

Direct Tax Alert

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Supreme Court reverses High Court rulings to restore 90,000 reassessment notices issued under the old regime

In a recent landmark ruling¹, the Hon'ble Supreme Court, after assuming powers under Article 142 of the Constitution of India, has ruled that reassessment notices issued under section 148 of the Income-tax Act, 1961 ('the Act') on or after 1 April 2021 under the old regime shall be deemed to have been issued under section 148A of the Act (i.e. new reassessment regime which is applicable from 1 April 2021).

The Court has further held that appropriate legal defences would be available to the taxpayers and has given directions on detailed procedure to be followed for completion of these reassessment proceedings.

Background and facts of the case

- In view of the outbreak of Covid-19 pandemic, vide the Relaxation Act² and CBDT Notifications³ issued from time to time, the due date for issue of reassessment notices under section 148 falling between 20 March 2020 and 31 March 2021 were extended to 30 June 2021.
- The said extensions were primarily applicable for issue of section 148 notices for Assessment Years ('AY') 2013-14 and 2014-15 which were getting time-barred during the abovementioned period.

¹ Union of India v. Ashish Agarwal (Civil Appeal no. 3005 of 2022) (SC), order dated 4 May 2022

² The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020

³ CBDT Notification No. 20 dated 31 March 2021 and Notification No. 38 dated 27 April 2021



- In the meanwhile, the Finance Act, 2021 brought in the new reassessment regime which drastically changed the substantive law and procedures for reassessment, effective 1 April 2021.
- The new reassessment regime consists of key modifications as under:
 - A revised time-limit for issue of notices (ten/three years). Further, the issue of notices beyond three years from end of AY is subject to fulfilment of certain prescribed conditions.
 - New section 148A requiring show cause notice to the taxpayer, opportunity for raising objections and passing speaking order to be followed by the Assessing Officer ('AO') prior to issue of notice under section 148.
- However, from 1 April 2021, the AOs started issuing notices under the old section 148 based on the extended time-limit prescribed under the aforesaid CBDT Notifications (without following the procedure laid down under the new regime).
- The AOs relied on the *Explanation* inserted in the said CBDT Notifications for issue of section 148 notices on or after 1 April 2021 based on old regime, in terms of the law as stood on 31 March 2021.
- The taxpayers challenged such notices before several High Courts by way of multiple writ petitions. They contested that the *Explanation* inserted in the said CBDT Notifications are invalid and cannot defer the effective date of new reassessment regime which was introduced by the Finance Act, 2021. Therefore, the notices issued on or after

1 April 2021 should have followed the procedure laid down under section 148A of the new regime.

- The High Courts⁴ quashed such reassessment notices issued on or after 1 April 2021 under the old regime by holding that:
 - The *Explanation* in the CBDT Notifications is ultra vires/ unconstitutional and invalid.
 - Any notices under section 148 issued on or after 1 April 2021 must comply with the provisions of the new regime i.e. issuance of notice under section 148A.

Further, the High Courts left it open to the AOs to initiate fresh reassessment proceedings in accordance new regime brought in by the Finance Act, 2021.

- Against one decision of the Allahabad High Court, the Revenue had preferred appeal before the Supreme Court. In this context, on 4 May 2022, the Supreme Court delivered its landmark judgement, which is summarised below.

Supreme Court ruling

While delivering the judgement, the Supreme Court observed that the present controversy is with regard to approximately 90,000 notices which is subject matter of 9,000 writ petitions before the High Courts. The Court invoked its extraordinary powers contained under Article 142 of the Constitution of India.

With a view to strike a balance between rights of the Revenue and taxpayers, the Supreme Court held that the notices issued under section 148 on or after 1 April 2021 (under the old regime) shall

⁴Ashok Kumar Agarwal v. UOI [2021] 131 taxmann.com 22 (Allahabad HC); Mon Mohan Kohli v. ACIT [2021] 133 taxmann.com 166 (Delhi HC); Sudesh Taneja v. ITO (Writ Petition No.969 of 2022) (Rajasthan HC); Vellore Institute of Technology v. CBDT (Writ Petition No.15019 of 2021) (Madras HC), etc. For summary of Bombay High Court

decision in case of *Tata Communications* case, please refer Dhruva Alert dated 5 April 2022 <https://www.dhruvaadvisors.com/insights/files/Dhruva%20Alert%20-%20HC%20quashes%20reassessment%20notices.pdf>



be deemed to have been issued under section 148A (i.e. the new regime).

The key aspects of the Supreme Court ruling are enlisted below:

(i) Article 142 of the Constitution invoked

- Article 142 of the Constitution empowers the Supreme Court to pass a decree/order as is necessary for doing complete justice in matter pending before it.
- The Supreme Court noted that the Revenue has issued approximately 90,000 notices on or after 1 April 2021 under the old regime due to a bonafide belief. The same were subject matter of 9,000 writ petitions before various High Courts.
- With a view to avoid further appeals by the Revenue on the very issue and not to burden the Supreme Court, Article 142 of the Constitution has been invoked by the Court.
- Therefore, it is held that this judgement is applicable for all similar judgements passed by various High Courts/cases pending before them and shall be applicable PAN-India.

(ii) Notices issued on or after 1 April 2021 ought to comply with the new regime

- The Supreme Court while dealing with issue examined the reassessment provisions under the old regime as well as under the new regime.
- The Supreme Court agreed with the view of the High Courts that in respect of notice under section 148 issued on or after 1 April 2021 for past AYs, the benefit of new provisions shall be made available.
- The Supreme Court held that notices issued on or after 1 April 2021 should not have been issued under the old regime and ought to have been issued as per new regime inserted vide Finance Act, 2021.

(iii) Notices under section 148 deemed to be issued under section 148A

- Having said the above, the Supreme Court held that there is genuine non-application of the amendments by the AOs as they may have been under a bonafide belief that amendments may not yet have been enforced due to Explanation inserted in the CBDT Notifications.
- The Revenue cannot be made remediless and the object and purpose of reassessment proceedings cannot be frustrated. Therefore, some leeway must be shown in that regard.
- Taking this into account, the Supreme Court held that the said notices under section 148 shall be deemed to have been issued under section 148A under the new reassessment regime and treated to be show-cause notices in terms of section 148A(b) of the Act.
- The Supreme Court held that the Revenue is permitted to proceed further as per new regime comprising of section 147 to 151 subject to compliance of all procedural requirements.
- Further, it has been held that all defences which may be available to the taxpayers including those available under section 149 of the Act and all rights and contentions which may be available to the taxpayers and Revenue under the Finance Act, 2021 and in law shall continue to be available.

(iv) Procedure to be followed by the AOs

- The Supreme Court has dispensed with the requirement of conducting an enquiry under section 148A(a) (which Supreme Court observed is not mandatory) as a one-time measure for notices issued under section 148 of the unamended Act on or after 1 April 2021.
- The AOs have been given thirty days from the date of Supreme Court judgement to provide



information/ material relied upon by Revenue, to the respective taxpayers.

- The taxpayer can respond to the AO within two weeks.
- Thereafter, the AO to pass order under section 148A(d).
- After following the procedure as laid down under section 148A, the AO may issue notice under section 148 under the new regime.

Dhruva Comments

This is an unprecedented and one-of-a-kind judgement in the history of income-tax law wherein the Supreme Court has invoked its extraordinary powers under Article 142 of the Constitution possibly for the first time in relation to a tax matter.

In relation to reassessment proceedings, the Courts have generally held that procedures laid down under the statute are to be strictly followed. However, the Supreme Court in the present case has taken a liberal view and has undone a major procedural lapse of the Revenue by bringing a deeming fiction, which is not forming part of the current statute.

While the Supreme Court has deemed notices issued on or after 1 April 2021 as issued under section 148A, however, it has also held that such notices/reassessment proceedings have to be in accordance with the new regime. Therefore, while it may appear to be an initial victory for the Revenue on the procedural lapse, however, the conduct of the reassessment proceedings and the final outcome in these matters could be subject to further rounds of litigation on various aspects which were not subject matter of debate in this ruling. Further, multiple defenses would be available to the taxpayers to challenge the validity of the issue of notice under section 148A/148 of the new regime basis the facts of each case.

As per section 148 of the new regime, the AO should have 'information' which suggests that income chargeable to tax has escaped assessment. Therefore, where the basis/reasons recorded for re-opening does not satisfy the above condition, there can be an argument that the notice issued under section 148A/148 is void-ab-initio.

Further, under the new regime, the time-limit for issue of notices prescribed under section 149 has been reduced to three years which extends to ten years only in exceptional cases. Certain grandfathering provisions have also been prescribed under section 149 which restrict the time-limit for issue of notice under section 148 to the extent as was prescribed under the old regime. The impact of the same also need to be analyzed and taken into account.

Thus, notices issued for AYs 2013-14 to AY 2017-18 could be prone to be challenged by taxpayers as non-est if the time-limit under section 149 under the new regime is not met or if conditions for invoking the 10-year time limit have not been satisfied.

Further, it needs to be examined whether these notices will be impacted by the amendments made by Finance Act, 2022 (w.e.f. 1 April 2022) expanding the scope of 10-year time limit to cover income escaped assessment represented in form of *expenditure* and *entries in books of accounts*. Thus, it appears this is not an end to the litigation but rather a start to a new era of litigation.

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