THE HENRY VIII MANOEUVRE

CBDT INSTRUCTION DATED 11.5.2022 ON S 148:ANOTHER EXECUTIVE OVERREACH,JUDICIAL CENSURE & THE LARGER QUESTION OF PERILS OF DELEGATED LEGISLATION

I.RAJEEV BANSAL CASE:

1.In Rajeev Bansal VS Union Of India And 3 Others WRIT TAX No. - 1086 of 2022 dated 22.02.2023 there are **three very interesting paras** which censure CBDT for its executive overreach in interpreting Ashish Agarwal decision as well as the Statute.In my view ,it is gross abuse of process of a Court and seriously undermines their judicial wisdom in framing Instructions u/s 119.[Analysis part in the judgement starts from para 57 thereof].

2.Let us look at what the Court held:

‘’**89**. At the cost of repetition, it may be noted here that the ApexCourt has permitted the revenue to proceed further with the reassessment proceedings under the substituted provisions of Sections 147 to 151 of the Income Tax Act as per the Finance Act, 2021, **subject to compliance of all the procedural requirements and the defences, which may be available to the assessee under the substituted provisions of the Income Tax Act and which may be available under the Finance Act, 2021 and in laws.**

90. Now coming to the CBDT Instructions dated 11.5.2022 is concerned, we find that **the third bullet to clause (6.1)** which states that the Apex Court has allowed time extension provided by TOLA and the “extended reassessment notices” will travel back in time to their original date when such notices were to be issued and then Section

149 of the Act is to be applied at that point, is **a surreptitious attempt to circumvent the decision of the Apex Court The observations in paragraph '7' of the judgment in Ashish Agarwal (supra) of the Apex court has been noted in piecemeal in the said bullet point to clause (6.1) of the CBDT instructions dated 11.5.2022 to give it a distorted picture.**

91. The directions issued in clause 6.2 to deal with the cases of the assessment years 2013-14 to 2017-18 are based on the misreading of the judgment of the Apex Court in Para 6.1 of the Instructions.Terming reassessment notices issued on or after 1.4.2021 and ending with 30.6.2021 as "extended reassessment notices", within the time extended by the Enabling Act (TOLA 2020) and various notifications issued thereunder, **in Para 6.1 is an effort of the revenue to overreach the judgment of this Court in Ashok Kumar Agarwal (supra) as affirmed by the Apex court in Ashish Agarwal (supra).**

92. In any case, the CBDT Instruction No. 1/2022 dated 11.5.2022, issued in exercise of its power under Section 119 of the Income Tax Act, **as per own stand of the revenue, is only a guiding instruction** issued for effective implementation of the judgment of the Apex Court in Ashish Agarwal (supra). **The instructions issued in the offending clauses (third bullet to clause 6.1) and clause 6.2 (i) and (ii), being in teeth of the decision of the Apex Court have no binding force.''**

[NOTE: The stand of the revenue is astonishing saving your face stand where the remedy is worse than the disease.How can a 119 instruction be a ''guiding'' instruction where the very language of the statute and settled judgements like UCO bank (1999) 237 ITR 0889(SC)have held otherwise.The stand is a joke,and they got lucky that the faux pa escaped a

Court censure for self contradiction.**]**

II.The instruction in question:

3.INSTRUCTION REGARDING IMPLEMENTATION OF JUDGMENT OF HON'BLE SUPREME COURT, DATED 4-5-2022 (UNION OF INDIA V. ASHISH AGARWAL [2022] 138 TAXMANN.COM 64)

INSTRUCTION NO. 1/2022 [F.NO. 279/MISC/M-51/2022-ITJ], DATED 11-5-2022

1. Hon'ble Supreme Court, *vide* its judgment dated 4-5-2022 (2022 SCC Online SC 543), in the case of Union of India v. Ashish Agarwal has adjudicated on the validity of the issue of reassessment notices issued by the Assessing Officers during the period beginning on 1st April, 2021 and ending with 30th June, 2021, within the time extended by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act. 2020 [hereinafter referred to as "TOLA"] and various notifications issued thereunder (these reassessment notices hereinafter referred to as "extended reassessment notices").

2. These extended reassessment notices were issued by the Assessing Officers under the provision of section 148 of the Income-tax Act. 1961 (hereinafter referred to as "the Act") following the procedure prescribed under various sections pertaining to reassessment namely sections 147 to 151, as they existed prior to their amendment by the Finance Act. 2021 (hereinafter referred to as "old law"). With effect from 1st April 2021, the old law has been substituted with new sections 147-151 (hereinafter referred to as the "new law").

3. Hon'ble Supreme Court has held that these extended reassessment notices issued under the old law shall be deemed to be the show cause notices issued under clause (*b*) of section 148A of the new law and has directed Assessing Officers to follow the procedure with respect to such notices. It has also held that all the defences available to assessees under section 149 of the new law and whatever rights are available to the Assessing Officer under the new law shall continue to be available. Hon'ble Supreme Court has passed this order in exercise of its power under Article 142 of the Constitution of India.

4. The implementation of the judgment of Hon'ble Supreme Court is

required to be done in a uniform manner. **Accordingly, in exercise of its power under section 119 of the Act, the Central Board of Direct Taxes (hereinafter referred to as "the Board") directs that the following may be taken into consideration while implementing this judgment.**

5. Scope of the judgment:

5.1 Taking into account the decision of the Hon'ble Supreme Court in various paragraphs. it is clarified that the judgment applies to all cases where extended reassessment notices have been issued. This is irrespective of the fact whether such notices have been challenged or not.

6. Operation of the new section 149 of the Act to identify cases where fresh notice under section 148 of the Act can be issued:

6.1 With respect of operation of new section 149 of the Act, the following may be seen:

- Hon'ble Supreme Court has held that the new law shall operate and all the defences available to assessees under section 149 of the new law **and whatever rights are available to the Assessing Officer under the new law shall continue to be available.**
- Sub-section (1) of new section 149 of the Act as amended by the Finance Act, 2021 (before its amendment by the Finance Act, 2022) reads as under:—

  149. (1) No notice under section 148 shall be issued for the relevant assessment year. —

  (*a*) if three years have elapsed from the end of the relevant assessment year unless the case falls under clause (*b*);

  (*b*) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year:

  Provided that no notice under section 148 shall be issued at any time in a case for the relevant, assessment year beginning on or before 1st day of April, 2021. if such notice could not have been issued at that time on account of being beyond the time limit

Provided that no notice under section 148 shall be issued at any time in a case for the relevant, assessment year beginning on or before 1st day of April, 2021. if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (*b*) of sub-section (1) of this section, as they stood immediately before the commencement of the Finance Act, 2021.

- **Hon'ble Supreme Court has upheld the views of High Courts that the benefit of new law shall be made available even in respect of proceedings relating to past assessment years. Decision of Hon'ble Supreme Court read with the time extension provided by TOLA will allow extended reassessment notices to travel back in time to their original date when such notices were to be issued and then new section 149 of the Act is to be applied at that point.**

6.2 Based on above, the extended reassessment notices are to be dealt with as under:

(*i*) AY 2013-14, AY 2014-15 and AY 2015-16: Fresh notice under section 148 of the Act can be issued in these cases, with the approval of the specified authority, only if the case falls under clause (*b*) of sub-section (I) of section 149 as amended by the Finance Act, 2021 and reproduced in paragraph 6.1 above. Specified authority under section 151 of the new law in this case shall be the authority prescribed under clause (*ii*) of that section.

(*ii*) AY 16-17. AY 17-18: Fresh notice under section 148 can be issued in these cases, with the approval of the specified authority, under clause (*a*) of sub-section (1) of new section 149 of the Act, since they are within the period of three years from the end of the relevant assessment year. Specified authority under section 151 of the new law in this case shall be the authority prescribed under clause (*i*) of that section.

7. Cases where the Assessing Officer is required to provide the information and material relied upon within 30 days:

7.1 Hon'ble Supreme Court has directed that information and material is required to be provided in all cases within 30 days. However, it has also been noticed that notices cannot be issued in a case for AY 2013-14, AY 2014-15 and AY 2015-16. if the income escaping assessment, in that case for that year, amounts to or is likely to amount to less than fifty lakh rupees. **Hence, in order to reduce the compliance burden of**

assessees, it is clarified that information and material may not be provided in a case for AY 2013-14. AY 2014-15 and AY 2015-16, if the income escaping assessment, in that case for that year, amounts to or is likely to amount to less than fifty lakh rupees. **Separate instruction shall be issued regarding procedure for disposing these cases.**

8. Procedure required to be followed by the Assessing Officers to comply with the Supreme Court judgment:

8.1 **The procedure required to be followed** by the Jurisdictional Assessing Officer/Assessing Officer, in compliance with the order of the Hon'ble Supreme Court, is as under:

- The extended reassessment notices are deemed to be show cause notices under clause (*b*) of section 148A of the Act in accordance with the judgment of Hon'ble Supreme Court. Therefore, all requirement of new law prior to that show cause notice shall be deemed to have been complied with.
- The Assessing Officer shall exclude cases as per clarification in paragraph 7.1 above.
- Within 30 days *i.e.* by 2nd June, 2022, the Assessing Officer shall provide to the assessees, in remaining cases, the information and material relied upon for issuance of extended reassessment notices.
- The assessee has two weeks to reply as to why a notice under section 148 of the Act should not be issued, on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year The time period of two weeks shall be counted from the date of last communication of information and material by the Assessing Officer to the assessee.
- In view of the observation of Hon'ble Supreme Court that all the defences of the new law are available to the assessee, **if assessee makes a request** by making an application that more time be given to him to file reply to the show cause notice, then such a request shall be considered by the Assessing Officer on merit and time may be extended by the Assessing Officer as provided in clause (*b*) of new section 148A of the Act.
- After receiving the reply, the Assessing Officer shall 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 o the Act. The Assessing Officer is required to pass an order under

After receiving the reply, the Assessing Officer shall 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 o the Act. The Assessing Officer is required to pass an order under clause (*d*) of section I48A of the Act to that effect, with the prior approval of the specified authority of the new law. This order is required to be passed within one month from the end of the month in which the reply is received by him from the assessee. In case no such reply is furnished by the assessee, then the order is required to be passed within one month from the end of the month in which time or extended time allowed to furnish a reply expires.

- If it is a fit case to issue a notice under section 148 of the Act, the Assessing Officer shall serve on the assessee a notice under section 148 after obtaining the approval of the specified authority under section 151 of the new law. The copy of the order passed under clause (*d*) of section 148A of the Act shall also be served with the notice u/s 148.
- If it is not a fit case to issue a notice under section 148 of the Act, the order passed under clause (*d*) of section 148A to that effect shall be served on the assessee.

Tanay Sharma
DCIT (OSD), ITJ-I

III.MISREADING AND MISAPPLYING:

4.Para 7 in Ashish Agarwal misread and misapplied in above Instruction PER COURT:

''7. Thus, the new provisions substituted by the Finance Act, 2021 being remedial and benevolent in nature and substituted ***with a specific aim and object to protect the rights and interest of the assessee as well as and the same being in public interest****, the respective High Courts have rightly held that the benefit of new provisions shall be made available even in respect of the proceedings relating to past assessment years, provided section 148 notice has*

been issued on or after 1st April, 2021. We are in complete agreement with the view taken by the various High Courts in holding so."

IIIA. ANOTHER MISREADING:

5. Also **misreading and part reading of para 10(iv)**in my view:

10."(iv) ***All defences which may be available to the assesses including those available under section 149 of the IT Act and all rights and contentions which may be available to the concerned assessees and Revenue*** *under the Finance Act, 2021 and in law shall continue to be available."*

IV.**Function and scope of delegated legislation** :

6. S 119 narrowly and s 298 broadly provide for what we may call as delegated legislation.That is thus in focus. Bhagwati Dan Charan has written a fine article on **Doctrine of Permissible Limits Under Delegated Legislation** (available online on Legal Service India.com.Extracts are provided as under with grateful acknowledgment and due credit:)

" *Legislation by the executive branch or a statutory authority or local or other body under the authority of the competent legislature is called Delegated legislation. An Act of Parliament creates the framework of a particular law and tends only to contain an outline of the purpose of the Act.* ***By Parliament giving authority for legislation to be delegated it enables other persons or bodies to provide more detail to an Act of Parliament.*** *Parliament thereby, through primary legislation (i.e. an Act of Parliament), permit others to make law and rules through delegated legislation. The Legislature is quite competent to delegate to other authorities. To frame the rules to carry out the law made by it.*

*In **D. S. Gerewal v. The State of Punjab , K.N. Wanchoo,** the then justice of the Hon'ble Supreme Court dealt in detail the **powers of delegated legislation under the Article 312** of Indian Constitution.* ***In England, the parliament being supreme can delegated any amount of powers because there is no restriction.*** *On the other hand in America, like India, the Congress does not possess uncontrolled and unlimited powers of delegation. In **Panama Refining Co. v. Rayans, the Supreme court of the United States** had held that the Congress can delegate legislative powers to the Executive subject to the condition that **it lays down the policies and establishes standards while leaving to the administrative authorities the making of subordinate rules within the prescribed limits.''***

V.KEENARA INDUSTRIES DECISION:

7.In an earlier decision in **KEENARA INDUSTRIES PRIVATE LIMITED V THE INCOME TAX OFFICER, WARD 1(1)(3), SURAT R/SPECIAL CIVIL APPLICATION NO. 17321 of 2022 With ors dated 07/02/2023** the hon'ble Court relied on the celebrated decision of **Vasu Dev Singh and Ors.vs. Union of India and Ors., reported in (2006) 12 SCC 753(can see para 40 of Keenara.)**

7.1 The Apex Court laid down in regard to delegated legislation as follows:

"19.The nature of delegated legislation can be broadly classified as:

(i) the rule-making power;

(ii) grant of exemption from the operation of a statute.

20. In the latter category, the scope of judicial review would be wider as

the statutory authority while exercising its statutory power must show that the same had not only been done within the four-corners thereof but otherwise fulfils the criteria laid down therefor as was held by this Court, inter alia, in P.J. Irani vs. State of Madras & Anr.

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26.The law, which, therefore, has been laid down is that if by a notification, the Act itself stands effaced; the notification may be struck down. But that may not be the only factor.

31.In ***Indian Express Newspapers (Bombay) Pvt. Ltd. & Ors. etc. vs. Union of India & Ors. etc. [(1985) 1 SCC 641],*** *the question which arose for consideration therein was as to whether the exemption notification issued under Section 25 of the Customs Act, 1 962 was beyond the reach of the Administrative Law. Venkataramiah, J. speaking for the Bench, held that the Court exercising power of judicial review of a piece of subordinate legislation can exercise its jurisdiction, apart from the grounds on which a plenary legislation can be challenged, but if it is contrary to other statute or if it is so unreasonable so as to attract the wrath of Article 14 of the Constitution of India opined that the arbitrariness is not treated as a separate ground in India as it is a part of Article 14 of the Constitution stating:".A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc., etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into*

account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statue or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that
it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant."

7.2 It was categorically held that a subordinate legislation would not enjoy the same degree of immunity as a legislative act would.The Apex Court held that delegate must act within limit of authority and cannot go beyond the Act. **If a rule was beyond the power delegated under the Act, it becomes ultra vires.**

8.Also relied was CIT vs. Sirpur Paper Mills, reported in (1988) 172 ITR 762(see para 42)wherein the Apex Court held that it is a settled position of law that **when it conflict the rule must give way to the act**. In case of **CIT vs. S.Chennaippa Mudaliar, reported in (1969) 74 ITR 41(it was reiterated that)** essential legislative functions also cannot be delegated nor can the delegation extend repealing or altering in essential particulars of laws, which are already enforced. The relegated power cannot be exercised to nullify the commencement of the act.

VI.CONSTITUTIONAL LIMITS OF DELEGATED LEGISLATION:

9.A conjoint reading of all above leads to the inescapable conclusion that Constitutional limit for delegated legislation is

that the Rules / Regulations/Instructions/Circulars/Notifications should not be ultra vires the provisions of the parent Act and should not fail to conform to the substantive provisions of the statute. **Historically, delegated legislation was designed for prescribing matters of administrative and technical detail, not substantive policy decisions**. Gradually, however, the threshold between primary and delegated legislation has shifted.

10.We noted earlier,that in England the delegated or subordinate legislation power is too broad based .Studies conducted thereon indicates the arising complications.One such study,by **Hansard Society** informs us the perils.It found that **the powers given to Ministers to make delegated legislation are frequently too broad**. Too many Bills are now 'skeleton' Bills worldwide (or have 'skeleton' parts to them) that contain powers rather than policy – reflecting administrative convenience, incomplete policy development or Ministers' wish for the greatest freedom to act at a later date. **In 'skeleton' Bills the majority of the content is left to be decided at a later date through delegated legislation**.The skeletal drafting leads to broad based drafting of statutory clauses leading to possibility of exercise of a substantial discretion.**This exercise is via ''power to remove difficulties''** type of clause in substantive law.

11.Section 298

In context of Indian IT Act, s 298 was enacted with this purpose. The original section read as follows:

Power to remove difficulties.

298. (1) If any difficulty arises in giving effect to the provisions of this Act the Central Government may, by general or special order, do anything not inconsistent with such provisions which appears to it to be necessary or expedient for the purpose of removing the difficulty.

(2) In particular, and without prejudice to the generality of the foregoing power, any such order may provide for the adaptations or modifications subject to which the repealed Act shall apply in relation to the assessments for the assessment year ending on the 31st day of March, 1962, or any earlier year.

11.1 Later ,however, **subsection 3 & 4 were introduced by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1988 :**

[(3) If any difficulty arises in giving effect to the provisions of this Act as amended by the Direct Tax Laws (Amendment) Act, 1987, the Central Government may, by order, do anything not inconsistent with such provisions for the purpose of removing the difficulty:

Provided that no such order shall be made after the expiration of three years from the 1st day of April, 1988.

(4) Every order made under sub-section (3) shall be laid before each House of Parliament.]

12. S 119

S 119 is noted here as well as substituted by the Taxation Laws (Amendment) Act, 1970, w.e.f. 1-4-1971.:

Instructions to subordinate authorities.

119. (1) The Board may, from time to time, issue such orders,

instructions and directions to other income-tax authorities **as it may deem fit for the proper administration of this Act**……

12.1 The power is merely for ‘’proper administration of this Act.’’The instructions issued are however a legally unacceptable executive overreach on many a occasion leading to adverse decisions (supra).

13.The justification behind the censure:

Broadly-drawn delegated powers cannot be effectively scrutinised, and the **Statutory Instruments(SIs**) that emanate from these powers are subsequently also subject to little or no parliamentary scrutiny. Ministerial action is thus not accompanied by any meaningful parliamentary oversight.

VII. A HENRY VIII CLAUSE/POWER:

14.A ‘Henry VIII power’ is a delegated power in an Act of Parliament that enables Ministers to amend, repeal or otherwise alter the effect of primary legislation by delegated legislation.

14.1 The power to amend Acts of Parliament 'by order' is known as a 'Henry VIII power', is a slightly tongue in cheek reference to King Henry VIII's supposed preference for legislating via Royal Proclamations rather than through Parliament.

15.Any clause present in the statute, providing the executive rulemaking powers WITHOUT LEGISLATIVE SCRUTINY, is presumed to be the **Henry VIII Clause**. In India, Henry VIII clause was sparingly adopted but has seen an upturn of late.

16. ‘Henry VIII powers’ are now a relatively common feature of Acts of Parliaments esp in England. The scrutiny process for delegated legislation is couched in procedural language that is difficult for even the most seasoned observers of Parliament to understand: ‘made’ and

'laid' SIs; 'negative', 'affirmative', 'strengthened', 'enhanced' and 'super-affirmative' scrutiny procedures; 'prayers', 'fatal' and 'non-fatal' motions, and 'Henry VIII powers'. Such language is confusing.

17.The legislature drafts the statute in a skeletal manner. Therefore, the individual provisions are broadly termed. This ensures that the Executive gets to exercise a significant amount of discretion.The resultant danger is that power under the parent law allows the Executive to clarify or interpret the meaning of the provisions given.The ambiguity or generality or skeletality enables the Executive:the Central Govt. or CBDT in Indian context-to virtually amend the main law or make it amenable to their objectives. **Authorities may follow the dictatorial principle** and may create room for abuse of power by unelected officials.

VIII.JUDICIARY TO THE RESCUE:

Fortunately ,the Judiciary is a recourse available to the assessee but only to the well heeled ones-time,energy,effort and money(cost of litigation) required –is not within reach of many.

The delegated legislation can be challenged in India in the courts of law as being **unconstitutional, excessive and arbitrary**. It can be controlled by the Judiciary on either being **substantial ultra vires** or on the ground of **procedural ultra vires.**

IX. CONCLUSION:

The Enabling Acts of 2020 regarding s 148,the mass striking down thereof by HCs and the rescue by hon'ble SC by exercising Article 142 powers in Ashish Agarwal case are one set of illustrations.The second set of illustrations is the fancy footwork shown in Instruction of 11.5.2022 and their being called out by hon'ble Allahabad and Gujrat

HCs(uptill now)-these are classic illustrations of contradictory legislation,perils of delegated legislation and Henry VIII manoeuvre. This is an act that is being played out.Its time for exhibition of some common sense and self restraint by CBDT. Or is it a pipe dream?

The last word on the issue remains to be written.

Anadi Varma