

Law on Re-assessment including impact of Supreme Court Judgment

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Scheme of Re-assessment prior to 01.04.2021

Scheme of Re-assessment prior to 01.04.2021

Procedure under the erstwhile Re-assessment scheme:

- ❖ **Recording of reasons to believe:** Sec. 148(2) required the Assessing Officer (AO) to record 'reasons to believe' demonstrating income has escaped assessment, prior to initiation of re-assessment proceedings.
- ❖ Where re-assessment was initiated beyond four assessment years, AO was required to come to conclusion that income has escaped assessment on account of failure on the part of the assessee to disclose fully and truly material facts;
- ❖ **Valid sanction under section 151:** Prior to issuance of re-assessment notice under section 148, AO was required to obtain valid sanction of his superiors under section 151;

Scheme of Re-assessment prior to 01.04.2021

Procedure under the erstwhile Re-assessment scheme:

- ❖ **Time limit for issuance of notice:** Sec. 149 provided the time limits for issuance of notice under section 148. Re-assessment notice could have been issued within 4 years, 6 years and / or 16 years from the end of the assessment year depending on the category of case;
- ❖ **Issuance of notice under section 148:** After complying with the statutory requirements, AO was required to issue jurisdictional notice under section 148 intimating the assessee about initiation of re-assessment proceedings and directing filing of return of income;
- ❖ **Filing of Return of Income and seeking reasons:** Upon receipt of notice under Sec. 148, assessee was required to file its return of income for the said year and seek reasons to believe;

Scheme of Re-assessment prior to 01.04.2021

Procedure under the erstwhile Re-assessment scheme:

- ❖ **Furnishing reasons recorded along with other documents:** AO was obliged to provide copy of reasons recorded under section 148(2), along with copies of the sanction under section 151 and documents/ information/ evidence relied upon;
- ❖ **Filing of preliminary legal objections:** After receiving reasons as well as other documents, assessee was at liberty to challenge the initiation of such re-assessment proceedings by filing legal objections with the AO;
- ❖ **Order disposing-off legal objections:** If legal objections were filed by the assessee, AO, prior to proceeding with the re-assessment, was required to pass a separate speaking order disposing-off the legal objections. If adverse, assessee was at liberty to challenge the same invoking writ jurisdiction of the Hon'ble Jurisdictional High Court;

Scheme of Re-assessment prior to 01.04.2021

Procedure under the erstwhile Re-assessment scheme:

- ❖ **Completion of re-assessment proceedings and passing the assessment order:** After disposing off the legal objections, the AO was required to conduct necessary enquiries and finalize the assessment after taking into account the responses of assessee. Assessment order was required to be passed within the time period provided under section 153 of the Act.
- ❖ The aforesaid procedure has been approved by the Supreme Court in the landmark case of **GKN Driveshafts (India) Ltd. vs. ITO 259 ITR 19 (SC)**.

Scheme of Re-assessment prior to 01.04.2021

Important principles laid down by Courts w.r.t. erstwhile Re-assessment scheme:

- ❖ Concept of '**reason to believe**' was explained to mean honest/ bonafide belief of a prudent person which has live link/ connection with the tangible information on the basis of which such belief is formed; [Ref: S. Narayanappa vs. CIT 63 ITR 219 (SC), Ganga Saran & Sons (P.) Ltd. vs. ITO 130 ITR 1 (SC), Raymond Woollen Mills Ltd. vs. ITO 236 ITR 34 (SC), Sheo Nath Singh vs. AAC 82 ITR 147 (SC), ITO vs. Lakhmani Mewal Das 103 ITR 437 (SC)]
- ❖ Re-assessment proceedings could not be a means to carry out **fishing and roving enquiries**, necessary enquiry / investigation should precede initiation of re-assessment proceedings; [Ref: Chhugamal Rajpal vs. S.P. Chaliha 79 ITR 603 (SC); CIT vs. Batra Bhatta Co. 321 ITR 526 (Del)].

Scheme of Re-assessment prior to 01.04.2021

Important principles laid down by Courts w.r.t. erstwhile Re-assessment scheme:

- ❖ **Review of an assessment** in the guise of re-assessment proceedings was barred, being an in-built and inherent check on the arbitrary exercise of power of reassessment by AO. Concept of '**change of opinion**' was to be read into the re-assessment scheme. [Ref: CIT vs. Kelvinator of India Ltd. 320 ITR 561 (SC)]
- ❖ **Valid sanction under section 151** an inbuilt check on the wanton exercise of power under section 147, cannot be reduced to mere formality. Sanction must be proper. [Ref: United Electrical Co. Pvt. Ltd 258 ITR 317 (Del); Arjun Singh vs. ADIT 246 ITR 363 (MP); S.P. Agarwalla alias Sukhdeo Prasad Agarwalla vs. ITO 140 ITR 1010 (Cal)]

Scheme of Re-assessment prior to 01.04.2021

Important principles laid down by Courts w.r.t. erstwhile Re-assessment scheme:

- ❖ Furnishing of reasons to believe, sanction u/s 151, and relied upon documents/information/evidence, to assessee is mandatory; [Ref: GKN Driveshaft (Supra), Sabh Infrastructure vs. ACIT 398 ITR 198 (Del), Tata Capital Financial Services Ltd. vs. ACIT [W.P. No.546/2022; decided on 15.02.2022] (Bom)]
- ❖ Order disposing-off the legal objections amenable to challenge under writ jurisdiction of the Jurisdictional High Court; [Ref: Jeans Knit Pvt. Ltd. vs. DCIT 390 ITR 10 (SC), and Garden Finance Limited vs. ACIT [2004] 268 ITR 48 (Guj.)]

Scheme of Re-assessment w.e.f 01.04.2021

Scheme of Re-assessment w.e.f 01.04.2021

Introduction of new scheme of Re-assessment vide Finance Act 2021; further amended vide Finance Act 2022:

- ❖ The legislature vide the Finance Act, 2021 completely revamped the scheme of reassessment by substituting the provisions of sections 147, 148, 149 & 151 and introducing new procedure to be followed before issuance of notice under section 148.
- ❖ Sunset clauses were inserted in sections 153A & 153C in respect of assessments to be completed pursuant to search initiated under section 132 & requisition under section 132A on or after 01.04.2021.
- ❖ New re-assessment scheme came into effect from 01.04.2021.

Scheme of Re-assessment w.e.f 01.04.2021

Important/Key aspects of the new Re-assessment scheme:

- ❖ Section 148 has been completely substituted to provide that re-assessment proceedings can be initiated under section 148 when there is “**information**” with the AO “*which suggests that income chargeable to tax has escaped assessment for the relevant year*”.

- ❖ “**Information**” for the purpose of section 148 has been specifically defined in Explanation 1 to **mean**:
 - a) any information in accordance with risk management strategy of the Board;
 - b) any information flagged in accordance with risk management strategy of the Board;
 - c) any audit objection that assessment has not been made in accordance with the provisions of the Act;
 - d) any information received under DTAA;
 - e) any information made available to the Assessing Officer under the scheme notified under section 135A;
 - f) any information which requires action in consequence of the order of a Tribunal or a Court

Scheme of Re-assessment w.e.f 01.04.2021

Important/Key aspects of the new Re-assessment scheme:

- ❖ Prior to issuance of notice under section 148, AO is required to follow the procedure prescribed under section 148A and pass an order under section 148A(d). Procedure under section 148A is not required to be followed in search/ survey/ requisition cases.

- ❖ The AO, under section 148A, is obliged to:
 - a. **Conduct enquiry**, with the prior approval of the specified authority, with respect to information which suggests that income of the assessee has escaped assessment [section 148A(a)];

 - b. **Issue a notice upon the assessee to show-cause** why notice under section 148 should not be issued and provide an opportunity of being heard to the assessee [section 148A(b)]. Time period of at least 7 days but not exceeding 30 days to be provided to respond to show cause notice.

Scheme of Re-assessment w.e.f 01.04.2021

Important/Key aspects of the new Re-assessment scheme:

- c. **Consider the reply** of the assessee [section 148A(c)];
- d. “Decide” on the basis of material available on record and the reply furnished by the assessee, **by passing “an order”** within one month of receipt of assessee's reply whether or not it is a fit case for issuance of notice under section 148, with prior approval of specified authority [section 148A(d)].
- ❖ Procedure provided in section 148A is not applicable in cases of search, survey or requisition initiated or made on or after 01.04.2021.
- ❖ **Issuance of jurisdictional notice under section 148:** Once the mandatory procedure set in section 148A is undertaken, the AO shall issue notice under section 148, along with the order passed under section 148A(d), if applicable, requiring the assessee to furnish, within the prescribed period, its return of income for the relevant year;

Scheme of Re-assessment w.e.f 01.04.2021

Important/Key aspects of the new Re-assessment scheme:

- ❖ **Completion of re-assessment:** After filing of the return, the assessment proceedings thereafter, shall be carried out in terms of sections 143(3)/ 144 of the Act, as the case may be and the order completing the re-assessment shall be passed within the time limit prescribed under section 153.
- ❖ Explanation 2 to section 148 provides that in case of search, **survey** or requisition initiated or made on or after 01.04.2021, **assessing officer shall be deemed to have information which suggest that income chargeable to tax has escaped assessment.**

Scheme of Re-assessment w.e.f 01.04.2021

Important/Key aspects of the new Re-assessment scheme:

- ❖ **Time-limit for issuance of notice under section 148** – In terms of section 149, notice under section 148 can be issued:
 - a. within 3 years from the end of the relevant assessment year;
 - b. within 10 years from the end of the relevant assessment year, where, the **AO has in his possession ‘books of accounts’ or ‘other documents’ or ‘evidence’** which reveal that income chargeable to tax, which has escaped assessment amounts to or is likely to amount to Rs.50 lakhs or more for the said year, and is represented in the form of:
 - an asset;
 - expenditure in respect of a transaction or in relation to an event or occasion; or
 - an entry or entries in the books of account

Scheme of Re-assessment w.e.f 01.04.2021

Important/Key aspects of the new Re-assessment scheme:

- ❖ Section 149 (1A) provides that, if income escaping assessment in the form of an asset or expenditure in relation to an event or occasion of Rs.50 lakhs or more is in relation to more than one assessment year within the extended period of 10 years, then, notice under section 148 can be issued for every such assessment year.
- ❖ Section 149 contains grandfathering clause, whereby assessment for assessment year 2021-22 and years prior thereto can, even under the new regime, be reopened only up to 6 years (and not 10 years). If time-limit for issuance of notice under section 148 has expired on 31.03.2021, in terms of the pre-amended provisions, then notice cannot be issued under the new re-assessment scheme.

Scheme of Re-assessment w.e.f 01.04.2021

Important/Key aspects of the new Re-assessment scheme:

- ❖ Time limit prescribed under section 149 of the Act shall exclude:
 - the time or extended time allowed to the assessee to respond to show cause notice under section 148A(b); and
 - any period during which the proceedings under section 148A are stayed by an order of any Court.

- ❖ If after excluding the aforesaid period, time available for passing order under section 148A(d) is less than 7 days, the remaining time shall be deemed to be extended to 7 days.

Scheme of Re-assessment w.e.f 01.04.2021

Important/Key aspects of the new Re-assessment scheme:

- ❖ **Approval of Specified Authority [section 151]:** For the purposes of section 148 and 148A, “**specified authority**” shall be:
 - a) Where 3 years or less have elapsed from the end of the relevant assessment year, Pr. CIT, Pr. DIT, CIT or DIT;
 - b) Where more than 3 years have elapsed from the end of the relevant assessment year, Pr. CCIT, Pr. DGIT, CCIT or DGIT, as applicable.
- ❖ In cases where re-assessment is initiated on the basis of ‘**deemed information**’ (i.e., search, requisition and survey cases), no reassessment order shall be passed by an AO below the rank of Jt. CIT except with prior approval of the Addl. CIT/ Addl. DIT or Jt. CIT/ DIT. [Section 148B]

Scheme of Re-assessment w.e.f 01.04.2021

Comparative analysis of old re-assessment scheme and new re-assessment scheme:

Section 147 (prior to 01.04.2021):

“ 147(1). 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 ... ”

Section 147 (after 01.04.2021):

“147. If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year, the Assessing Officer may, subject to the provisions of sections 148 to 153, assess or reassess such income ”

Scheme of Re-assessment w.e.f 01.04.2021

Section 148 (prior to 01.04.2021):

“148(1). Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income

*(2) The Assessing Officer shall, before issuing any notice under this section, **record his reasons for doing so.**”*

Section 148 (after 01.04.2021):

“148. Before making the assessment, reassessment or recomputation under section 147, and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of section 148A, requiring him to furnish within such period, as may be specified in such notice, a return of his income ”

*Provided that **no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment** in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice.”*

Scheme of Re-assessment w.e.f 01.04.2021

Comparative analysis of old re-assessment scheme and new re-assessment scheme:

- ❖ The amended section 147 does not use the phrase “**reason to believe that any income has escaped assessment**” and rather states, “**if any income has escaped assessment**”.
- ❖ Amended section 148 provides that no notice can be issued unless there is information which suggests that income has escaped assessment. In the erstwhile section 148, AO was only required to record the reasons for reopening before issuance of notice.
- ❖ Courts have interpreted the phrase ‘**reason to believe**’, to lay down several judicial principles to prevent abuse of powers by the AO. [Ref: Kelvinator India (Supra)]
- ❖ In absence of the phrase ‘**reason to believe**’ under the new scheme, whether the jurisprudence developed under the erstwhile regime will still be applicable?

Scheme of Re-assessment w.e.f 01.04.2021

Comparative analysis of old re-assessment scheme and new re-assessment scheme:

Particulars	Old provisions	New re-assessment scheme
Existence of 'reason to believe' that income has escaped assessment necessary	Yes	No; requirement of having prescribed 'information' suggesting escapement of income
Reassessment initiated <u>beyond</u> 4 years in case where regular assessment concluded under section 143(3) of the Act	Only if failure to disclose full and true material facts by assessee	Permitted in case where likely escapement of income is Rs.50 lakhs or more and represented in prescribed form
Enquiry and opportunity of being heard to assessee <u>before</u> issuance of notice under section 148 of the Act	Not required	Mandatory

Scheme of Re-assessment w.e.f 01.04.2021

Comparative analysis of old re-assessment scheme and new re-assessment scheme:

Particulars	Old provisions	New re-assessment scheme
Time limit for initiation of re-assessment proceedings	<p>General - 4 years;</p> <p>where income escaping assessment exceeds Rs.1 lakh - 6 years</p> <p>In case of foreign asset (including financial interest) - 16 years</p>	<p>General - 3 years;</p> <p>In cases where likely escapement of income in the form of asset/expense/entry is Rs.50 lakhs or more - 10 years</p> <p>No separate category for foreign asset.</p>

Scheme of Re-assessment w.e.f 01.04.2021

Important/Key aspects of the new Re-assessment scheme:

- ❖ New re-assessment scheme is based on the procedure laid down by Supreme Court in case of GKN Driveshaft (supra), inasmuch as AO is required to conduct preliminary enquiry, issue show cause notice to assessee affording opportunity of being heard, and thereafter pass speaking order, prior to issuance of notice under section 148;
- ❖ No separate time limit for re-assessment in case of foreign income/ assets;
- ❖ Limitation in case of search cases is governed by section 153, i.e., dependent on financial year in which notice under section 148 was served and not on the basis of search authorization as under erstwhile law.

Scheme of Re-assessment w.e.f 01.04.2021

Conflict regarding applicability of old re-assessment provisions vis-a-vis new re-assessment provisions for the period 01.04.2021 to 30.06.2021:

- ❖ CBDT issued several notifications extending the applicability of old re-assessment provisions from 31.03.2021 till 30.06.2021.
- ❖ Finance Act 2021 provided that the new re-assessment scheme shall be effective from 01.04.2021.
- ❖ Notices under erstwhile re-assessment scheme was issued to various assessee's after 01.04.2021, without following the provisions of new re-assessment scheme (such as without conducting proceedings under section 148A, etc.);
- ❖ Due to the conflict / overlap in two different re-assessment schemes, notices issued under section 148 were challenged before High Courts;

Scheme of Re-assessment w.e.f 01.04.2021

Conflict regarding applicability of old re-assessment provisions vis-a-vis new re-assessment provisions for the period 01.04.2021 till 30.06.2021:

- ❖ Hon'ble Delhi High Court decided the issue in favour of taxpayers in the case of **Man Mohan Kohli vs. ACIT in W.P. (C) No. 6176 of 2021**, holding inter alia that notice under section 148 issued after 01.04.2021 without following the provisions of new re-assessment provisions, is invalid;
- ❖ Thereafter, various High Courts followed the ratio laid down by the Hon'ble Delhi High Court in *Man Mohan Kohli judgment (supra)*.

Scheme of Re-assessment w.e.f 01.04.2021

Conflict regarding applicability of old re-assessment provisions vis-a-vis new re-assessment provisions for the period 01.04.2021 till 30.06.2021:

- ❖ The Hon'ble Supreme Court vide order dated 04.05.2022 in the case of **UOI vs. Ashish Aggarwal**, held that:
 - Notices under section 148 notices issued to the assesseees which were issued under erstwhile law, shall be deemed to have been issued under section 148A of the IT Act and construed or treated to be show cause notices in terms of section 148A(b).
 - AO shall, within thirty days from 04.05.2022 provide to the respective assesseees information and material relied upon by him;
 - Assesseees can reply to the show cause notices within two weeks thereafter;

Scheme of Re-assessment w.e.f 01.04.2021

Conflict regarding applicability of old re-assessment provisions vis-a-vis new re-assessment provisions for the period 01.04.2021 till 30.06.2021:

- Requirement of conducting any enquiry under section 148A(a) is hereby dispensed with as a onetime measure;
- AO shall pass orders in terms of section 148A(d), and after following the procedure as required under section 148A may issue notice under new section 148;
- Defenses which may be available to the assesseees including those available under new section 149 and all rights and contentions which may be available to the assesseees shall continue to be available.

Scheme of Re-assessment w.e.f 01.04.2021

Pertinent issues arising in the new re-assessment scheme:

- ❖ What shall be the remedy available to the taxpayer against order passed under section 148A(d)? [Ref: *BHEL vs. PCIT: WP(c) 6482 of 2022 (Delhi HC)* and *Gulmuhar Silk Pvt Ltd vs. ITO: WP(C) 5787 of 2022 (Delhi HC)*]
- ❖ Whether issues which are subject matter of appeal/revision can be covered in proceedings reopened under section 147?
- ❖ Whether ‘*information*’ defined in section 148 is required to be tangible / valid / precise / reliable, or mere existence of some purported information shall authorize the AO to initiate re-assessment proceedings?
- ❖ Whether the judicial concept of ‘*change of opinion*’ developed under the erstwhile re-assessment law is still applicable to the new re-assessment scheme?

Scheme of Re-assessment w.e.f 01.04.2021

Pertinent issues arising in the new re-assessment scheme:

- ❖ Whether re-assessment proceedings can be initiated on the basis of surmises and conjectures to conduct fishing and roving enquiries merely on the pretext of availability of some '*information*' as defined in section 148?
- ❖ Whether legally inadmissible documents / information / evidence (such as statement recorded on oath during survey, etc.) can be held to be '*information*' under section 148?
- ❖ Whether there must be a live link / nexus between the alleged '*information*' and the suggestion that income has escaped assessment at the stage of 148A proceedings?

THANK YOU