Reassessment Proceedings in New Regime

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India's rise in the 'Ease of Doing Business 2020' report of the World Bank has been tremendous. India has figured among the top 10 performers in the last there editions of the report, currently standing at 63rd position, yet India's rank in 'paying taxes' which is one of the important indicator in measuring the overall ease of doing business is lowly 115 out of the 190 economies. The report impresses upon the importance of an efficient tax administration. In their own words

> *"Taxation not only pays for public goods and services; it is also a key ingredient in the social contract between citizens and the economy. How taxes are raised and spent can determine a government's very legitimacy".* [1]

The Indian Government it seems were already aware of this 'taxing' situation and introduced a slew of measures including amendments in legislations in an attempt to not only streamline the tax collection and administration but also to reduce litigation and implement efficient dispute resolution. As explained in Memorandum to Finance Bill, 2021

> *"It is expected that the new system would result in less litigation and would provide ease of doing business to taxpayers"* [2]

This article is an attempt to highlight the departures made in the new reassessment system from the old reassessment scheme to reduce litigation and also addresses a few important issues arising out of such departures. New assessment system for search and seizure cases are not part of this article and would be covered separately.

Section 147

Reason to believe done away with?

Section 147 prior to its substitution by Finance Act, 2021 prescribed the need for an Assessing officer, before assuming jurisdiction, to have "reason to believe" that any income chargeable to tax has escaped assessment. This "reason to believe" had to be reduced to writing by the Ld. AO as expressed by sub-section 148(2) before issue of notice u/s 147.

This requirement to form reason to believe seems to have been omitted in the newly substituted section 147 as the words reason to believe have been omitted in the new section 147 and no express requirement has been laid to "record reasons" in section 148 as well.

The question that arises is whether the legislature has altogether erased the condition of "recording reasons" before assessment or reassessment of the income of an assessee under the section 147? From bare reading of proviso to section 148 of the new regime it is clear that the jurisdictional Assessing

officer proposing to issue notice u/s 147 must possess information which suggests that the income chargeable to tax has escaped assessment. However, unlike sub-section (2) of the erstwhile section 148, the new reassessment scheme does not lay any express requirement to record reasons; but it has been replaced with a robust system of checks and balances. This system may however collapse if the requirement to reduce in writing "information which suggests that the income chargeable to tax has escaped assessment" is removed entirely. For instance, proviso to new section 148 requires the Assessing Officer to obtain prior approval of the specified authority before issue of notice. Likewise, newly introduced section 148A mandates the Assessing Officer to provide an opportunity of "being heard" to the assessee, with the prior approval of specified authority, before issuing notice u/s 148 as to why such notice may not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment. It is implied that such notice given to the assessee at this stage must reveal all the material that the assessing officer possesses in the form of "information" as contemplated under section 148 and it must also reveal why in the opinion of Assessing officer the information available with him suggests that income chargeable to tax has escaped assessment. Any notice bereft of this "information" expressly showing how such information reveals that the income has escaped assessment, will stand in violation of the principles of natural justice. In effect the notice as contemplated under section 148A(*b*) is as good as a deterrent as "reasons to be recorded" in the old reassessment scheme and their seems to be an implied condition of reducing the same in writing.

Further in clause (*c*) and (*d*) of Section 148A, the legislature has provided that the Assessing Officer after considering the material available and the reply of the assessee furnished in response to the notice under section 148A(*b*), has to decide whether to issue notice under section 148 "by passing an order". The phrase "by passing the order" is a clear mandate to the Assessing office to pass a separate order indicating his decision in a speaking order. It is pertinent here to note that the legislature has provided a separate clause mandating the Assessing officer to "consider the reply of assessee" despite the same being necessarily implied. The importance laid by the legislature on consideration of the assessee's reply is amply clear from clause (*c*) of the section. To begin with, opportunity of being heard to the assessee with respect to information available with the Assessing Officer can only be provided when such information is reduced to writing and already brought on record by him. In addition, it is then imperative that the order passed by the Assessing officer under section 148(*d*), must reflect that the Assessing Officer has "considered" the reply of the assessee and either accepted the reply or rejected the contentions of the assesse, with sufficient reasons and such reflection can be made evident only when it is reduced in writing. From the above it can be concluded that the requirement to form "reason to believe" and to reduce such reasons in writing is not removed entirely but this safeguard has only been strengthened by providing a full-fledged framework for the Assessing Officer to adhere to before exercising powers under section 147.

No more litigation on subjective approach of Assessing Officer?

In the old regime there has been prolonged litigation on questions such as whether the AO has acted in good faith while recording the reasons, whether the reassessment powers vested by the statue on the AO are exercised merely on rumors or suspicions, whether the belief entertained by the Assessing Officer are not arbitrary or irrational, whether the materials having a natural and live nexus with the formation of the belief were suitably disclosed by the Assessing Officer in the reasons, whether the 'reason to believe' are merely 'reason to suspect', whether the AO has independently applied his mind while

forming 'reason to believe' etc. This was due to the fact that the term 'reason to believe' was not defined in the Act.

Unlike the reason to believe which was not codified by the legislature and which was largely a function of various judicial pronouncements, the "Information suggesting that income chargeable to tax has escaped assessment" as referred in the new section 148 is defined in *Explanation 1* to section 148, which sets out two sources of such information.

(*i*) Any information flagged by the CBDT in accordance with the risk management strategy that may be notified by the Board from time to time.

(*ii*) Any final objection raised by CAG that assessment has not been made in accordance with the provision of the Act. It is pertinent here to note that the objection of the CAG is not limited to any income that has escaped assessment but covers any situation where the assessment has not been made in accordance with the provisions of the Act.

Consequently, it appears that by strictly defining the paths leading to the 'Information' as stipulated in the Act, the legislature has narrowed the scope for opening assessments under section 147 and would most likely eliminate the litigation caused due to ambiguity of the term.

A more systematical/well laid down approach??

Under the old regime of reassessment, though the requirement to record reasons was explicitly stated, the Act was silent on whether these reasons should be provided to the Assessee more so, when specifically asked for. Consequently, it became a settled position that an assessee, after filing their income-tax return, if he so desires can seek reasons for issuing notices which the Assessing Officer was bound to furnish within a reasonable time. On receipt of reasons, the noticee was entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order[3]. Thus, the entire reassessment proceedings were quashed in case the AO failed to provide copy of reasons to the assessee or failed to pass a speaking order disposing off the objections raised and that too in a time bound manner due to no express provision in law.

Under the revised reassessment regime, the legislature in its wisdom has installed a GPS enabled navigation system in the form of section 148A to be observed by the Assessing Officer, before assuming jurisdiction under section 147 of the Income-tax Act. The section provides a series of steps which acts as precursors, before the proceedings under section 147 are initiated. These steps are

(1) conducting an enquiry, if required, with the prior approval of specified authority with respect to the information which suggests that income chargeable to tax has escaped assessment;

(2) providing an opportunity to assessee, with the prior approval of specified authority, to explain why notice under section 148 should not be issued to the assessee on the basis of information which suggest that income chargeable to tax has escaped assessment as a result of enquiry conducted above;

(3) decide by passing a speaking order, with the prior approval of specified authority, on the basis of material available on record and the replies filed by the assessee as to whether such notice u/s 148 should be issued to the assessee.

Thus, the statute has in the new reassessment regime provided a systematic and well laid out structure to reduce prolonged litigations and potential loss of revenue due to administrative negligence caused due to ambiguous provisions in statute.

Whether addition can be made on any other issues that comes to AO's notice subsequently in the course of proceedings?

As highlighted above in the memorandum explaining Finance Bill the expectation, from the new system is to reduce litigation and promote ease of doing business. Therefore, this legislation has been drafted in a manner which reduces ambiguity and indistinctness. This issue that whether an Assessing Officer can make addition on any issue, which has escaped assessment, and that comes to AO's notice subsequently in the course of proceedings has been addressed by way of an explanation to section 147 which provides that the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, which comes to his notice subsequently in the course of the proceedings under this section, irrespective of whether provisions of section 148A have not been complied with. Thus, to this extend there is no ambiguity.

The second question that arises is whether any addition can be made in regards with any subsequent issue, which is discovered to have escaped assessment during the course of assessment proceedings, when no addition is made in the hands of the assessee in regards with the initial issues, regarding which the information was available with AO and prior approval was sought from the specified authorities. The genesis of this prolonged litigated issue can be traced from word 'also' used in the erstwhile section 147. In the case of *CIT* v. *Jet Airways (I) Ltd*[4], Hon'ble Bombay High Court has held that the use of words 'and also' in the statute is indicative of the position that the assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the proceedings as having escaped assessment, as the Legislature did not rest content by merely using the word 'and'. The words 'and' as well as 'also' have been used together and in conjunction. If the income, the escapement of which was the basis of the formation of the reason to believe, is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. Similar ratios were given in the case of *Ranbaxy Laboratories Ltd*. v. *CIT*[5], High Court of Delhi and several other cases. However, in *N. Govindaraju Raju* v. *ITO*[6], Hon'ble High Court held that *Explanation 3* was inserted in section 147 by which it has been clarified that Assessing Officer can assess income in respect of any issue which has escaped assessment and also 'any other income' which comes to his notice subsequently during course of proceedings. Due to this ambiguity in law and doubt as to accuracy of interpretation of section 147, Hon'ble Delhi High Court in the case of *Pr. CIT* v. *Jakhotia Plastics (P.) Ltd*[7]., referred the matter to full bench.

The above controversial issue seems to have been negated by the newly introduced scheme as new section 147 is not similarly worded and thus it appears that AO can assess/reassess all issues which came to his knowledge subsequently during the course of assessment proceedings irrespective of whether addition/disallowance in respect of the issues which were initially available before him. However, whether the courts can presume the legislature to have intended to give such blanket powers to the Assessing Officer that on assuming jurisdiction under section 147 regarding assessment or

reassessment of escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with initial issues on the basis of which he assumed jurisdiction, will be clear only with time.

The Web of Approvals?

Section 148A mandates the assessing officer to take prior approvals before initiating each of the steps mentioned above. The sheer number of approvals that the Assessing officer is required to take before assuming jurisdiction under section 147 clearly indicates that the legislature by dispensing with the express requirement of recording reasons in the old reassessment scheme has not let the guard down but has only crystallized and strengthened the safeguards for assessee. It however falls upon the Assessing Officer, the specified authority and the courts of law to make sure that the approvals deployed by the legislature as safeguards are not reduced to mere formalities. The Black Law Dictionary defines "Approval" as "*The act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another"*. "Approval" implies knowledge and exercise of discretion after knowledge[8]. The Supreme Court in the case of *Ashok Kumar Sahu* v. *Union of India*[9] noted that "Approve" means to have or express a favorable opinion of to accept as satisfactory. The Karnataka High Court while deliberating on the meaning of the word 'prior approval' as contemplated under section 158BG of the Income-tax Act noted that application of mind is sine *qua* non for granting approval and held that

> *'approval' means to agree with full knowledge of the contents of what is approved and pronounce it as good. In other words confirm authoritatively. When the power of such approval is vested in higher authority, when such higher authority approves an order of the lower authority, which means he has gone through the order of the lower authority, he has no reason to disagree, he finds no fault with that order and, therefore, he confirms the order by his approval. It is to be seen that the statute has not used merely the word 'approval'. The word used is 'previous approval'. Therefore, unless the approval is previously taken, the assessment order would have no value at all. Therefore, when previous approval is a condition precedent and approval means to 'agree', i.e., to concur, to give mutual assent, to come into harmony, it is possible only after application of mind by the authority according approval.* [10]

The Karnataka High Court pointed out the difference between the approval and permission by referring P.Ramanatha Aiyar's Law Lexicon and held that when approval is given, it means the approving authority has full knowledge about the contents of what is approved and confirm authoritatively the order of the lower authority. The Supreme court in regard with section 151 of the Income-tax Act has held that merely writing the word "approved" in the sanction form without recording satisfaction renders the reopening void. The court held that

> *In the instant case, we find from the perusal of the order sheet which is on record, the Commissioner has simply put "approved" and signed the report thereby giving sanction to the AO. Nowhere the Commissioner has recorded a satisfaction note not even in brief. Therefore, it cannot be said that the Commissioner has accorded sanction after applying his mind and after recording his satisfaction.* [11]

In the light of the above, it is clear that the word approval implies application of mind and such application of mind must be reflected, though not in so many words as in "reasons to be recorded". This position is also strengthened by the trite law that whenever legislature mandates a particular act to be

done in a particular manner, then it should be done in that manner alone; else it shall be deemed to have never been done at all. Hence where the legislature mandates prior approval, such approval must not be recorded in such a manner that it is not mechanical and reflects application of mind.

Having said that, one may argue that taking approvals before each and every step i.e taking three different approvals before even issuing notice under section 148A is an overkill and it would only slowdown the process. It is however a necessary evil that is in line with the object of change in reassessment regime *i.e.* to reduce further litigation. A notice issued under section 147 after following the process laid in section 148A would ensure little space for litigation on subjectivity of the Assessing Officer and would ensure that the Principle of Natural Justice is not violated.

Safeguards under section 149

The newly amended section 149 of the Income-tax Act bars issuance of notice after three years from the end of the relevant assessment year except in cases where the income chargeable to tax which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more and the same is represented in the form of an asset. The erstwhile section 149 consisted of a similar provision which barred reopening of assessment after 4 years from the relevant assessment year except in cases where income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupee. In this regard apart from the obvious departures, the legislature has deemed it necessary to add an additional layer of safeguard that "*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*". As mentioned above it is a trite law thatwhenever legislature mandates a particular act to be done in a particular manner, then it should be done in that manner, hence the Assessing officer is bound to show that not only the income that has escaped assessment is *"likely to"* amount to fifty lakhs or more but also that such income is represented in form of the an asset. The Oxford dictionary defines the word likely as 'probable'. The Assessing officer hence is tasked with an additional function to show that in light of the evidence that the Assessing officer possesses, it is probable that amount escaping assessment is equal to or more than 50 lakhs before the officer can assume jurisdiction and that too represented in the form of asset. The Assessing officer is thus bound to reflect his opinion of such probability in writing to satisfy the principle of natural justice and the requirements of the section. In those cases where the assessing officer does not have sufficient evidence to establish such likelihood, and subsequently finds favorable material, such material cannot be used to justify the jurisdictional error. However, once the Assessing Officer has demonstrated such likelihood, the proceedings cannot be quashed merely on the basis that the actual amount of income escaping assessment is less than Rs. 50 lakhs.

The question that is left unanswered is whether after establishing the probability and assuming jurisdiction under section 147, if in the course of assessment, the Assessing Officer finds additional income that has escaped assessment that is not represented in asset, will such income be covered under the ambit of section 147 r.w.s. 149. In other words, whether the requirements laid in section 149(*b*), are only jurisdictional requirements or whether it limits the entire scope and spectrum of section 147? The wordings of the section do not give any definite answer in this matter and is subject to further clarity by the legislature.

(Source: Taxmann.com)