Demystifying the decision of Supreme Court on reassessment notices

Controversy in brief:

1. To ease and provide relaxation in complying with the statutory time limits, the Government of India issued Ordinance[1], which was later ratified by the legislature as Relaxation Act[2]. Various notifications[3] were issued under the said Relaxation Act thereby extending timelines, inter alia for issuance of notices under section 148 of the IT Act.

2. Thereafter, the Legislature vide FA-21[4], which was passed on 28.03.2021 revamped the provisions of sections 147 to 151 with an avowed object of, (a) reducing litigation and compliance burden, remove discretion, impart certainty; and (b) provide ease of doing business.

3. The said amendments by FA-21 came into effect from 01.04.2021, however vide notifications dated 31.03.2021 & 27.04.2021 issued under the Relaxation Act, the Revenue issued an explanation that the notices under section 148 issued between 01.04.2021 to 30.062021 are to be governed by the provisions as existed prior to amendment.

4. Relying on such explanation in the notifications dated 30.03.2021 & 27.04.2021, the Revenue issued notices under section 148, which were impugned by the assesses before High Courts across the Country (PAN INDIA).

Unanimous decisions by High Courts:

5. The Division Benches of Courts[5] unanimously held the Explanations as ultra vires the Relaxation Act and consequently quashed all the notices issued under section 148 of the IT Act[6], observing:

   (a) The amendments by FA-21 are effective from 01.04.2021 and the executive cannot postpone applicably of such legislative amendments;

   (b) FA-21 has changed the procedure to be followed prior to issuance of notice under section 148 and the same is mandatorily required to be followed by the AOs.

6. Pertinently, all the High Courts granted liberty to Revenue to take further steps in the matter, if law permits.

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1 Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020
2 The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020
3 Notification No. 20 of 2021 dated 31.03.2021; Notification No. 38 of 2021 dated 27.04.2021
4 Finance Act, 2021
5 Ashok Kumar Agarwal vs. Union of India Through its Revenue Secretary & Ors. : Writ Tax No. 524/2021; Bpip Infra Pvt. Ltd. Vs. ITO: S.B. Civil Writ Petition No. 13297/2021 (Rajasthan); Dharmendra Gupta (Huf) v. Income-tax Officer*: [2022] 135 taxmann.com 219 (Rajasthan); Mon Mohan Kohli vs. ACIT & Anr.: W.P.(C) 6176/2021(Delhi); Bagari Properties & Investment Pvt. Ltd. vs. UOI: W.P.O. Nos. 244/2021 (Cal.); Sudesh Taneja vs. ITO & Anr.: D.B. C.W.P. No. 969/2022 (Rajasthan); Yuvraj vs. ITO & Ors.: W.P. No. 28293/2021 (Madhya Pradesh); Tata Communications Transformation Services Ltd. vs. ACIT: WP No. 1334 of 2021 (Bombay)
6 Income Tax Act, 1961

Observations by the Hon'ble Supreme Court:

7. Amongst all the High Courts, Revenue has assailed only the Judgment passed by the Hon'ble Allahabad High Court before the Hon'ble Supreme Court in the case of Ashish Agarwal[7].

8. The Hon'ble Supreme Court expressly concurred with the view taken by respective High Courts and has categorically held that, '*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.*'.

9. It was further observed that the Revenue ought to have issued the notices under section 148 under the substituted provisions of sections 147 to 151 as amended by FA-21. However, the Hon'ble Supreme Court reasoned that the respective High Courts instead of quashing and setting aside the reassessment notices ought to have passed an order construing the notices issued under the erstwhile provisions of the Act as those ***deemed*** to have been issued under section 148A of the Act, i.e., the amended provisions for the following reasons:
   - Judgments of several High Courts would result in no reassessment proceedings at all, even if same are permissible under the FA-21 and as per substituted sections 147 to 151; (pr. 8)
   - The Revenue cannot be left remediless, and the object and purpose of reassessment proceedings cannot be frustrated;
   - There appears to be genuine non-application of the amendments as the officers of the Revenue may have been under a bonafide belief that the amendments may not yet have been enforced;
   - Therefore, some leeway must be shown to the Revenue which the High Courts could have also done;
   - This would strike a balance between the rights of the Revenue as well as respective assessees, as approximately 90000 notices issued by Officers of the Revenue due to bonafide belief, would result loss to public exchequer.

10. The Hon'ble Supreme Court has held that this judgment will to be applicable PAN India and modify the judgments and orders passed by respective High Courts across the Country, irrespective of whether they have been assailed by the Revenue before the Hon'ble Supreme Court and the same would also apply to pending writ petitions before various High Court in which similar notices under section 148 issued after 01.04.2021 are under challenge.

11. In exercise of powers under Article 142 of the Constitution of India, the Hon'ble Supreme Court has modified the judgment to the following extent only:
    i. The section 148 notices issued under the unamended provisions shall be deemed to have been issued under section 148A of the Act as amended by FA 21 and shall be treated as show cause notices in terms of section 148A(b) of the Act;

[7] Union of India & Ors. vs. Ashish Agarwal: Civil Appeal No. 3005/2022

ii. The Revenue shall within thirty days from 04.05.2022, i.e., the date of the judgment, provide to the assessees the information and material relied upon by the Revenue;

iii. The assessees can reply to the aforesaid notices within two weeks thereafter;

iv. Requirement of conducting any enquiry with prior approval of specified authority as contemplated by section 148A(a) would be dispensed with as a one-time measure with respect to all 148 notices issued under the unamended provisions from 01.04.2021 till 04.05.2022, including those quashed by the High Courts;

v. The Revenue shall thereafter pass order under section 148A(d) of the Act;

vi. All defences and rights available to the assessees, in law, including under section 149, as amended by FA-21 shall be available.

Way forward:

12. Pursuant to the aforesaid directions by the Hon'ble Supreme Court, the following will be the course of action:

a. The notices which were originally issued under section 148 of the Act will be deemed to be notices issued under section 148A of the Act, subject to the condition that the AO by 03.06.2022 (within 30 days from 04.05.2022), provides the information and material relied upon by the Revenue, to the respective assessees.

b. The law as amended by Finance Act, 2021 mandates reopening on the basis of information which suggests that income chargeable to tax has escaped assessment, on the contrary law that existed prior thereto, mandated reopening on the basis of reason to believe that income has escaped assessment. Thus, there may be numerous cases where the reopening is not based on some specific information, but merely on the basis of reason to believe formed by the Assessing Officer, in such cases, the Assessing Officers will have to share copies of reasons to believe with the respective assessee.

c. In cases where (a) the reopening is not based on information or (b) such information/material is not self-explanatory, the AO will have to address some communication, so as to enable the assessee to furnish reply to the same, otherwise opportunity of being heard, under section 148A, will be rendered otiose.

d. After receiving such information/material relied upon by the Revenue, the assessee will be required to furnish its reply within two weeks. However, it has not been specified/clarified whether, as per the mandate of section 148A(b), the assessee can seek further time for furnishing its reply.

e. After receiving reply from the assessee, the AO is required to pass an order in terms of section 148A(d). However, since no timeline has been specified for passing of such order by the Assessing Officer, the timelines provided under section 148A(d), i.e., one month from the end of the month in which the reply has been furnished by the assessee, will have to be adhered to.

Defences available:

13. Following defences will generally be available to assessees:

a. As per the provisions of section 149, as amended by Finance Act, 2021, the Revenue will have no jurisdiction to issue notices for assessment years 2013-14 & 2014-15, as the time limit for issuance of notices for the said assessment years is barred in terms of sub-sections (a) & (b), read with the first proviso to section 149;

b. As regards, the notices pertaining to assessment year 2015-16, the limitation prescribed under section 149(a) of the Act has lapsed and very limited number of notices falling within the time limits specified under section 149(b) will survive, as the same is coupled with preconditions, viz. income likely to escape assessment should amount to Rs. 50 lakhs or more, the same should be represented in the form of asset, etc.

c. As regards, assessment years 2016-17 & 2017-18, since the limitation prescribed under section 149(a) has lapsed, it will be a matter of dispute whether the extension provided by the Relaxation Act will save the notices for these year under section 149(a). However, the applicability of extended period provided under section 149(b) will depend on the facts and circumstances of individual cases.

d. The precondition for conducting of an enquiry, if required, as a one-time measure has been dispensed with. However, the precondition for invoking the provisions of section 148A, which is existence of information which suggests that the income chargeable to tax has escaped assessment, has not been dispensed with. In cases where the reopening is not based on any such information, it can be argued that the same is outside the preview of section 148A.

e. Depending on facts and circumstances of respective cases, multiple arguments emanating from the amended provisions of section 147 to 151A can be raised.

14. Thus, further litigation is inevitable and cannot be ruled out.

For any details and clarifications, please feel free to write to:
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