

J. B. Nagar CPE Study Circle of WIRC

Income Tax Re-assessments- Recent Development and Practical Issues

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Coverage of Today's session

I.	Changes made under the New Re-assessment Regime
II.	Relevant Legislative Provisions
III.	Critical Issues
IV.	CBDT instruction dated 10th December, 2021
V.	Checklist of conducting re-assessment proceedings
VI.	Recent Judicial Pronouncements
VII.	Drafting of re-assessment submissions
VIII.	Landmark decisions on Re-assessment which shall still hold good.

I. Highlights of changes made under the New Re-assessment Regime

- Applicable from 01-04-2021.
- The time limits of 4/6 years is now made 3/10 years.
- Assessments in case of Search and Seizures u/s. 153A to 153D now covered under this section.
- ‘to disclose fully and truly all material facts’ is done away with.
- Reason to believe replaced with ‘information’
- Incorporation of section 148A – mandatory show cause before re-opening- adopting GKN Driveshafts.

II. Section 147

- Section 147 – Any income chargeable to tax has escaped assessment , AO subject to sections 148-153 assessee, reassess such income or recompute loss or depreciation or any allowance/deduction for such assessment year.
- Explanation to section 147 – Any subsequent issue which comes to notice of AO even though section 148A not complied with.

II. Section 148

- Section 148 – Subject to provisions of section 148A, AO shall serve notice with the order passed, if required u/s. 148A(d) to file return of income.
- ROI to be furnished within a period of **3 months** from end of the month in which notice is issued. **(w.e.f. 01.04.2023)**.
 - First proviso – No notice to be issued unless there is **information** with AO to **suggest** that income has escaped assessment and AO has obtained **approval** of specified authority.
 - Second proviso- No approval required if the same taken at 148A(d) stage. **(w.e.f. 01-04-2022)**.
 - **Third proviso- return filed beyond period allowed under this section shall not be deemed to be return u/s. 139 (w.e.f. 01.04.2023).**

II. Section 148

■ Section 148:

Explanation 1- 'Information' means information with AO that **suggests** that income has escaped assessment.

- i. Any information ~~flagged~~ in accordance with risk management strategy formulated by Board from time to time.
- ii. Any audit objection raised by ~~CAG~~ to the effect that assessment has not been made in accordance with provisions of this Act.
- iii. Any information received under agreements u/s. 90/90A.
- iv. Any information made available under scheme u/s. 135A (Faceless collection of information- e-Verification Scheme 2021)
- v. Any information which requires action in consequence of order of Tribunal or Court.

II. Section 148

■ Section 148:

Explanation 2 – ‘Deemed’ information in following cases

- i. Search is initiated after 01-04-2021 u/s.132.
- ii. Survey is conducted u/s. 133A other than u/s. 2A or ~~sub sec (5)~~.
- iii. AO is satisfied that any money, bullion, jewellery or valuable article/thing seized u/s. 132/132A belongs to the assessee.
- iv. AO is satisfied any books of account/documents seized u/s. 132/132A pertains/relates to assessee.

For ~~three AYs immediately preceding the AY relevant to PY in which~~ where the search is initiated or survey conducted. (w.r.e.f 01-04-2021)

Explanation 3- Specified authority means as referred in S.151

II. Section 148A

- Section 148A:
 - (a) To conduct enquiry with prior approval if required.
 - (b) Provide an opportunity to be heard by servicing show cause notice with ~~prior approval~~ giving time not less than 7 days and not more than 30 days from the date of issue with results of enquiry in clause (a). – Adjournment can be made at this stage.
 - (c) Consider reply furnished of notice under clause(b)
 - (d) Decide on basis of material on record including reply of assessee whether it's a fit case to reopen or not with prior approval within one month FTEM of reply received or when one month FTEM the time expires as allowed under clause (b).

II. Section 1491

- Section 149 – Time limit for notice:
 - (a) 3 years from the end of relevant AY.
 - (b) 10 years if AO has in his possession books of account or documents or evidences which reveal that income chargeable to tax represented in form of:
 - i. An asset
 - ii. **Expenditure** in respect of a transaction, event or occasion. (1-4-22)
 - iii. An **entry/entries** in the books of account (01-04-22).
- which has escaped assessment amounts to or is likely to amount to 50 lakhs or more.
- Explanation – Asset includes immovable property, shares, securities, loans, advances and deposits in bank accounts.

II. Section 149.....2

- Provisions to Section 149:

First Proviso- No notice to be issued if the same could not have been issued being time barred as on 01-04-2021 as per the erstwhile time limits. **(w.r.e.f 01-04-2021)**

Second Proviso - Section not applicable if search initiated on or before 31st March, 2021.

II. Section 149.....3

Third Proviso- for cases referred to in clauses (i), (iii) & (iv) of Explanation 2 to S. 148, if a search is initiated u/s. 132, search u/s. 132 for which last authorization is executed or requisition is made u/s. 132A, after the 15th day of March of any financial year and the period for issue of notice under section 148 expires on the 31st day of March of such financial year, a period of 15 days shall be excluded for the purpose of computing the period of limitation as per this section and the notice issued under section 148 in such case shall be deemed to have been issued on the 31st day of March of such financial year. **(w.e.f. 01.04.2023).**

II. Section 149.....3

Fourth Proviso- The information as referred to in Explanation 1 to S. 148 emanates from a statement recorded or documents impounded under section 131 or section 133A, as the case may be, on or before the 31st day of March of a financial year, in consequence of,—

- (a) a search under section 132 which is initiated; or
- (b) a search under section 132 for which the last of authorizations is executed; or
- (c) a requisition made under section 132A,

after the 15th day of March of such financial year, a period of 15 days shall be excluded for the purpose of computing the period of limitation as per this section and the notice issued under clause (b) of section 148A in such case shall be deemed to have been issued on the 31st day of March of such financial year. **(w.e.f. 01.04.2023).**

II. Section 149.....4

Fifth Proviso- for limitation period, the time for which the proceedings are stayed by a court order or injunction shall be excluded.

Sixth Proviso- The period to pass order u/s. 148A(d) if after giving effect to above proviso, shall be extended to 7 days if lesser than that.

Section 149(1A)- the limit of 50 lakh is cumulative for all years of assets and expenditure. **(01-04-22)**

II. Section 151 & Section 151A

Sanction under section 151:

- For 3 years or less – PCIT, PDIT, CIT, DIT,
- For more than 3 years – PCCIT, PDGIT, CCIT, DGIT.

First Proviso - the period of three years for the purposes of clause (i) shall be computed after taking into account the period of limitation as excluded by the third or fourth or fifth provisos or extended by the sixth proviso to sub-section (1) of section 149. **(w.e.f. 01.04.2023)**

Section 151A – Faceless Assessments of income escaping assessments ?

III. Critical Issues

- Change of opinion whether still holds good ?
- Reason to believe v/s. information (change in language & interpretation)
- Whether there is any escapement of income ?
- Whether assessee and re-assess only income – Explanation ?.
 - Under explanation 1, AO has the power to assess/ reassess for any subsequent issue noticed.
 - The word under explanation 1 is “*income in respect of any issue*”
 - Does it covers expenses/disallowances as well?

III. Critical Issues

- **Comes to his notice subsequently**
 - Can information received from third party be considered as comes to his notice?
 - Can AO make fishing or roving entries?

- **Deletion of third proviso**
 - Third proviso under erstwhile 147 is deleted.
 - Incomes which were subject matter of appeal, reference or revision cannot be assessed/reassessed under old 147.
 - Full merger v/s. partial merger.

III. Critical Issues

- **Deletion of the word “and also” & Explanation to sec 147:**
 - Under erstwhile section 147, re-assessment proceedings shall not be sustainable if no addition was made on primary grounds – Jet Airways 331 ITR 236
 - Explanation added to enable re-assessment of any other issues.
 - Recompute of loss and depreciation allowance.

- **Deletion of the phrase “failure to disclose fully and truly”**
 - AO can now re-open case beyond 4 years, even when 143(3) was done subject to section 149.
 - Reasons recorded need not necessarily show escapement of income due to failure on part of assessee to disclose fully and truly all material facts.

III. Critical Issues

- ◆ **Issuance of notice u/s. 143(2):**
 - Third provision of erstwhile section 147 missing from the new law.
 - 143(2) is required for any return furnished with respect to section 139 or notice u/s. 142(1) of the Act.
 - Third proviso of new section 148 - If ROI u/s. 148 furnished after due date or not furnished than the same shall not be considered as return u/s. 139.
- The words deduction added for re-computation under the new law.
- Whether penalty leviable u/s. 270A if the escaped income accepted in the return of income filed u/s. 148?

III. Critical Issues

▪ What is meant by 'information'

- The definition is not inclusive as it uses word 'means'.
- SC in case of Larsen & Tubro (CAN 5390/2007), CIT v. A. Raman & Co. [1968] 67 ITR 11 (SC) and Maharaj Kumar Kamal Singh v. CIT [1959] 35 ITR 1 (SC).
- Vague information cannot be made basis of reopening – 338 ITR 51 Delhi HC.
- Must be factual supported by evidences ?
- Application of mind on information. Girdhar Gopal Dalmia v. UOI [2023] 250 taxmann.com 54 (Calcutta) (HC)
- Nexus between information and escapement of income. Mathew Cherian v. ACIT (2023) 151 taxmann.com 154 (Mad.) (HC)

III. Critical Issues

▪ Notice u/s. 148 should be signed

- Signature shall be affixed either manually or digitally
- Prakash Krishnavtar Bhardwaj v. ITO [2023] 150 taxmann.com 60 (Bombay).
- DIN is mandatory

▪ Issuance of 148A is mandatory

- Before issuing notice u/s. 148, AO has to conduct inquiry under 148A.
- Provide opportunity/sufficient opportunity of being heard to the assessee. (Anita Gupta case P&H)
- AO has to provide requisite material relied upon. Anurag Gupta v. ITO [2023] 150 taxmann.com 99 (Bombay).

III. Critical Issues

- AO has to consider reply of the assessee. *Aten Capital P. Ltd v. ACIT* [2022] 141 taxmann.com 5 (Delhi) (HC)
- **Can 148A be challenged?**
 - Order passed under 148A is not covered u/s. 246 of the Act.(appealable orders)
 - Writ petition can be filed if procedure laid down u/s. 148A is not followed eg. passed in violation of jurisdiction, time limitation or principle of natural justice.

III. Critical Issues

- Writ petition can be filed challenging 148A(d) order along with notice u/s. 148.
- **Material on record vs. suspicion**
 - The order under 148A(d) has to be passed on the basis of material on record.
 - Cannot be passed on mere suspicion/ presumption.
 - Abdul Majeed v. ITO [2022] 140 taxmann.com 485 (Rajasthan)(HC).

III. Critical Issues

- **Which and when notices should be objected to ?**
 - Notice u/s. 148A(a)
 - Notice u/s. 148A(b)
 - Order u/s. 148A(d)
 - Notice u/s. 148
 - Assessment order u/s. 147

- **Can notice u/s.148A(a) be enquiring like full fledged assessments?**
 - The word used in the clause is conduct enquiry, if required w.r.t the information which suggests that income has escaped assessment.
 - Restrict the scope of his enquiries to the information in his possession.

III. Critical Issues

- **Deemed information in some cases.**
 - In case of search u/s. 132, survey 133A, requisition u/s. 132A of the Act.
 - For Survey cases, 148A issuance is still mandatory.

- **Is search conducted equivalent to escapement of Income?**
 - Under explanation 2 to section 148, the statute clearly states that AO shall be deemed to have **information** which suggest that the **income chargeable** to tax has **escaped assessment**.
 - The heading of the Section 148 itself says *“Issue of notice where income has escaped assessment.”*

III. Critical Issues

- **Is Explanation 2 to Section 148A is applicable only to the year in which search is conducted or other years as well?**
 - Deemed information was available only for a period of 3 years immediately preceding the assessment year in which search was conducted.
 - However, Finance Act 2022 omitted the word 3 years and that too w.r.e.f. 01.04.2021.

III. Critical Issues

- **Search cases in case of third party?**
 - Deemed information was available only for a period of 3 years immediately preceding the assessment year in which search was conducted.
 - Provisions of 148A shall not apply
 - Pradeep Kumar Varshney v. ITO (Delhi)(HC) – WP(C)- 7115/2022.

III. Critical Issues

- **Requirement of satisfaction note u/s. 153C**
 - Under old provisions the language used was AO is **satisfied** that books of accounts/docs/assets seized or requisitioned have a **bearing** on the **determination** of the **total income** of such other person.
 - However, under explanation 2(iii) & (iv) to Section 148, the words used are **satisfaction and prior approval** of PCIT/CIT.
 - The wordings of explanation 2 fails to include clause (iv) of explanation 2

III. Critical Issues

- **What is meant by the word entry u/s. 149**
 - Maintenance of books of accounts is necessary
 - multiple entries covered

- **What is meant by “an asset”**
 - FA 2021 used the word asset which later got replaced as “an asset” by FA 2022.
 - Asset does not include liabilities and expenses.
 - Limit of Rs.50 lakhs has to be checked for each asset.
 - Undisclosed/ unaccounted asset resulting in escapement of income.

III. Critical Issues

- AO should have in his possession books of account or other documents or evidence.
- Books of account should reveal something beyond what assessee has furnished, cannot be just assumptions.
- Section 153A – 4th proviso
- What is expenditure – actual and not bogus, may be for business or personal.
- **How to compute Rs.50 lakhs**
 - The phrase used is amounts to or is likely to amount.
 - According to whom 50 Lakhs is to be computed.
 - cumulative

III. Critical Issues

- **Issues relating to Section 149(1A)**
 - Overrides section 149(1)
 - Covers only *“an asset”* or *“expenditure in relation to an event or occasion”*
 - Does not cover *“expenditure in respect of a transaction”* which is covered u/s 149(1)(b)
 - Does not cover *“entry or entries in books of account”* [covered u/s. 149(1)(b)]

III. Critical Issues

- **E-Verification Scheme of 2021 (Section 135A)**
 - Features:
 - Enables taxpayers to explain the financial transaction with evidence.
 - Helps with data cleaning and correction.
 - Encourages voluntary compliance.
 - Taxpayer gets chance to explain a transaction being verified before any further action by way of Assessment or Reassessment is undertaken.
 - 148A not required if AO has received any info. under this scheme.
 - Any info. available with AO under this scheme shall be treated as info. which suggest that income has escaped assessment.

IV. CBDT instruction dated 10th December, 2021

- Update correct details on portal. uploading of information on the on Insight portal for implementation of risk management strategy.
- Instruction applicable to Jurisdictional AOs.
- Directions to extract information from AY:2015-16 to AY:2018-19.
- Information from any other Government Agency/Law Enforcement Agency.
- Information arising out of Internal Audit objection, which requires action under section 148 of the Act.
- Information received from any Income-tax Authority including the assessing officer himself or herself.
- Information arising out of search or survey action
- Information arising out of FT&TR references.

IV. CBDT instruction dated 10th December, 2021

- Information arising out of any order of court, appellate order, order of NCLT, u/s. 263/264, having impact on income in the assessee's case or in the case of any other assessee.
- Cases involving addition in any assessment year on a recurring issue of law or fact:
 - a) Exceeding Rs. 25 lakhs in eight metro charges while at other charges, exceeding Rs. 10 lakhs;
 - b) Exceeding Rs. 10 crores in transfer pricing cases.
 - c) and where such an addition:
 - has become final or
 - has been confirmed at any stage of appellate process in favor of revenue and assessee has not filed further appeal;
 - has been confirmed at the 1st stage of appeal in favor of revenue or subsequently; even if further appeal of assessee is pending, against such order.

V. Checklist of conducting re-assessment proceedings

- Notice the notice
- Check DIN and date of issuance and date of service (date of email or physical receipt)
- Check the time limitations u/s.149- whether 3 years or 10 years
- Check the sanction required u/s. 151 – Prior Approval
- Check the amounts of escapement of income mentioned in the notices and co-relate with time limits.
- Ask for more time and put it on record if lesser than 7 days given specially weekends.
- Check whether order u/s. 148A (d) passed within one month or not.
- Whether information was already on record.
- Notice u/s.148A not required for search and seizure cases, however required for survey cases.

V. Checklist of conducting re-assessment proceedings

- Update correct email and contact details on the ITD portal.
- Check the amounts of escapement of income mentioned in the notices.
- Ask for details/information based on which show-cause notice issued.
- Ask for cross-examination where ever required.
- Reply to each notice with correlating documentary proofs.
- Declare in return filed u/s. 148 if agreeing to the addition to make better case for penalty.
- Show cause notice with proposed variation based on Income or loss determination proposal is mandatory. (144B(xii)(b)).

VI. Some Recent Judicial Pronouncements:

- Response filed by assessee was not considered by the AO while passing order u/s.148A(d) – HC held that writ not maintainable as alternate remedy available, but SC held HC is reqd. to examine in depth jurisdiction as precondition for issue of notice. 2023 (291 Taxman 524) SC.
- For AY: 2013-14, if income alleged escapement of income is exceeding Rs.50 lakhs , first proviso to section 149 shall not be applicable and with or without instructions, the re-assessment is not time barred. Salil Gulati 2023 (293 Taxman 75) SC.
- SLP of revenue was dismissed- HC held that for AY: 2015-16, reopening notice was issued on 31-03-2021 as it is time barred as more than 6 years have passed, therefore quashed. ITO v/s. Salu Agarwal (453 ITR 786) SC.
- 148A noticed issued after 03/06/2022, which was mandated by the CBDT Instruction No.1, the notice is abrogates the mandate of instrcution and SC ruling, to be quashed. Jindal Exports & Imports P Ltd. 2023 (152 taxmann.com 609)(Del HC)

VI. Some Recent Judicial Pronouncements:

- Notice u/s.148A(b) issued on the wrong address- the proceeding carried out without hearing the assessee and giving opportunity to file reply is to be quashed – Chitra Suprekar v/s. ITO 2023 (149 taxmann.com 26) Bom HC.
- Notices issued u/s. 148 after the SC decision in case of Ashish Agarwal and after considering the CBDT Instruction No.1 dated 11/05/2022, is time barred as per provision to section 149 for AYs: 2013-14 and AY: 2014-15 – Keenara Industries Private Limited 2023 (435 ITR 51) Guj HC.
- SLP dismissed as withdrawn that when AO accepted that no documents or relevant material were furnished to the assessee with re-opening notice and the notice and order u/s. 148A(d) to be set aside and fresh order to be passed after furnishing documents 2023 (149 taxmann.com 481) SC

VI. Some Recent Judicial Pronouncements:

- AO issued notice as there was sale of immovable property as per his records and no CG was offered to tax. The assessee replied that it was purchase and not sale, the order u/s. 148A(d) and notice did not align with each other and therefore set aside. 2023 (151 taxmann.com 499) Del HC.
- Re-assessment notices in name of the deceased assessee, even after informing to the AO by the legal heir is set aside as legal heir does not consent to participate in re-assessment proceedings 2023 (452 ITR 59) BOM HC.
- Company being amalgamated, order u/s. 148A(d) issued in the old company, to be quashed as Assessee had informed the AO about amalgamation. 2023(150 taxmann.com 488) BOM HC.
- The AO without considering the reply of the assessee, passed order u/s. 148A(d) only based on information on record and without applying his mind , the exercise has to be carried de-novo. 2023 Sru Steels (150 taxmann.com 121) Del HC

VII. Drafting of re-assessment submissions

- Crisp and upto the point.
- Robust explanations.
- Clarity of facts.
- Prompt responses.
- Explain how there is no escapement of income.
- Point specific reply to show cause notice.
- Fact finding essential.
- Avoid submission of additional evidence at later stage.
- Correct and contextual reliance on judgments.
- If filing a Writ petition avoid giving submissions on merits.
- When challenging legality of notices avoid merits.
- Record all instances of technical errors.

IX. Landmark decisions on Re-assessment which shall still hold good.

- Objections not dealt properly - Scan Holding P Ltd v. ACIT 402 ITR 290 (Delhi) (HC), Ankita A. Chokssey v. ITO 402 ITR 207 (Bom) (HC), Swastic Safe Deposit and Investments Ltd 263 Taxman 303 (Bom) (HC) (SLP rejected (2020) 270 Taxman 8 (SC).
- Sanction not given objectively - Gernman Remedies Ltd v. Dy CIT (2006) 287 ITR 494 (Bom) (HC) and CIT v. Suman Waman Chaduahry (2010) 321 ITR 495 (Bom) (HC), Central India Electricity Supply Co Ltd v. ITO (2011) 333 ITR 237 (Delhi).

IX. Landmark decisions on Re-assessment which shall still hold good.

- Re-opening beyond 6 years is invalid and barred by limitation - Nestle India Ltd. 384 ITR 334 (Delhi).
- Notice to be issued only with sanction of relevant authority - DSJ Communication Ltd. 41 taxmann.com 151 (Bom).
- Sanction to be given before issuance - Smt. Suman Waman Chaudhary 321 ITR 495 (Bom).
- Inadequate Opportunity to reply to notices - Tin Box Co. v. CIT- 249 ITR 216 (SC) - Lack of opportunity before the Assessing officer cannot be rectified by the appellate authority by giving such opportunity.

IX. Landmark decisions on Re-assessment which shall still hold good.

- The term “month” does not mean consisting of 30 days. It would mean one calendar month - CIT v. Munnalal Shrikishan [1987] 167 ITR 415 (All)(HC).
- What is escapement of income - Nirmal Bang Securities Pvt Ltd v. ACIT WP. No. 671 of 2022 dated February 08, 2022 (Bom) (HC)- Non application of mind by AO and sanctioning authority.
- Opinion of the Internal Audit party of the Income Tax Department on a point of law cannot be regarded as information within the meaning of section 147(b) of the Act - Indian & Eastern Newspaper Society v. CIT (1979) 119 ITR 996 (SC) ??

IX. Landmark decisions on Re-assessment which shall still hold good.

- Issuance of notice u/s. 143(2) cannot be before notice u/s. 148 - Asian Paints Ltd. 296 ITR 90 (Bom). Hotel Blue Moon decision of SC.
- Change of Opinion not permissible – Kelvinator of India Ltd. (320 ITR 561) SC.
- Not independent to assessee some other issue leaving aside the issue for which reopened - CIT v. Jet Airways (I) Ltd. [2011] 331 ITR 236 (Bom)(HC).



Thank You !!!



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