New Reassessment regime: Analysis of *Ashish Agarwal* SC judgment and subsequent CBDT Instruction 1/20022

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Introduction

The provisions under the Income Tax Act, 1961 related to reopening of assessment in Sections 147, 148, 149 and 151 were substituted by a completely new regime through the Finance Act, 2021. The new provisions were effective from 1-04-2021 were prescribed under the same provisions (Sections 147-151), including a new provision Section 148A prescribing the procedure for reopening and reassessment proceedings.

Preceding the Finance Act, 2021, the CBDT felt empowered by COVID related Act to give an extension to allow notices to be sent under the old reassessment provision of Section 148 till 30-6-2021 though the new Finance Act ie new provisions were enacted with effect from 1-4-2021. End result is Assessing Officers all over India issued around 90,000 reassessment notices under the old provisions (S.148 Notice) between the period of 1-4-2021 and 30-6-2021, and the validity of the same was questioned because of the overriding effect of the Finance Act, 2021.

This Article throws light upon the somewhat controversial nature of the Supreme Court judgement of ***Union of India vs Ashish Agarwal (2022 SCC Online SC 543)*** wherein the Supreme Court revived the reassessments of assessees across India between 1-4-2021 and 30-6-2021 which had been struck down by HCs across the country. This judgment in *Ashish Agarwal* (supra) is analysed along with the subsequent CBDT Instruction 1/2022 issued by the Department following this judgment.

Analysis of the Old Provisions

In the old provision of Section 147 that was followed till 31-03-2021, if no scrutiny assessment were caried out, an assessment could be reopened only if six years from the end of the Assessment Year has not elapsed on the date of issuing the notice to the assessee under Section 148 and that too only if the AO has tangible material giving him a reason to believe assessment should be reopened and not merely a change of opinion on his/her part. An important judgment in this regard was the Full Bench of the Delhi High Court in ***CIT v. Kelvinator of India Ltd. (2002 (64) DRJ 109)*** which held that Section 147 does not give power to the Assessing Officer

to reopen a proceeding merely based on change of opinion, an appeal was preferred by the Department to the Supreme Court, and the Supreme Court in its landmark and oft-cited judgment in ***CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC)*** dismissed the appeal and held that the Assessing Officer has the power to reopen the proceeding provided that it satisfies the condition that there is "tangible material" based on which it can be concluded that there is escapement of income from assessment. The following observation was made by the Supreme Court in this judgement:

"5…. where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe"…….

Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open.

6. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place.

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."

Therefore, this judgment and many hundreds to follow provided checks and balances on reopening of assessments as envisaged under Section 147. It is crucial at this juncture to also note that, within the meaning of the proviso to Section 147, it was stated that, where there had already been a scrutiny, an assessment could be reopened if four years from the end of the Assessment Year has not elapsed on the date of issuing the notice to the assessee under Section 148, and this was so envisaged considering that an opportunity had already been given to the Assessing Officer to bring forth a case against the assesse. This too can be reopened only if there is tangible material that gives reason to make the conclusion about the assessee's income escapement and also importantly to record in the reasons for reopening as to what was the failure on the assessee's part in terms of disclosure of details as required by law.

Many Writs under Article 226 were being filed on reassessment orders u/S 147 where in the AO's sent notices and were not satisfied replies and Orders were passed against which assessee's only recourse was to file an appeal to the appellate authority (CIT(A)) however egregious the reopening Order was. The SC in its landmark judgement ***Gkn Driveshafts (India) Ltd. v. Income Tax Officer & Ors. ((2003) 259 ITR 19 (SC))***, laid down a procedure for reopening under Section 147 as follows:

"…However, we clarify that when a notice under Section 148 of the Income tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking Order before proceeding with the assessment in respect of the abovesaid five assessment years."

Having reiterated that reasons must be disclosed by the Assessing Officer for reopening the proceedings, and the entitlement of the assessee to file objections for the same to the reopening and the Department must dispose of the objections in a speaking Order. Against this speaking Order the assessee's came on Writ's if they found that the objections were not met soundly. Thus, neither was coming to the Writ Court too premature i.e., it was not merely at notice stage nor was it too late i.e., no Order had been passed for which appellate remedy available. This practice was set by GKN Driveshaft and reassessments practically thenceforth. The new provisions in S.148A, among many other sweeping changes, codified *GKN Driveshaft (supra)* under the new provisions of FinanceAct, 2021.

<u>Analysis of the New Provisions</u>

With respect to codification of Sections 148 and 148A following ***Gkn Driveshafts***, the provisions mandates that, before making any assessment under Section 147, the Assessing Officer must serve a notice to the assessee requiring him to file his return of income within specified time and before such notice, the Assessing Officer shall record his reasons for the same. While the earlier provision required the Assessing Officer to have reason to believe that there is escapement of income, the new provision required any information as specified under Explanation 1 to Section 148 to be present for there to be a reopening of the case. Furthermore, Section 148A which was inserted by the Finance Act, 2021 reiterates the procedure to be

followed by the Assessment Officer upon receiving such information, including conducting any inquiry regarding the information received, providing an opportunity of being heard to the assessee through serving of notice to showcause within the prescribed time in the notice (which is less than 7 days and not more than 30 days on the date of serving the notice or the time period till which time extension was received by the assessee), considering the reply given by the assessee and deciding on the basis of the material that is present, including the reply, about whether the case is fit for passing a notice under Section 148 (through passing an order within 1 month from the reply).

Apart from the codification of Sections 148 and 148A, Section 149 was further modified to state that any case can be reopened within three years from the time of end of relevant assessment year as under clause (a) of Section 149(1) if there is information with the Assessing Officer that suggests that there is escapement of income as provided under Explanation 1 to Section 148, and upto 10 years as provided in Clause (b) of Section 149(1) in certain exceptional cases, defined as circumstances where income chargeable to tax, within the meaning of "asset" that has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in that year. There were further sweeping changes brought into the provisions addressing or tackling many of the litigated points for which jurisprudence was available in plenty in favour of assessee.

The Relaxation Act following COVID-19

Considering the issues that arose because of the COVID-19 pandemic during the period from January 2020, the statutory limits that were provided under Section 149 of the Act could not be complied with by the individuals as well as the Government authorities. In order to deal with this issue, the Government of India introduced the Relaxation Act within the meaning of an ordinance being Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 (hereinafter referred to as TOLA), which was replaced by the Act. Thus as under Notification No. 38 of 2021 by the CBDT, the time limit for issuance of notice under Section 148 of the Act was extended to 30-06-2021.

Being followed by the Finance Act, 2021, this caused confusion as to how notices can be issued under the old provision when the new provisions came into existence under the Finance Act in 1-4-2021, while the new provisions would under normal circumstances have an overriding effect on the old provisions. Between 1-4-2021 and 30-6-2021, around 90,000 notices were issued by the Assessing Officers to the assessees under the old scheme, and a huge number of

writ petitions were filed before various High Courts challenging the validity of such notices when the new provisions would have an overriding effect on the old provisions regarding reopening of proceedings.

Judgements regarding Sections 148 and 148A

Following the confusion, a number of High Courts held in favour of the assessee and quashed such notices which were made under the old provisions between 1-4-2021 and 30-6-2021, including the High Court of Allahabad in ***Ashok Kumar Agarwal v. Union of India (W.P.(T) No. 524 of 2021)***, the High Court of Madras in ***Vellore Institute of Technology v. CBDT (2021) 436 ITR 483)***, the High Court of Calcutta in ***Manoj Jain v. Union of India (W.P.A. No. 11950 of 2021)***, the High Court of Delhi in ***Mon Mohan Kohli v. ACIT (2021 SCC OnLine Del 4717)***, the High Court of Rajasthan in ***Bpip Infra Pvt. Ltd. v. Income Tax Officer & Ors. (W.P.(C) No. 13297 of 2021)***, and the High Court of Bombay in ***Tata Communications Transformation Services v. ACIT (W.P.(C) No. 1334 of 2021).*** These judgements held that, considering that the Finance Act of 2021 has come into force, the pre-amendment provisions cannot be revived through the notification of the CBDT as they had ceased to exist, since deferring the coming into force of the amendments under the Finance Bill 2021 in light of the CBDT notification would only create a precedent for executive discretion conferred upon authorities to override a legislative mandate.

In contrast, the Chhattisgarh High Court in ***Palak Khatuja v. Union of India (W.P.(T) No. 149 of 2021)*** ruled in favour of the Department, stating that the notices that were issued under the old provisions from 1-4-2021 would be valid, holding that the TOLA was a conditional legislation that was enacted during COVID-19 for flexibility and it would be applicable even after the Finance Bill 2021.

Following this, the Supreme Court in the landmark judgment of ***Union of India v. Ashish Agarwal (2022 SCC Online SC 543)*** reversed the various High Court judgements made in favour of the assessee and held that the reassessments would now be valid in the eyes of law.

Analysis of Union of India v. Ashish Agarwal

In the judgement of ***Union of India v. Ashish Agarwal (2022 SCC Online SC 543),*** the Supreme Court effectively validated the reassessments made by the Assessing Officers after 1-4-2021 while making the following key observations:

"8. However, at the same time, the judgments of the several High Courts would result in no reassessment proceedings at all, even if the same are permissible under the Finance Act, 2021 and as per substituted sections 147 to 151 of the IT Act. The Revenue cannot be made remediless and the object and purpose of reassessment proceedings cannot be frustrated. It is true that due to a bonafide mistake and in view of subsequent extension of time vide various notifications, the Revenue issued the impugned notices under section 148 after the amendment was enforced w.e.f. 01.04.2021, under the unamended section 148. In our view the same ought not to have been issued under the unamended Act and ought to have been issued under the substituted provisions of sections 147 to 151 of the IT Act as per the Finance Act, 2021. 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, we are of the opinion that some leeway must be shown in that regard which the High Courts could have done so**. Therefore, instead of quashing and setting aside the reassessment notices issued under the unamended provision of IT Act, the High Courts ought to have passed an order construing the notices issued under unamended Act/unamended provision of the IT Act as those deemed to have been issued under section 148A of the IT Act as per the new provision section 148A and the Revenue ought to have been permitted to proceed further with the reassessment proceedings as per the substituted provisions of sections 147 to 151 of the IT 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 sections 147 to 151 of the IT Act and which may be available under the Finance Act, 2021 and in law…"*

In the instant case, the phrases "due to a bonafide mistake", "genuine non-application of amendments", "bonafide belief that the amendments may not yet have been enforced" and "leeway must be shown" should be given due consideration, as there would be ramifications following this landmark judgement regarding this matter. Apart from the evident impact that the reassessments after 1-4-2021 would be held valid, this also sets a possible worrying precedent giving leeway to the Revenue in this regard, stating that the Revenue cannot be left without any remedy and suffer the brunt for an act that was done in bonafide belief, which would impact future assessments as well.

This judgement is controversial and hotly debated because of the following contentions:

1. **Holding "Leeway must be shown":**

By using the phrase "leeway must be shown", the Court is overturning the concept of strict interpretation of taxing statute and also worrying providing for Revenue to get a preferential treatment in this regard, while considering that there was a mistake made in good faith by the Department. However, there is no necessity or question regarding preferential treatment to be given to either of the parties seems to completely deviate from the existing law. Even considering the extraordinary power that is available to the Court, the law ought not be construed in a manner that goes against the very intention of the current position of law that exists.

2. **Holding Revenue made a "Bonafide Mistake":**

In the judgement, the phrase "bonafide mistake" has been used. Firstly, with respect to this usage, the Apex Court has referred to the actions of the Revenue as a mere "mistake" as the Revenue though one has to consciously exercise the power to issue a notice under a particular legal framework. Considering that it was a conscious action, it cannot be stated to a "mistake" thereafter, especially considering that the Finance Act, 2021 is a legislative mandate that the Revenue has to be follow. Secondly, *ignorantia juris non excusat*, i.e., ignorance of law is no excuse, and the Supreme Court ought not to provide a leeway going beyond this general principle even if there is a mistake. Accepting this to be a mistake and letting one party avoid its consequences would make way for it becoming a practice.. Tax statutes are given a strict interpretation and such a defense could not be thought of by the assessee when it came to specific timelines, returns, notices or any such pari materia provision applicable to assessee. It would not be amiss to point out that tomorrow if Revenue sends a notice beyond time-limit it ought not be given leeway based on this judgment just because the time-limits were amended recently and Revenue made a bonafide mistake. The assessee's cannot also use this judgment to not follow the law that is laid down. In fact, only exemption provisions in the tax statute were earlier considered to construed beneficially for the assessee's and even that has been tossed out of the window by decisions of SC in _____ and recently in _____ . Thus to take a completely different view adopting a liberal interpretation in this case is inconsistent and illogical in our view.

3. **Use of Article 142:**

It is a well-established position of law from the case of ***Supreme Court Bar Association v. Union of India ((1998) 4 SCC 409)*** that the Supreme Court's exercise of its extraordinary power to do complete justice under Article 142 must be exercised sparingly in cases of manifest

illegality, manifest want of jurisdiction or some blatant injustice and must not come directly in conflict with what has been expressly provided in a statute with respect to a particular subject.

In light of this use of extraordinary power that the Supreme Court relies on to enforce its decision on all reassessment notices that were issued after 1-04-2021, the granting of "leeway" to the Revenue is surprisingly and may likely have significant consequences in future tax cases.

Moreover, it is contended that it was never envisaged by the makers of the Constitution to use Article 142 in tax cases. As a means of analysis, the following are certain cases in which the power under Article 142 has been used:

a. ***M Siddiq (D) Thr Lrs v. Mahant Suresh Das & Ors. (Ayodhya judgement) (2019 SCC Online 1440)***
b. ***Union Carbide Corporation v. Union of India (Bhopal Gas Tragedy judgement) (AIR 1988 SC 1531)***
c. ***Coal Block Allocation Case***
d. ***Ban on sale of alcohol along National and State Highways***

Considering the previous cases in which Article 142 has been used, its usage in tax seems a bit far-fetched, even for administrative reasons.

4. Procedure under Section 148A modified:

Finally, in the judgement, the Court directed that:

"8… (ii) The requirement of conducting any enquiry with the prior approval of the specified authority under section 148A(a) be dispensed with as a one-time measure vis-à-vis those notices which have been issued under Section 148 of the unamended Act from 01.04.2021 till date, including those which have been quashed by the High Courts;"

Not only was this enquiry and approval presumed and done away with, surprisingly, but the SC held that the assessing officer shall, within thirty days from today provide to the respective assessees information and material relied upon by the Revenue, so that the assesees can reply to the show-cause notices within two weeks thereafter. Neither 30 days nor 2 weeks is mentioned in Section and these seem like timelines that SC came up with to inject some practicality into the exercise.

Analysis of the CBDT Instruction following the Judgement

Following the judgement by the Supreme Court in ***Ashish Agarwal***, the CBDT issued Instruction No. 01/2022 dated 11.05.2022 which contained the guidelines of implementation of the judgement. However, this Instruction leads to further complications due to the nature of its wordings.

Paragraph 6.2 of the CBDT Instruction iterates manner in which the impugned reassessment notices that were issued are to be dealt with, and reads as follows:

"(i) AY 2013-14, AY 2014-15 and AY 2015-16: Fresh Notice u/s 148 can be issued in these cases, with the approval of the specified authority, only if the assessing officer has in his possession books of accounts or other documents or evidence which reveal that the income chargeable to tax, represented in the form of an asset, which has escaped assessment, amounts to or is likely to amount to fifty lakh rupees or more, for that year.

(ii) AY 2016-17, AY 2017-18: Fresh Notice u/s 148 can be issued in these cases, with the approval of the specified authority, since they are within a period of three years from the end of the relevant assessment years."

A reading of this paragraph shows that it contravenes the limitation periods that are to be followed for reassessment notices on or after 1-4-2021 within the meaning of Section 149 of the Income Tax Act, in accordance with the Finance Act, 2021.

In light of the above, Section 149 of the Income Tax Act, in accordance with the Finance Act, 2021 is analyzed. The Proviso to Section 149 reads as follows:

"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."

Therefore, taking into account the first proviso to Section 149 of the Income Tax Act, in accordance with the Finance Act, 2021, no notice can be issued under Section 148 for the Assessment years 2013-14 and 2014-15 on or after 1-4-2021 even if the escapement of income exceeds Rs. 50 lakhs. The CBDT Instruction however completely ignores the first proviso as

the scope as under Assessment years 2013-14 and 2014-15, and this is a mathematical calculation error.

Similarly, in the case that the alleged income is less than or equal to Rs. 50 lakhs, the implication is that any notice under Section 148 being issued on or after 1.4.2021 cannot be issued for Assessment Year 2017-18 and the years preceding that. The CBDT Instruction seems to however wrongly includes Assessment Years 2016-17 and 2017-18 as falling within the three-year mark.

Therefore, reassessment notices for the Assessment Years 2013-14 and 2014-15 would not be valid whatever be the case (even if the escapement of income exceeds 50 lakhs) as they could not have been reopened under old provisions and hence by new one too, and reassessment notices for the Assessment Years 2015-16, 2016-17 and 2017-18 can be made only if the escaped income exceeds Rs. 50 lakhs and not otherwise, and thus there seems to be conflicting view taken in the CBDT Instruction viz a viz the new reassessment provisions which was never disturbed by the SC. It is clear that the CBDT Instruction No. 01/2022 dated 11.05.2022 has opened up a plethora of litigation challenges in the near future.

Conclusion

The *Ashish Agarwal* SC judgement is quite controversial in its sweep by considering Revenue's actions of sending notice under previous regime as a bonafide mistake. It is our opinion that the taxing statues ought to be construed strictly as has always been the case and that the decision by SC in *Ashish Agarwal* deviates from well-accepted jurisprudence in this regard and its outcome may have unfortunate ramifications in future decisions which may follow its rationale. Further, the subsequent Instruction 1/2022 by the CBDT giving effect to the Ashish Agarwal judgment also has a number of issues by taking positions contrary to the provisions of the Act and it is likely the Instruction will see a lot of legal challenges in the near future.