT 77 taxmann.com 293 (Guj); MP Inds v ITO 57 ITR 637 (SC), on final appeal 77 ITR 268 (SC); Chhugamal v Chaliha 79 ITR 603 (SC); Bhimraj v CIT 32 ITR 289, affirmed in 41 ITR 221 (SC); Kantamani v ITO 64 ITR 516.

- income chargeable to tax has been underassessed ; or
- such income has been assessed at too low a rate ; or
- such income has been made the subject of excessive relief under the Act ; or
- excessive loss or depreciation allowance or any other allowance has been computed;

v. reassessment basis information or document received from the prescribed income-tax authority u/s 133C(2)

vi. where a person is found to have any asset (including financial interest in any entity) located outside India.

3.3. However, unlike reopening basis 'reason to believe' under the erstwhile regime, under new regime reopening is permissible if TA has information with him which suggest that income chargeable to tax has escaped assessment.

i. Perusal of the above would indicate that the concept of *"reason to believe"* has been given a complete go-bye and the entire emphasis for invoking section 147 of the Act is on *"escapement of income"*. Thus, as per the existing provisions, an TA has to prove beyond any shadow of doubt that there is "escapement of income". Unless *"escapement of income chargeable to tax"* is proved, provisions of section 147 of the Act cannot be invoked.

ii. Thus, now the burden is more on the revenue before issuance of notice u/s 148 of the Act to prove escapement of income.

3.4. Further, the expression 'information which suggest that income chargeable to tax has escaped assessment' has now been defined in Explanation 1 to s. 148 in a restrictive manner to mean –

i. any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Central Board of Direct Taxes (CBDT) from time to time.

- In this respect, CBDT has issued Instruction dated December 10, 2021 bearing no F.N0. 225/135/2021/TA-II

ii. 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.

- It may be noted that under the old regime, it was well settled that reassessment is not permitted merely on account of C&AG objections. This was on the ground that 'reason to believe' requires satisfaction of AO himself and not borrowed satisfaction from someone else[8].

iii. any information received under an agreement referred to in section 90 or section 90A of the Act; or

- Information from leaks (such as Panama leaks etc.) may be considered as the same is received under s. 90/90A
- Similarly, information from CbCR not being under section 90 or section 90A may not be covered

iv. any information made available to the Assessing Officer under the scheme notified under section 135A; or

v. any information which requires action in consequence of the order of a Tribunal or a Court.

3.5. The phrase used in the first proviso i.e. *information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment* clearly indicates that the information is required to have live link with escapement of income. Further, mere listing in Explanation 1 may not suffice as such item shall carry with 'income escaping assessment' inherently in it.

3.6. Further, under the new scheme, there is no concept of deemed escapement as existed under Explanation 2 to S. 147 of the Act under the old scheme.

i. Deemed Escapement' as defined in Explanation 2 to old S.147 has the effect of presumption of escapement and since it was part of the old jurisdictional section, such presumption would confer jurisdiction on the TA. As against the same, Explanation 1 to S. 148 deals with specific information which suggests that an assessee has escaped assessment so reopening can be initiated if suggestive information can result into escapement of income.

[8] Refer Mobis India Ltd. (2018) 90 taxmann.com 389 (Mad HC); PCIT v. Lalit Bagai (2019) 111 taxmann.com 71 (Del HC); CIT v. Rajan A. Aswani (2018) 403 ITR 0030 (Bom HC)

ii. Further, explanation 2 to S. 148 goes one step further and creates a deeming fiction in as much as whenever there is search/survey action, the existence of information suggestive of escapement of income would be presumed for all the years falling within the period of limitation. However, the same is not equal to deemed escapement. What is presumed by deeming fiction is availability of information suggestive of escapement of income for the entire period. But the same is not deemed escapement as existed under the old Act.

4. Procedure to be followed before proceeding with the reassessment

4.1. Under the erstwhile regime, there was no specific provision providing procedure to be followed by the TA for issuance of notice for reassessment except the following -

i. Before making any reassessment, the TA is required serve a notice to the taxpayer (after taking prior approval from specified authority) requiring him to file ROI [s. 148(1)].

ii. Before issuing the above notice, the TA shall record his reasons for reopening.

iii. Taxpayer is required to file ROI against the above notice

4.2. Apart from the above, there were no other procedure prescribed under the Act. However, certain procedures were laid down by the SC in its landmark judgement in the Case of GKN Driveshafts (India) Ltd. (Supra) which are as under-

i. When a notice u/s 148 is issued, taxpayer is required to file the ITR in response to such notice.

ii. Taxpayer can seek the reasons recorded by the TA for reassessment after filing of ROI

iii. On receipt of such request, TA is bound to furnish the reasons within a reasonable time

iv. On receipt of such reasons, taxpayer may file objections

v. TA is required dispose off the taxpayer's objections by passing a speaking order before proceeding for reassessment

It may be noted that there was no specific provision to file an appeal against the rejection order so passed by the TA. However, taxpayer may file writ petition against the same.

4.3. With the introduction of S. 148A of the Act, the law laid down by the SC in GKN Drive Shaft is more or less now legislated. The new provisions provide the following procedure to be followed by TA before issuing a notice for reassessment u/s 148.

i. Conduct any enquiry, if required, with prior sanction of the specified authority, with respect to the information suggesting escapement of income;

ii. Provide the assessee an opportunity of being heard by serving a show cause notice (SCN) within such time (being not less than 7 days and not exceeding 30

days) as to why a notice under section 148 should not be issued on the basis of information suggesting escapement of chargeable income and results of enquiry conducted, if any;

iii. SCN shall specifically indicate basis of information suggesting escapement of income and the result of inquiry (if conducted)

iv. Consider the reply of assessee, if any, furnished and basis the material including reply of the assessee, decide whether a notice is to be issued by passing an order, with the prior approval of specified authority, within 1 month from the end of the month in which the reply referred to in received/ time allowed to furnish a reply expires[9].

4.4. The above procedure can be summarised as under

i. **Old law**: Get a notice to file return, file a return, ask for reasons, get reasons, file objections and await order overruling objections

ii. **New law**: Get a notice u/ 148A(b) along with reasons, respond to the same, get an order u/s 148A(d), get a notice u/s 148 and then file the return

4.5. The aforesaid procedure is not required to be followed in cases relating to search and seizure, or where books of account, other documents or any assets are requisitioned under section 132A, etc. (i.e. situations where TA is deemed to have information suggesting escapement of assessment.).

It may be noted that this proviso does not cover survey cases and therefore 148A procedure needs to be followed in case of reopening as a result of survey.

[9] It may be noted that there is no safeguard how the AO will frame the order u/s 148A(d). He has to simply decide, every order u/s 148A(d) will be a decision against which there is no appeal.

5. Time limits for reopening

5.1. Under erstwhile regime, the notice of reassessment was required to be issued-

i. within 4 years from the end of the relevant AY, if the escaped income is less than Rs. 1,00,000.

ii. If the income which is escaped is equal to or more than Rs. 1,00,000 then notice can be issued for up to 6 years from end of the relevant AY.

iii. If escaped income is associated with any assets located outside India, then notice can be issued up to 16 years from the end of the relevant AY.

5.2. Now under the new regime, time limit to reopen is modified in a major way. Now reopening is permitted

i. generally for 3 years from end of the relevant AY; and

ii. in exceptional cases, reopening can be made upto 10 years where TA has in his possession books of account or other documents or evidence which reveal that escaped assessment amount is INR 50 Lakh or more and the income chargeable to tax is represented in the form of

- an asset; or
    - "Asset" is defined in an inclusive manner to include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account [Explanation to s. 149 provides].
    - There is no attached conditions with asset meaning thereby that if books of accounts or documents or other evidence show that there is outflow of escaped income in an asset, it will satisfy the condition. There is no limit of amount of outflow, it can be in one year or it can be in several years in the same asset. Also, there is no restrictions as to the number of assets wherein there is outflow of escaped income in several years.[10]

[10] https://www.taxmann.com/budget/budget-story/349/whether-proposal-in-finance-bill-2022-for-reassessment-are-retrograde

- expenditure in respect of a transaction or in relation to an event or occasion; or
    - For satisfying this condition, the AO has to only identify an expenditure either in a transaction or in an event or on an occasion. Such expenditure may be either in one or two or all the three, it can be one transaction or more than one transaction, it can be one event or more than one event, it can be one occasion or more than one occasion, it can be in one year or more than one year. So, the spectrum is very wide and accordingly the AO is empowered to carry out arithmetical exercise to make-up aggregation above Rs. 50 lakhs and then reopen the assessment for all the ten years. One cannot stop the AO to add up Rs. 10,000/- of any innocuous outflow in a transaction to make up the aggregate amount to Rs. 50 lakhs or more. One may not surprise that this small amount of Rs. 10,000 of alleged escaped income is found in year ten enabling the AO to reopen the assessment for year ten for that petty sum and this may be compulsive action as if this amount is excluded, the aggregate will fall below Rs. 50 lakhs and as a result reopening of all the other assessment years will fail[11].
- an entry or entries in the books of account
    - in the long line at the beginning of the provision, reference is made to books of accounts, documents or evidence, whereas in this clause only books of accounts are referred, therefore, for invoking this clause initial long line is qualified by the attachment with this clause i.e. such entry has to be only in the books of accounts. But here also spectrum is very wide i.e. whether it is entry for credit or for debit or is a journal entry, all will be covered. But the entries found in the documents or in other evidence will be outside the scope of this clause[11].

5.3. It may be noted that the 16 years time limit for reopening in cases of foreign assets has been deleted under the new regime and accordingly, reopening even in such cases

[11] https://www.taxmann.com/budget/budget-story/349/whether-proposal-in-finance-bill-2022-for-reassessment-are-retrograde

shall be restricted to 10 years at the most. However, this is subject to Black money (undisclosed foreign income and assets) and imposition of tax Act, 2015.

5.4. Where the escaped income represented in the form of (i) an asset; or (ii) expenditure in respect of a transaction or in relation to an event or occasion; has been made/incurred in more than 1 year then notice us/ 148 shall be issued for every such year.

5.5. While determining period of limitation for issuance of notice u/s 148 under the new regime, following period is required to be excluded

i. Time allowed to taxpayer to reply to SCN u/s 148A

ii. Time period for which s. 148A proceedings are stayed by court order / injunction

5.6. Further, if the time left to pass an order u/s 148A(d) after above exclusion is less than 7 days, then such remaining period for passing an order is extended to 7 days and period of limitation u/s 149 shall be deemed extended till the end of 7 days.

5.7. Moreover, 1st proviso to s. 149 provides grandfathering benefit to past years. It provides that the years which have already become time barred under the old regime, cannot be reopened due to change in the law which provides extended limitation period of 10 years. The new provision grandfather issuance of notice for reopening of assessment till FY 20-21. This would imply that reassessment upto FY 2011-12 cannot be reopened as the 6 year time period under old law got expired on 31.03.2019. FY 2012-13 and 2013-14 also cannot be reopened as 6 year time period expired as on 31.03.2021, however, CBDT has granted general extension of time upto 30 April 2021 for issue of notice vide Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020[12]. Hence, the cases of these years can be reopened under the extended time period.

[12] Ordinance was succeeded by the Relaxation Act in September 2020 (w.e.f. March 2020)

5.8. Following table captures comparative time limit available to TA for issue of notice under old and new regime. [For simplicity, period considered for reopening under old regime is 6 years and under new regime is 3 years. The principle can be applied even for other years available under old and new regime]

AY	Last date for issue of notice under old regime	Last date for issue of notice under new regime	Comments
Upto AY 2012-13	31.03.2019	-	Time barred under old regime itself
2013-14	31.03.2020	-	• These years got time barred before the effective date of new regime. • However, on account of COVID -19, TA was given general extension of time upto 30 April 2021 by the Central Govt. through the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020[13]. • The Delhi HC in the case of Touchstone Holdings Pvt. Ltd[14] upheld the validity of notice for AY 2013-14 which was issued post 01.04.2021. o In the present case, the Taxpayer contended that as per the new scheme of reassessment which is effective from 1 April 2021 a notice cannot be issued for reassessment of given AY on or after 1 April 2021 if the time period for issuance of notice under
2014-15	31.03.2021	-	

[13] Ordinance was succeeded by the Relaxation Act in September 2020 (w.e.f. March 2020)
[14] WPC 13102/2022, [TS-726-HC-2022(DEL)] dated 9 September 2022

AY	Last date for issue of notice under old regime	Last date for issue of notice under new regime	Comments
			the old regime of reassessment has already expired on the date of issuance of such notice. o The tax authority, however, rejected the Taxpayer's contention citing the CBDT Instruction 1/2022 which was issued in the matter of implementation of said SC ruling in Ashish Agarwal's case and passed an order together with notice of reassessment dated 20 July 2022 which was challenged by the Taxpayer before HC in Writ. o The HC held that since the reassessment proceedings were initiated during the time extended by the Relaxation Act and were undisputedly within time, the Grandfathering Provision is not attracted in the facts of this case
2015-16	31.03.2022	31.03.2019	• This is strange situation as reopening turns time barred under new regime on 01.04.2021 while it was very much alive as on 31.03.2021. • It seems that TA has forfeited its right to reopen the case
2016-17	31.03.2023	31.03.2020	
2017-18	31.03.2024	31.03.2021	

AY	Last date for issue of notice under old regime	Last date for issue of notice under new regime	Comments
			• It is to be seen whether court can provide some reasonable time limit to TA after 31.03.2021 basis theory of vested right?[15]
2018-19 onwards	31.03.2025	31.03.2022	These years are alive as on the effective date of new regime. Hence, notice can be issued under the new regime.

5.9. Further, s. 149 under the old as well new regime prescribes time limits for issuance of notice u/s 148 of the Act. Here the legislature uses the word 'issued' and not 'served'. In this respect, following may be noted -

i. In interpreting the word 'issued' courts have held that notice can be said to have been issued when the same is given to independent agent for service. Gujarat High Court in the case of Kanubhai M. Patel HUF vs. Hiren Bhatt[16] has held that if notice is not given to post department for service before expiry of limitation period, the same is time barred.

ii. In a recent decision, Delhi HC in the case of Suman Jeet Agarwal[17] laid down the following principles with regard to point of time of issuance of notice:

- For reassessment proceedings to be valid, what is relevant is the issuance of notice within the limitation period. The date mentioned on the notice or the date on which the notice is served on the taxpayer is irrelevant.
- Reassessment notices need not be digitally signed for being valid, as long as the notice mentions the name, designation and the jurisdiction of the relevant tax authority issuing the notice.

[15] Refer Sadhu Singh Hamdard Trust (2013) 263 CTR 77 (P&H HC)
[16] 334 ITR 25
[17] [TS-752-HC-2022(DEL)]

- Nonetheless, in a case where the tax authority has opted for digitally signing the notice, the date on which the digital signature is affixed may be said to be the date of the notice (irrespective of the date which is mentioned on the said notice). In such case, it may be suggested that a notice cannot be issued prior to the date of digital signature.
- For valid issuance of notice, the tax authority must make an overt act to ensure due dispatch of notice to the addressee. It is only on due dispatch, that is beyond the control of the jurisdictional tax officer (JTA), can the notice be said to have been issued. Accordingly, neither the act of generation of the notice nor the date of affixing digital signature on the notice will signify issuance of notice.
- In case of electronic mode of sending notices, such notices may be said to be dispatched (and, therefore, issued) when the email leaves the last server of the ITBA system and enters a computer resource over which the tax authorities have no control.
- Separately, mere uploading of reassessment notices on the taxpayer's e-filing account, in the absence of any dispatch through email, will not be considered as valid service of reassessment notice.

5.10. Validity of notices issued after 1 April 2021 under old regime

i. As stated above, the new regime of reassessment is made effective from 1 April 2021. Amongst other changes, the new regime of reassessment provides a separate mechanism to be followed by the tax authority before issuing the notice for reopening assessments and is materially different than the procedure laid down under the old regime of reassessment applicable till 31 March 2021.

ii. Due to onset of the COVID-19 pandemic, the parliament had promulgated an ordinance[18] in March 2020, which was succeeded by the Relaxation Act in September 2020 (w.e.f. March 2020) to relax various compliances under various laws, including the income tax law, both for taxpayers and the tax authority. Pursuant to the powers granted by the Relaxation Act, the central government has extended the period for issuance of reassessment notice till 30 June 2021 in

[18] The Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020

respect of tax years which were getting time barred as on 31 March 2020 or 31 March 2021 as per the old regime.

iii. The validity of notices issued after 1 April 2021 under the erstwhile reassessment regime pursuant to the time extended under the Relaxation Act, despite the introduction of the new regime, was questioned before various HCs.

iv. The HCs generally ruled in favor of the taxpayers and quashed the reassessment notices issued from April to June 2021 for past tax year/s, which followed the old procedure of reassessment. The HCs unanimously held that the old provisions of reassessment were substituted and repealed vide FA 2021 w.e.f. 1 April 2021 and, in the absence of any saving provisions, the same cannot be resurrected by the tax authority under the guise of the Relaxation Act and various notifications issued thereunder. One of the roles of the Relaxation Act (enacted due to the onset of the COVID-19 pandemic) was held to be limited to extend the time limit for initiation of proceedings as per the law.

v. Upon appeal, the SC[19] has upheld the validity of reassessment notices issued between 1 April 2021 and 30 June 2021 following the old reassessment regime, by exercising its extraordinary power under Article 142 of the Constitution of India for complete justice. According to the SC, its order will strike a balance between the rights of the taxpayer and the tax authority and will avoid detrimental consequences to the tax authority (and ultimately, the public exchequer) which acted under the bona fide belief that amendments to the reassessment regime were not effective on the date of issue of such notice in view of subsequent extensions provided by The Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 (Relaxation Act) till 30 June 2021. The SC directed to treat notices so issued as show-cause notices issued under the pre-notice inquiry procedure enunciated under the new regime of reassessment, while preserving all rights and defenses available to taxpayers, including application of limitation period as per the new reassessment regime.

vi. In terms of SC order, for the tax years covered by the Relaxation Act under reference, the Tax Authority was required to issue fresh notice for reassessment during tax year 2022-23 after completion of pre notice inquiry as directed by the

[19] Union of India & Others v. Ashish Agarwal - Civil Appeal No. 3005/2022

SC. Consequently, the period for passing of order of reassessment will stand extended till 31 March 2024 instead of 31 March 2023.

5.11. After the above ruling, CBDT has introduced Instruction[20] dated 11 May 2022 explaining tax authority's understanding of the SC's ruling in the case of Ashish Agarwal and the way forward in the matter of cases reopened earlier. The CBDT, amongst others, clarifies that for AY 2013-14 to 2015-16, notices for reassessment cannot be issued unless the conditions for invoking the extended time limit of 10 years from the end of the AY under the new regime of reassessment are satisfied. Similarly, for AY 2016-17 and 2017- 18, the fresh notices for reassessment can be issued considering the 4 year time limit from the end of the AY as per the new regime reassessment, read with the extensions granted under Relaxation Act.

[20] Instruction No 01/2022

6. Validity of items of additions in a reassessment without adding the very item which was the ground for reopening

6.1. The erstwhile s. 147 reads as under -

> *"If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess* ***such income and also any other income*** *chargeable to tax which has escaped assessment and* ***which comes to his notice subsequently in the course of the proceedings*** *under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)*

6.2. The pre-amended s. 147 of the Act was in two parts viz (a) reassessment of income which Tax Authority has 'reason to believe' that it has escaped assessment; 'and' (b) any other income which has escaped assessment and comes to Tax Authority's notice in the course of reassessment.

6.3. Further, Explanation 3 was inserted by Finance (No. 2) Act 2009 which reads as under.

> *"Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."*

6.4. Prior to insertion of Explanation 3, there was conflict of views on TA's ability to take up new issues in reassessment without recording reasons and issuing notice. This aspect was settled by inserting Explanation 3. But another facet related to the controversy was if the TA does not make addition in respect of issues identified for initiating reassessment, whether he can still go ahead and make additions in respect of other issues coming to his notice in the course of reassessment. This limb of controversy survived even after insertion of Explanation 3.

6.5. Majority of the HCs[21] have taken view that if the TA does not make addition on identified issue, he cannot make addition on new issues. The lead decision taking this view is the Bombay HC ruling in Jet Airways case. This view is primarily supported on the interpretation that the phrase "and also" separating first and second parts of s. 147 of the TA is conjunctive in nature. Therefore, unless addition is made on identified issue, TA cannot make addition on new issue. The logic of favourable view has been extended to situations where the addition made on identified issue is deleted in appeal.

6.6. On the other hand, P&H[22] and Karnataka[23] HCs have taken view against the taxpayer viz. once the reassessment is validly initiated based on 'reason to believe' but Tax Authority does not make addition on identified issue, nevertheless, he is entitled to make additions on other issues. As per this view, the reassessment proceedings are for the benefit of Tax Department and the phrase "and also" is both conjunctive and disjunctive.

6.7. The new s. 147 post amendment by FA 2021 does not carry reference to second part viz. ***'and also any other income chargeable to tax which has escaped assessment and comes to his notice subsequently in the course of proceedings under this section***'. But old Explanation 3 to s. 147 of the TA is continued in the form of Explanation to new s. 147 of the TA.

6.8. As discussed above, the premise of favourable rulings was on the phrase "and also" as appearing in the old s. 147 is separating first and second parts of s. 147 and the phrase "and also" is conjunctive in nature. Once the second part of s. 147 is deleted, the foundation on which favourable rulings were rendered, is taken away. Thus, the safeguard of the favourable case laws that no addition can be made on additional issues unless addition is made on the primary issue seems to be taken away by omitting the second part from main s. 147 of the Act. Mere continuance of Exp 3 may not be sufficient for the taxpayer to rely on the favourable rulings.

[21] Illustratively refer Commissioner of Income-tax v. Jet Airways Ltd. (2011) 331 ITR 236 (Bom HC); Ranbaxy Laboratories Ltd. v. Commissioner of Income tax [2011] 336 ITR 136 (Delhi HC); Commissioner of Income tax-II v. Mohmed Juned Dadani [2014] 355 ITR 172 (Gujarat HC); Assistant Commissioner of Income-tax, Raipur v. Major Deepak Mehta [2012] 24 taxmann.com 147 (Chhattisgarh HC)

[22] Majinder Singh Kang v. CIT (2012)(344 ITR 358)(SLP dismissed by SC on 19 August 2011); Commissioner of Income tax v. Mehak Finvest (P.) Ltd. [2014] 367 ITR 769 (Punjab & Haryana HC)

[23] N. Govindraju v. ITO (2015)(377 ITR 243)

7. Reassesment in case of search, seizure, requisition, survey.

Under erstwhile regime

7.1. Under the erstwhile regime, search assessments were governed by separate scheme of provisions (s. 153A to s. 153D)

7.2. If any search was conducted, the TA was required to issue notice of assessment/ reassessment for last 6 years in addition to the year of search

7.3. Notice can be issued for additional 4 years (making it to 10 years in all) if-

i. TA has in possession books of accounts or other document or evidence which reveal that the income (represented in the form of asset) which has escaped assessment is more than INR 50 lakh; and

ii. Income covered above or part thereof has escaped assessment; and

iii. Search was conducted on or after 1 April 2017

7.4. If during the course of search proceedings, any information in relation to some other taxpayer is also unearthed, TA is empowered to assess or reassess the income of such other person for last 6/10 years as the case may be [s. 153C].

Under new regime

7.5. Any assessment/ reassessment pursuant to search conducted on or before 31 March 2021 shall be continued to be governed by pre amendment provisions.

7.6. In case search initiated on or after 1 April 2021, new regime provides for assessment/ reassessment under normal provisions of the Act. Operation of s. 153A to s. 153C are suspended. In other words now assessment/ reassessment proceedings in relation search will be carried under normal provision of s. 143(3) / 147 of the Act.

7.7. The procedure discussed above in case of reassessment proceedings will also apply to in case of search/survey cases with some modification.

7.8. In case of search u/s 132, requisition u/s 132A, survey u/s 133A (other than TDS survey u/s 133(2A)) and third party search and requisition (falling under earlier provisions of S.153C of the Act) taking place after 1 April 2021, explanation 2 to s. 148 provides deeming fiction as per which the above event itself will constitute *information which suggests that the income chargeable to tax has escaped assessment*.

7.9. Further, the procedure as prescribed u/s 148A is not required to be followed in cases relating to search, requisition and third-party search & requisition before issuance of reassessment notice [proviso to s. 148A]. In other words, there is no requirement on TA to make pre notice inquiry or give an opportunity to taxpayer to object to reopening basis evidence given etc.

However, this proviso does not cover survey cases and therefore 148A procedure needs to be followed in case of reopening as a result of survey.

7.10. It may be noted that between 01.04.2021 to 31.03.2022, such deemed information under Explanation 2 to s. 148 was available only for a period of 3 years immediately preceding the assessment year relevant to the previous year in which search is initiated. However, after 01.04.2022, the presumption as regards deemed information is not restricted to 3 years. It could be for as long as 10 years. What is worse is the fact that search cases are excluded from the purview of S.148A of the Act and therefore even for the years covered u/s 149(1)(b) (i.e. 4 to 10 year), where reopening is subject to fulfilment of certain conditions, there would be automatic reopening without any order u/s 148A(d). So, technically the taxpayer would not even know the reason for reopening for these years.

7.11. It may further be noted that explanation 2 does not dilute the requirement for there being a nexus of such search with escapement of income. Mere search, without any indication of escapement of income may not suffice to trigger reassessment.

8. Principles of Merger after deletion of 3rd proviso to old s.147

8.1. 3rd Proviso to old s. 147 of the Act provided for exclusion of matters which are subject matters of any appeal, reference or revision from the purview of reassessment

8.2. 3rd Proviso to old s. 147 reads as under-

> *"Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment."*

8.3. It is well accepted principle that the order of higher authority gets merged with lower authorities order such that it is the order of the higher authority that holds the filed and continues to subsist. However, the issue was whether entire assessment order stands merged with the order of superior authority (full merger) or only portion of the order which was subject matter of challenge before such superior authority (partial merger).

8.4. The language of above 3rd proviso takes a position of partial merger[24] i.e. issues which are not subject matter of challenge can be taken up for reassessment.

8.5. There is no similar provision under the new regime. Thus, under the new regime the issue will arise whether the assessments which are subject matter of appeal/revision can be taken up for reassessment.

8.6. While presence of specific provision along the lines of 3rd proviso to erstwhile s. 147 would have avoided the controversy, but absence of provision would not mean that TA has power to reassess issues which subject matter of challenge.

8.7. Based on the logical conclusion, position may be taken that the law followed under the erstwhile regime (partial merger) may be applied to the new regime as well i.e. issues which are not subject matter of challenge can be taken up for reassessment. When an issue is challenged in appeal or by way of revision, the original order merges into the order of the appellate or revisionary authority upon passing of the order by respective authority and hence beyond the scope of reopening by TA.

[24] Refer Bom HC ruling in Sakseria Cotton Mills Ltd 124 ITR 570

9. Penalty under new regime for reassessment

9.1. Under the erstwhile regime, taxpayer was not aware of 'reasons' for reopening until it filed ITR against the notice u/s 148.

9.2. However, under the new regime, the reasons are provided prior to filing of ROI in the notice issued u/s 148A.

9.3. In case where taxpayer include the alleged income in the ROI filed in repose to notice under new s. 148, issue may arise whether mere inclusion of income in ROI, penalty u/s 270A is defensible?

9.4. Per the s. 270A(2), under reporting of income covers a case where the income reassessed is greater than the income assessed or reassessed immediately before such reassessment. The amount of under reported income shall be the difference between the amount of income reassessed or recomputed and the amount of income assessed, reassessed or recomputed in a preceding order.

9.5. However, taxpayer may claim the benefit of s. 270A(6) where bona fide explanation is provided to the satisfaction of TA and all material facts have been suitably disclosed. This is on the assumption that the case of taxpayer does not fall within the scope of mis-reporting of income as defined u/s 270A(8)/(9) of the Act.

9.6. Further, in case of wilful attempt for evasion of tax, risk of prosecution u/s 276C cannot be ruled out. However, immunity u/s 270AA for penalty and prosecution may be available also in case of reassessment order u/s 147 provided the case is not of mis-reporting of income.

10. Faceless assessment of income escaping assessment.

10.1. S. 151A of the Act provides that entire process of reassessment including proceedings u/s 148A and issuance of notice u/s 148 and the entire reassessment proceedings shall be carried out in faceless manner. CBDT has issued Notification No.18/2022 dated 29.03.22 which prescribes scheme for reassessment.

10.2. As per clause (b) of section 3 of the said notification, issuance of notice under section 148 of the Act shall be through automated allocation, in accordance with risk management strategy formulated by the Board as referred to in section 148 of the Act for issuance of notice, and in a faceless manner, to the extent provided in section 144B of the Act with reference to making assessment or reassessment of total income or loss of assessee. Thus, notice under section 148 of the Act has to be issued by the "National Faceless Assessment centre" only. Such notice cannot be issued by "jurisdictional AO". Many cases have come to light where such notices have been issued by the "jurisdictional AO" who did not have jurisdiction to issue such notice and therefore, validity of such notices would be questioned.

Abbreviations

Abbreviation	Full name
The Act	Income-tax Act, 1961
TA	Tax Authorities
ITR	Income tax return
AY	Assessment Year
FY	Financial Year
HC	High Court
SC	Supreme Court
CBDT	Central Board of Direct Taxes
AO	Assessing officer
SCN	Show Cause Notice
FA	Finance Act
w.e.f.	with effect from

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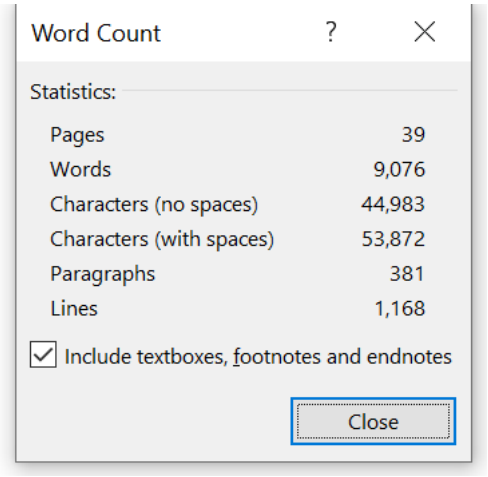
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