Taxation of Equity Ownership Plans for *Employees* (RSUs, ESOPs, ESPP)

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Agenda

- TYPES OF EQUITY OWNERSHIP PLANS
- IMPORTANT DATES
- TAXATION-RSU, ESOP'S AND ESPP
- OBLIGATIONS OF EMPLOYEES
- TAX SAVINGS

BLACK MONEY ACT

- IMPORTANT DEFINITIONS
- PENALTY FOR NON DISCLOSURE

THE WAY AHEAD

Types of Equity Ownership Plans

- RESTRICTED STOCK UNITS (RSU)
  - Employee gets ownership of shares/cash equivalent without any payment in future
- EMPLOYEE STOCK OPTION PLAN (ESOP)
  - Employee is given an option to buy shares at a pre-determined price at a later date
- EMPLOYEE SHARE PURCHASE PLAN (ESPP)
  - Option given to employees to enrol for ESPP monthly payroll deductions (% of salary)
    - At end of offering/purchase period (usually 6 months), shares are allotted at a pre-determined discount (generally up to 15%) to market value.
- SAR"S/RSU CASH - PAYMENT IN LIEU OF ALLOTMENT OF SHARES

Important Dates / Terminology

- GRANT DATE
- VESTING DATE
- EXERCISE DATE
- EXERCISE PERIOD
- SALE DATE

Taxation

- Tax is levied at two stages:
  1. Stage 1 - At the time of Vesting/Exercise/Allotment
     - Taxed under the head salary (perquisites) as per normal tax slab of the employee
  2. Stage 2 - At the time of selling of shares by Employee
     - Taxed under the head capital gains
- Fair Market Value or FMV means prevailing market price
  - In case of listed shares, FMV = listed share price
  - In case of the unlisted shares, FMV = As per the Valuation Certificate obtained from the merchant banker on the specified date (i.e. Exercise date or any earlier date not being more than 180 days prior to the date of exercise)

Stage 1: Taxation of RSUs

- Date on which Taxed: Vesting Date and *not* upon grant
- Value for Taxation: FMV of Shares allotted at vesting
- Taxed as: Perquisite
- Responsibility: Employer

Stage 1: Example for Taxation For RSUs

- On 01-01-2022, A is granted 100 shares in X Co.
- 25 shares vest to him after every completed year.
- FMV on date of First Vesting, i.e. 01-01-2023 is 20$ per share.
- He sells all these shares on 15-04-2023 @ 30$ per Share.
- The taxation will be as under:

Shares Offered	100	
Date of Grant	01/01/2022	
Date of First Vesting	01/01/2023	
Number of shares Vested	25	
FMV at time of Vesting	**20$**	
Stage 1 : Taxation at the time of Vesting (FY 2022-2023)		
Taxation Date	01/01/2023	
	Value	No of Shares
Perquisite to be taxed (25 shares*20$ per share)	500$	25
Tax @ 31.2% (as per slab rate)	156$	7.8 ~ 8 (Balance shares = 25-8 = 17)
Stage 2 : Taxation at the time of Sale of Shares		
Sale price (30$*17)	510$	
Less Cost price (20$*17)	340$	
Capital Gains	170$	

- WHAT HAPPENED TO 8 SHARES

Stage 1: Taxation of ESOPs & ESPP

- Date on which Taxed: Exercise Date/Purchase Date and *not* upon grant/Vesting
- Value for Taxation: FMV of shares allotted on the exercise date
  (Less) Amount paid by the Employee
- Taxed as: Perquisite
- Responsibility: Employer

Stage 2: Taxation on Subsequent Sale of ESPP/RSU

- Taxed as: **Capital Gains** (Long-term/ Short-term depending on the holding period of shares)
- Unlisted shares in India/Listed out of India, if sold within
  - < = 24 months of holding = STCG, taxable as per slab rates
  - > 24 months = LTCG, taxable @ 20% with indexation
- Date on which Taxed: Transfer Date.
- Value for Taxation: Sale Price – FMV considered for the purpose of Calculating Perquisite.
- Responsibility: **Employee**

Obligations of Employees

- DIVIDENDS CREDITED, INTEREST CREDITED IN THE BROKERAGE ACCOUNT NEED TO BE DECLARED AS INCOME .
- FORM NO 67 TO BE MANDATORILY FILED TO CLAIM REBATE OF WITHHOLDING TAX ON DIVIDENDS
- CAPITAL GAIN/LOSS IRRESPECTIVE OF THE AMOUNT INVOLVED NEED TO BE DECLARED IN INCOME TAX RETURNS
- SCHEDULE FA TO MANDATORILY INCLUDE THE SHARES HELD AS ON 31ST DECEMBER.
- PENALTY FOR NON DISCLOSURE IS RS 10 LAKHS

Tax savings

IF THE PERIOD OF HOLDING OF SHARES FROM DATE OF VESTING/EXERCISE IS EQUAL TO OR MORE THAN 24 MONTHS (I.E. LONG TERM)

- TAX SAVING U/S 54F IS AVAILABLE IF AMOUNT IS INVESTED IN THE ACQUISITION OF A NEW HOUSE PROPERTY……. SUBJECT TO CONDITIONS
- INDEXATION BENEFITS CAN ALSO BE CLAIMED.
- 54EE IS NOT AVAILABLE AS NO BONDS HAVE BEEN NOTIFIED.
- IN CASE OF LOSSES - BENEFITS OF SET OFF AND CARRY FORWARD IS ALSO AVAILABLE FOR BOTH LONG TERM AND SHORT TERM ASSETS.

Section 43: Penalty for failure to furnish in return of income, any information or furnish inaccurate particulars about an asset (including financial interest in any entity) located outside India

IF ANY PERSON,

WHO HAS FURNISHED THE RETURN OF INCOME FOR ANY PREVIOUS YEAR, **FAILS TO FURNISH ANY INFORMATION OR FURNISHES INACCURATE PARTICULARS** IN SUCH RETURN RELATING TO ANY ASSET (INCLUDING FINANCIAL INTEREST IN ANY ENTITY) LOCATED OUTSIDE INDIA, HELD BY HIM AS A BENEFICIAL OWNER OR OTHERWISE, OR IN RESPECT OF WHICH HE WAS A BENEFICIARY, OR RELATING TO ANY INCOME FROM A SOURCE LOCATED OUTSIDE INDIA, AT ANY TIME DURING SUCH PREVIOUS YEAR, THE ASSESSING OFFICER **MAY** DIRECT THAT SUCH PERSON SHALL PAY, BY WAY OF PENALTY, A SUM OF **TEN LAKH RUPEES**.

PROVIDED THAT THIS SECTION SHALL NOT APPLY IN RESPECT OF AN ASSET, BEING ONE OR MORE BANK ACCOUNTS HAVING AN AGGREGATE BALANCE WHICH DOES NOT EXCEED A VALUE EQUIVALENT TO **FIVE HUNDRED THOUSAND RUPEES** AT ANY TIME DURING THE PREVIOUS YEAR.

Section 42: Penalty for failure to furnish return in relation to foreign income and asset

IF A PERSON WHO IS REQUIRED TO FURNISH HIS RETURN UNDER INCOME TAX ACT AND WHO AT ANY TIME IN THE PREVIOUS YEAR:

a. HELD ANY ASSET (INCLUDING FINANCIAL INTEREST IN ANY ENTITY) LOCATED OUTSIDE INDIA AS A BENEFICIAL OWNER

b. WAS A BENEFICIARY OF ANY ASSET (INCLUDING FINANCIAL INTEREST IN ANY ENTITY) LOCATED OUTSIDE INDIA; OR

c. HAD ANY INCOME FROM A SOURCE LOCATED OUTSIDE INDIA,

AND FAILS TO FURNISH SUCH RETURN BEFORE THE END OF THE RELEVANT ASSESSMENT YEAR, THE ASSESSING OFFICER MAY DIRECT THAT SUCH PERSON SHALL PAY, BY WAY OF PENALTY, A **SUM OF TEN LAKH RUPEES.**

PROVIDED THAT THIS SECTION SHALL NOT APPLY IN RESPECT OF AN ASSET, BEING ONE OR MORE BANK ACCOUNTS HAVING AN AGGREGATE BALANCE WHICH DOES NOT EXCEED A VALUE EQUIVALENT TO **FIVE HUNDRED THOUSAND RUPEES AT ANY TIME DURING THE PREVIOUS YEAR.**

Section 41: Penalty in relation to undisclosed foreign income and asset

THE ASSESSING OFFICER MAY DIRECT THAT IN A CASE WHERE TAX HAS BEEN COMPUTED **UNDER SECTION 10 IN RESPECT OF UNDISCLOSED FOREIGN INCOME AND ASSET,** THE ASSESSEE SHALL PAY BY WAY OF PENALTY, IN ADDITION TO TAX, IF ANY, PAYABLE BY HIM, A **SUM EQUAL TO THREE TIMES THE TAX COMPUTED** UNDER THAT SECTION

BLACK MONEY (UNDISCLOSED FOREIGN INCOME AND ASSETS) AND IMPOSITION OF TAX ACT, 2015

BLACK MONEY ACT CAME INTO FORCE ON 1ST JULY 2015 AND IS APPLICABLE FROM ASSESSMENT YEAR 2016-17.

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AN ACT TO MAKE PROVISIONS TO DEAL WITH THE PROBLEM OF **BLACK MONEY, THAT IS UNDISCLOSED FOREIGN INCOME AND ASSETS, THE PROCEDURE** FOR DEALING WITH SUCH INCOME AND ASSETS AND **TO PROVIDE FOR IMPOSITION OF TAX ON ANY UNDISCLOSED FOREIGN INCOME AND ASSET HELD OUTSIDE INDIA** AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

Important Definitions

2(11) :

Undisclosed Asset located outside India" means an asset (including financial interest in any entity) **located outside India**, held by the assessee in his name or in respect of which he is a beneficial owner, and he has **no explanation** about the source of investment **in such asset or the explanation given by him is in the opinion of the Assessing Officer unsatisfactory**;

2(12)

Undisclosed foreign income and asset" means the total amount of **undisclosed income of an assessee from a source located outside India** and the value of an undisclosed asset located outside India, referred to in section 4, and computed in the manner laid down in section 5;

Section 10 Assessment

(1) For the purposes of making an assessment or reassessment under this Act, the Assessing Officer may, on receipt of an information from an income-tax authority under the Income-tax Act or any other authority under any law for the time being in force or on coming of any information to his notice, serve on any person, a notice requiring him on a date to be specified to produce or cause to be produced such accounts or documents or evidence as the Assessing Officer may require for the purposes of this Act and may, from time to time, serve further notices requiring the production of such other accounts or documents or evidence as he may require.

(2) The Assessing Officer may make such inquiry, as he considers necessary, for the purpose of obtaining full information in respect of undisclosed foreign income and asset of any person for the relevant financial year or years.

(3) **The Assessing Officer, after considering such accounts, documents or evidence, as he has obtained under sub-section (*1*), and after taking into account any relevant material which he has gathered under sub-section (*2*) and any other evidence produced by the assessee, shall by an order in writing, assess [*or reassess*] the undisclosed foreign income and asset and determine the sum payable by the assessee.**

(4) If any person fails to comply with all the terms of the notice under sub-section (1), the Assessing Officer shall, after taking into account all the relevant material which he has gathered and after giving the assessee an opportunity of being heard, make the assessment **[***or reassessment***]** of undisclosed foreign income and asset to the best of his judgment and determine the sum payable by the assessee.

The way ahead

For Future

The First thing we need to check is Form 12BA and if they contain Stock Options RSU/ESOPs, we have to file accordingly

For Past

If we have missed including any Foreign Assets/Foreign Income, advisable to File Updated returns for at least 2 years so that there is no dispute

Penalty of 10 Lakhs

Penalty is prescribed in Black Money Act

In majority of the cases the Income not reported in Income Tax returns cannot be treated as Undisclosed Asset as the source is explainable and is already offered to tax

Can department levy Penalty under Black Money Act on Income which is not Black money?

THANK YOU

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Perils of Taxation on Exit of Partners due to reconstitution of Partnership Firms on Dissolution, Death or otherwise

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EXTRACT OF MEMORANDUM

Rationalisation of provision of transfer of capital asset to partner on dissolution or reconstitution

The existing provisions of section 45 of the Act inter alia, provides that any profits or gains arising from the transfer of a capital asset shall be chargeable to income-tax under the head Capital gains and shall be deemed to be the income of the previous year in which such transfer takes place.

Further sub-section (4) of the said section, provides that the profits or gains arising from the transfer of a capital asset by way of distribution of capital assets on the dissolution of a firm or other association of persons or body of individuals (not being a company or a co-operative society) or otherwise, shall be chargeable to tax as the income of such firm or other association of persons or body of individuals of the previous year in which the said transfer takes place.

Further, the fair market value of the asset on the date of such transfer shall be deemed to be the full value of the consideration for the purposes of section 48.

In this regard, it has been noticed that there is uncertainty regarding applicability of provisions of aforesaid sub-section to a situation where assets are revalued or self generated assets are recorded in the books of accounts and payment is made to partner or member which is in excess of his capital contribution.

Hence, it is proposed to substitute the existing sub-section (4) of section 45 of the Act with a new sub-section (4) and also insert a new sub-section (4A) to this section.

New proposed sub-section (4) of section 45 of the Act applies in a case where a specified person who receives during the previous year any capital asset at the time of dissolution or reconstitution of the specified entity.

The capital asset represents the balance in the capital account of such specified person in the books of the specified entity at the time of its dissolution or reconstitution.

In this situation, the profit and gains arising from the receipt of such capital asset by the specified person shall be chargeable to income-tax as income of the specified entity under the head capital gains and shall be deemed to be the income of such specified entity of the previous year in which the capital asset was received by the specified person.

For the purposes of section 48 of the Act, the fair market value of the capital asset on the date of such receipt shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.

The balance in the capital account of the specified person in the books of account of the specified entity is to be calculated without taking into account increase in the capital account of the specified person due to revaluation of any asset or due to self-generated goodwill or any other self-generated asset.

New proposed section sub-section (4A) of section 45 of the Act applies in a case where a specified person receives during the previous year any money or other asset at the time of dissolution or reconstitution of the specified entity.

The money or other asset is required to be in excess of the balance in the capital account of such specified person in the books of accounts of the specified entity at the time of its dissolution or reconstitution.

In this situation, the profits or gains arising from the receipt of such money or other asset by the specified person shall be chargeable to income-tax as income of the specified entity under the head "Capital gains" and shall be deemed to be the income of such specified entity of the previous year in which the money or other asset was received by the specified person.

For the purposes of section 48 of the Act,

- *value of the money or the fair market value of other asset on the date of such receipt shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset; and*
- *the balance in the capital account of the specified person in the books of accounts of the specified entity at the time of its dissolution or reconstitution shall be deemed to be the cost of acquisition.*

The balance in the capital account of the specified person in the books of account of the specified entity is to be calculated without taking into account increase in the capital account of the specified person due to revaluation of any asset or due to self generated goodwill or any other self-generated asset.

For the purposes of these two sub-sections,-

- *specified person is proposed to be defined as a person who is partner of a firm or member of other association of persons or body of individuals (not being a company or a cooperative society), in any previous year;*
- *specified entity is proposed to be defined as a firm or other association of persons or body of individuals (not being a company or a cooperative society);and*
- *self-generated goodwill and self–generated assets are proposed to be defined as goodwill or asset, as the case may be, which has been acquired without incurring any cost for purchase or which has been generated during the course of the business or profession.*

Consequential amendment is also proposed in section 48 of the Act to provide that in case of specified entity, the amount included in the total income of such specified entity under sub-section (4A) of section 45 which is attributable to the capital asset being transferred, shall be reduced from the full value of the consideration to compute income charged under the head - capital gains.

This is to be calculated in the manner to be prescribed later.

This is to mitigate the double taxation which may have happened but for this provision in a situation where an asset which was revalued and for which income under the proposed sub-section (4A) of section 45 of the Act was brought to tax is transferred subsequently by the specified entity.

These amendments will be effective from the 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.

[Clauses 14 and 16]

SECTION 45(4) OF INCOME TAX ACT, 1961

Before Amendment

(i)	There is a transfer of capital assets
(ii)	Such transfer is by way of distribution of capital assets
(iii)	Such distribution is on dissolution of a firm or other association of persons or body of individuals (not being a company or a co-operative society) or otherwise
(iv)	If all the above conditions are satisfied:
(a)	The profits or gains arising from such transfer shall be chargeable to tax as the income of the firm, association or body, of the previous year in which the said transfer takes place.
(b)	For the purposes of section 48, the fair market value of the asset on the date of such transfer shall be deemed to be the full value of the consideration received or accruing as a result of the transfer.

View of the Courts before amendment

There was controversy surrounding the applicability of section 45(4) in case of distribution of capital assets otherwise than dissolution of firm as several courts have held that section 45(4) triggers only in the case of dissolution of a firm and not in other cases of reconstitution of firm.

The Courts have taken a view that the consequence of the distribution, division or allotment of assets by the partnership which follows upon dissolution or reconstitution after discharge of liabilities is nothing but a mutual adjustment of rights between the partners and there is no question of any extinguishment of the firm's rights in the partnership assets amounting to a transfer of assets within the meaning of section 2(47)].

Overrules established position & Nullifies the effect of following Supreme Court and High Court Rulings

Supreme Court

- **CIT v. Dewas Cine Corporation, [1968] 68 ITR 240 (SC)**
- **Malabar Fisheries Co. v. CIT, [1979] 120 ITR 49/2 Taxman 409 (SC)**
- **Sunil Siddharthbhai v. CIT [1985] 156 ITR 509 (SC)**
- **Addl CIT Vs Mohanbhai Pamabhai [1987] 165 ITR 166 (SC)**
- **CIT Vs R.L. Raghukumar [2001] 247 ITR 801 (SC): 166 CTR 398 (SC)**
- **B.T. Patil and Sons Vs CGT [2001] 247 ITR 588 (SC) : [2000] 163 CTR 363 (SC)**
- **Jagatram Ahuja Vs CGT [2000] 246 ITR 609 (SC) : 164 CTR 1 (SC)**
- **CIT Vs Bankey Lal Vaidya [1971] 79 ITR 594 (SC)**

High Courts

- **Prashant S.Joshi Vs ITO [2010] 324 ITR 154 (Bom) : 36 DTR 227 (Bom)**
- **CIT Vs P.N. Panjawani (Decd) [2012] 80 DTR 200 (Karn)**
- **CIT Vs Kunnamkulam Mill Board [2002] 257 ITR 544 (Ker): 178 CTR 356 (Ker)**
- **CIT Vs Surendra Kumar Gupta [2004] 270 ITR 325 (All): 191 CTR 538 (All)**
- **CIT Vs Mohanbhai Pamabhai [1973] 91 ITR 393 (Guj),**
- **Kay Engineering Co. Vs CIT [1971] 82 ITR 950, (Punjab and Haryana High Court)**
- **CIT Vs Nataraj Motor Service [1972] 86 ITR 109 (Kerala)**
- **National Company Vs ACIT [2019] 415 ITR 5 (Mad) :178 DTR 305 (Mad)**

To resolve controversies and uncertainties created by conflicting judicial pronouncements, the Finance Act, 2021 has made the following amendments in the Act.

inserted new section 9B in the Act;
substituted sub-section (4) of section 45 of the Act; and
inserted new clause (iii) in section 48 of the Act

These amendments are effective from assessment year 2021-22.

The avowed aims and objects of these amendments are:

a. Rationalise provisions for transfer of capital asset to specified person (partner/member) on dissolution or reconstitution of specified entity (firm/LLP/AOP/BOI) [Section 9B]

b. Clarify tax treatment where assets are revalued assets or self-generated assets/goodwill are recorded in the books of account of the firm/LLP/AOP/BOI and payment is made to retiring partner /member either of money only of money or capital asset or both which is in excess of his capital contribution and clarify that this capital gains arising in his hands due to payment or transfer of capital asset on transfer to firm of capital asset (his share / interest in firm) will also be taxed in firm's hands [New substituted section 45(4)].

This is very similar to tax in company's hands of buyback of share consideration under section 115QA.

c. Allow deduction of capital gains taxed under section 45(4) in taxation of capital gains under section 9B to alleviate double taxation. [New section 48(*iii*)]

d. Clarify that transfer of any capital asset or stock-in-trade by firm to partner in connection with dissolution/reconstitution is deemed transfer giving rise to income from capital gains/Profits and Gains from Business or Profession (PGBP) and resolve uncertainty created by conflicting judicial decisions. [Section 9B]

e. Clarify tax treatment where stock-in-trade is transferred to partner/member on dissolution or reconstitution of firm/ LLP/AOP/BOI. [Section 9B]

After amendment

Capital gains.

45(4)

- *Notwithstanding anything contained in sub-section (1),*
- *where a **specified person receives** during the previous year*
- ***any money or capital asset or both** from a specified entity*
- *in connection with the reconstitution of such specified entity,*
- *then any profits or gains arising from such receipt by the specified person*
- ***shall be chargeable to income-tax as income of such specified entity under the head "Capital gains"** and*
- *shall be deemed to be the income of such specified entity of the previous year*
- *in which such money or capital asset or both were received by the specified person, and*

- *notwithstanding anything to the contrary contained in this Act,*
- ***such profits or gains shall be determined in accordance with the following formula, namely:-***

A = B + C - D

Where,

A = income chargeable to income-tax under this subsection as income of the specified entity under the head "Capital gains";

B = ***value of any money*** *received by the specified person from the specified entity on the* ***date of such receipt****;*

C = the ***amount of fair market value of the capital asset*** *received by the specified person from the specified entity on the* ***date of such receipt****; and*

D = the ***amount of balance in the capital account (represented in any manner)*** *of the specified person in the books of account of the specified entity* ***at the time of its reconstitution****:*

Provided *that if the value of "A" in the above formula is negative, its value shall be deemed to be zero :*

- **Provided further** *that the balance in the capital account of the specified person*
- *in the books of account of the specified entity*
- *is to be calculated without taking into account*
- *the increase in the capital account*
- *of the specified person*
- ***due to revaluation of any asset or***
- ***due to self-generated goodwill or***
- ***any other self-generated asset.***

Explanation 1.—*For the purposes of this sub-section,—*

*(*i*) the expressions "reconstitution of the specified entity", "specified entity" and "specified person" shall have the meanings respectively assigned to them in section 9B;*

*(*ii*) "self-generated goodwill" and "self-generated asset" mean goodwill or asset, as the case may be, which has been acquired without incurring any cost for purchase or which has been generated during the course of the business or profession.*

- Explanation 2.- *For the removal of doubts,*
- *it is clarified that when a capital asset is received by a specified person from a specified entity*
- *in connection with the reconstitution of such specified entity,*
- *the provisions of this sub-section shall operate*
- *in addition to the provisions of section 9B and*
- *the taxation under the said provisions thereof shall be worked out independently.***]**

ANALYSIS OF SECTION 45(4)

Taxability u/s 45(4)

- Notwithstanding anything contained in sub-section (1)(overrides charging section)
- Where a specified person (Partner / member)
- receives during the previous year
- Any money or capital asset (doesn't cover stock in trade) or both
- From a specified entity (partnership firm LLP, AOP, BOI)
- In connection with the reconstitution of such specified entity (admission, retirement, change is PSR) (no dissolution)

- Shall be chargeable to income-tax as income of such specified entity (Not taxable in the hands of partners of members)

- Under the head "Capital Gain" (Deemed income exemption u/s 54 to 54GB is doubtful)

- And shall be deemed to be the income of such specified entity of the previous year in which such money or capital asset or both were received by the specified person (taxability to be calculated every year of receipt , separately)

FORMULA

A= B+C-D

- A = Income of specified entity which is to be calculated for charging capital gain.
- B = Vale of money on the date of receipt.
- C = FMV of capital assets on the date of receipt.
- D = Amount of capital balance of the specified person which is appeared in their capital account on the date of reconstitution.

We Calculate capital account of a specified person without taking effect of an increase in capital account

- Due to the revaluation of assets.
- Due to self-generation of goodwill.
- Due to other self-generated assets.

Calculation of balance in capital account of the partnership

The balance in the capital account of the partner in the books of account of the firm is to be calculated without taking into account the increase in the capital account of the partner due to revaluation of any asset or due to self-generated goodwill or any other self generated asset.

Thus the impact of revaluation of any asset or self-generated goodwill will have to be nullified while calculating capital account balance.

Further capital balance represented in manner such as capital account, current account or any other manner will be considered or this purpose.

Tax is payable by the firm and not the partners:

It may be noted that in above case, although a partner is getting benefit as he is the person who receives capital asset and money which in aggregate is more than the amount standing to his credit in his capital account in the books of firm, the tax liability however is on the partnership firm and not on the recipient partner.

Meaning of Self generated goodwill and Self generated asset:

For above section, “self-generated goodwill" and “self-generated asset" means goodwill or assets, which has been acquired without incurring any cost for purchase or which has been generated during the course of the business or profession.

Money or capital asset or both received by partner/member on reconstitution of firm/LLP/AOP/BOI [section 45(4)].

New sub-section (4) of section 45 shall apply if the following conditions are satisfied:

Condition (i): A specified person receives any capital asset [section 2(14) of the Act] or money or both.
Condition (ii): He receives it from specified entity
Condition (iii): Such receipt takes place during the previous year in question which must be 2020-21 or any subsequent previous year
Condition (iv): Such receipt takes place during the previous year in connection with the reconstitution of the specified entity
Condition (v): There has been an increase in the capital account of the specified person due to revaluation of any asset or due to self-generated goodwill or any other self-generated asset. If not, then computation provisions of section 45(4) will result in zero capital gains at least where settlement is only by money alone.

If all the above conditions are satisfied, then:

Any profits or gains arising from receipt of such money or capital asset or both by the specified person (partner/member) shall be chargeable to income-tax as income of such specified entity (firm/AOP/BOI) under the head "Capital gains";

Such capital gains shall be deemed to be the income of such specified entity of the previous year in which such capital asset was received by the specified person; and Such capital gains shall be computed by the formula

A=B+C-D

A=Income taxable as capital gains of the specified entity (If A is negative, firm cannot avail set off of capital loss. If A in negative, it shall be deemed to be zero)

B=Money received by specified person (*e.g.* partner) from specified entity (firm/LLP)

C= Fair Market Value of received capital asset received by specified person on the date of such receipt

D= the amount of balance in the capital account of the specified person in the books of account of the specified entity.

The balance in the capital account of the specified person in the books of account of the specified entity is to be calculated without taking into account increase in the capital account of the specified person due to revaluation of any asset or due to self-generated goodwill or any other self-generated asset.

'D' in the above formula is nothing but Adjusted Capital Account Balance or ACAB.

It would appear that the resulting capital gains from money or capital asset or both received by retiring partner from firm shall be classified as short-term or long-term depending on the whether partner has been with firm for 36 months or more

Explanation 2 below new substituted sub-section (4) of section 45 clarifies that when a capital asset is received by a specified person from a specified entity in connection with reconstitution of such specified entity, the provisions of this sub-section shall operate in addition to the provisions of section 9B and the taxation under the said provisions thereof shall be worked out independently.

In other words, separate independent of computation of capital gains will take place under section 9B taking the FMV as full value of consideration and deducting from it expenses incurred for transfer, cost of acquisition/improvement (or indexed cost as the case may be) and capital gains computed under section 45(4) attributable to capital asset as computed under Rules notified under section 48(iii).

Condition (i)

A specified person receives any capital asset or money or both.

There must be receipt of any capital asset or money or both by a specified person.

That said, section 45(4) does not say that, in order for its provisions to apply, the receipt by specified person from specified entity should be only of money or capital asset or both.

Section 45(4) will equally apply to a situation where money, capital asset and stock-in-trade is given or money and stock-in-trade is given to retiring partner/member.

Only that, in these situations, section 45(4) will be applied by excluding the stock-in-trade component of the package given to partner.

In such situation, the ACAB will be compared with the money and/or capital assets components of the package of settlement given to retiring partner. Particular stock-in-trade component is relevant only for section 9B and not for section 45(4).

Receipt must be in connection with the reconstitution of firm/AOP/BOI.

Meaning of receipt of money or capital asset or both

Words and Phrases Legally Defined (Third Edition) defines 'Receive' as under :

'...Prima facie, as a matter of ordinary English language, I think "received" means actually get into their hands.' **(Per Harvey J in Pilcher v. Logan (1914) 15 SR (NSW) 24 at 27)**

The Compact Oxford Dictionary gives the following definitions of 'receive'.

Receive

verb 1. be given, presented with, or paid.

2. accept or take delivery of.

Receipt of capital asset being shares and securities

It appears that **date of receipt** of credit of listed shares and securities **in demat account is the date of receipt for listed shares and securities.**

Unlisted shares are not in demat form.

So, transfer of these shares is effected by executing the share transfer deed and delivering the share certificate along with the transfer deed to the transferee.

The transferee signs the transfer deed and lodges it with the investee company along with the share certificate.

After verifying the documents and following the prescribed legal procedure, the investee company registers the transfer in favour of the transferee.

A question arises

at what point of time can shares be said to be received by the transferee?

Whether at the time of delivery of transfer deed and share certificate to transferee?

Or when the investee company registers the transfer in favour of the transferee?

It seems that as per the plain and ordinary meaning of the word 'receive' **the shares can be said to be received when the transferee receives the duly executed transfer deed and the relevant share certificate.**

In **Howrah Trading Co. Ltd. v. CIT [1959] 29 Comp. Cas. 282 (SC),** it was held that **when the transaction is completed by entry of the transferee's name in the register of members, transfer relates back to the date the transfer was first made.** This decision also seems to support the above view.

Receipt of capital asset being movable property like jewellery/artistic work/bullion

In case **of jewellery** [as defined in Explanation to sub-clause (ii) of section 2(14)], **archaeological collections, drawings, paintings, sculpture or works of art, bullion, date of receipt will be the date on which delivery (actual or constructive) is taken by the recipient or his agent.**

Receipt of capital asset being immovable property.

Question arises - **which date should be taken as the date of receipt of immovable property - date of receiving possession or date of registration?**

It appears that **date of receipt of possession of immovable property is the date of receipt and not the date of signing the deed or registration thereof.**

This view appears to be appropriate because the **Supreme Court has defined ownership as ownership in de facto sense rather than de jure sense.**

In a landmark judgment in **Mysore Minerals Ltd. v. CIT [1999] 106 Taxman 166, the Supreme Court held that to claim depreciation, it is not necessary that the assessee should be the registered owner of the assets. Exclusive possession rights, to exclude others from enjoyment of assets, right to retain possession and defend the same are some of the characteristics of ownership which would entitle the assessee to depreciation under section 32 (so long as it was used for carrying on business or profession).**

In **Tata Electric Companies (AOP) v. Jt. CIT [ITA No. 2330/Mum/2001] (17-10-2006) (unreported)**, the Tribunal considered the issue of 'ownership' of asset for claiming depreciation under section 32 of the Act **in the light of various Apex Court decisions on the subject and beautifully extracted the law** in this regard at para 21 of the Order :

'... the substantial de facto ownership of an asset is to be looked into, rather than examining the religious de jure ownership of the asset ..... In a case where the transfer of property was contemplated by an agreement and thereafter, the physical delivery of the property was handed over and the property was used for the business of the assessee and thereafter, even if delayed, the transaction was concluded by executing the relevant conveyance and documents, then in such circumstances, the ownership of the asset must be considered as having been transferred from the date of actual delivery of the asset. ... in such circumstances, where the contract has been lawfully executed, ... the validity of the registered documents go back to the date of de facto transfer of ownership of the asset. This liberal principle has been upheld by the Supreme Court ....'

Taking a cue from the above decisions, it may be opined that **date of receipt of possession of immovable property is the date of receipt and not the date of signing the deed or registration thereof.**

This view is also consistent with ordinary meaning of 'receive' as above.

Also, **the triggering event in section 9B & section 45(4) is not "transfer of capital asset" like in sub-section (1) but "receipt of capital asset".**

How to apply section 45(4) if say stock-in-trade is also received by partner/member in addition to money or capital asset or both.

The applicability of section 45(4) is not precluded that if the payout of settlement of retiring partner's capital account balance has components of stock-in-trade or assets which are neither stock-in-trade nor capital assets (*e.g.* rural agricultural land in India) or both in addition to money and/or capital assets.

The other **components of settlement apart from money and capital assets will be ignored for section 45(4) purposes and capital gains under section 45(4) will be computed only with reference to money and capital asset components.**

Business income from the stock-in-trade component will be computed with reference to FMV of the stock-in-trade in accordance with section 9B.

If any rural agricultural land in India owned by firm is given to retiring partner, it will neither result in capital gains nor business income in firm's hands.

Condition (ii)

Money or capital asset or both is received from specified entity.

Section 45(4) comes into play only if **money or capital asset or both is received** by specified person **from specified entity only and from no other person.**

The following points are noteworthy here:

Section 45(4) is attracted only when **retiring partner receives capital asset or money from the firm/LLP.**

If retiring partner receives only stock-in-trade section 45(4) will not apply. Only section 9B will apply.

However, **if retiring partner receives stock-in-trade in addition to money or capital asset or both, section 45(4) will apply to money and/or capital asset component of the package.**

If he receives any capital asset or money from other partners privately from their personal funds and they don't debit it to firm/LLP, then, section 45(4) is not attracted. The taxability in retiring partner's hands, however, is not ruled out.

Section 45(4) will also not be attracted where firm is transferred to a company and retiring partner receives shares or money of new company.

It appears that section 45(4) will not be attracted if retiring partner's balance is parked in a loan account or payable account and then the firm/LLP is converted into a company under Chapter XXI of the Companies Act, 2013 and then the company pays off the loan/payable account.

The reason is **mere reconstitution of entity does not trigger section 45(4) unless the retiring partner receives money or capital asset or both from the firm/LLP.**

Conditions (iii) and (iv)

Receipt must be during the previous year in connection with the reconstitution of firm/LLP/AOP/BOI.

Such receipt must take place during the previous year in question which must be 2020-21 or any subsequent previous year.

This is because new substituted clause (4) of section 45 is effective from assessment year 2021-22 only.

Also, such receipt must take place during the previous year in connection with the reconstitution of the specified entity.

In connection with the reconstitution.

What if **capital asset approximating the credit balance is given to a partner and is treated as drawings by debit to capital account** and **in the next financial year** they draw up a **deed of reconstitution** giving recitals **to the effect that partner has overdrawn and is unable to bring in capital and therefore it is mutually agreed that he will retire** with effect from …. date **and the ….. asset drawn by him as drawings on …. be treated as full and final settlement of dues payable to him *qua* partner of the firm?**

Such a **case would clearly not be receipt "at the time of reconstitution**" which words were there in the Finance Bill, 2021.

At time of passage of **Finance Bill, 2021** in Lok Sabha, the words **"at the time of" have been replaced with the words "in connection with the reconstitution".**

A similar amendment of substituting "at the time of " with "in connection with" was made by Finance Act, 2005 in section 35DDA.

The effect was explained in the *Notes on Clauses on the Finance Bill, 2005* as in order to make the section applicable to payments in connection with employee's voluntary retirement either in the year of retirement or in any subsequent year.

Taking a cue from the above Notes on clauses on an identical change in wordings in the past, one can take a view that, **even after the change in wordings, section 45(4) will not apply to drawings by partners in the financial years preceding the financial year in which the reconstitution takes place.**

A view can be taken that section **45(4) will only apply to receipt of asset by partner in the year in which reconstitution takes place or in any subsequent year.**

Condition (v)

Increase in the capital account of partner due to revaluation of any asset or due to self-generated goodwill or any other self-generated asset.

If there is no increase in the capital account of partner due to revaluation of any asset or due to self-generated goodwill or any other self-generated asset, then section 45(4) will result in *Nil* capital gains.

Capital gains resulting under sub-section (4) if only money is paid to partner/member - Whether LTCG or STCG?

If capital asset is given to partner/member, it is not difficult to decide whether resulting capital gain in hands of firm is short-term or long-term.

Question arises what if **only money is paid** to partner/member at the time of reconstitution or dissolution of firm/LLP/AOP/BOI?

In that case, if computation under sub-section (4) results in capital gains in the hands of firm, **it will be treated as short-term if partner/member has been with the firm/LLP/AOP/BOI for 36 months or less. Where it is treated as short-term, it would be taxed at slab rates.**

The resulting capital gains would be **treated as long-term capital gains if retiring partner has been partner with the firm for more than 36 months.**

Insertion of new section 9B.

Income on receipt of capital asset or stock in trade by specified person from specified entity.

'Section 9B(1)

- *Where a specified person receives during the previous year*
- *any* ***capital asset or stock in trade or both***
- *from a specified entity*
- ***in connection with the dissolution or reconstitution of such specified entity,***
- *then the* ***specified entity shall be deemed to have transferred such capital asset or stock in trade or both,***
- *as the case may be,*
- *to the specified person*
- *in the year in which such capital asset or stock in trade or both*
- *are received by the specified person.*

Section 9B(2)

- *Any profits and gains arising from such*
- ***deemed transfer of capital asset or stock in trade or both,***
- *as the case may be,*
- *by the specified entity shall be –*

(i) deemed to be the income of such specified entity of the previous year in which such capital asset or stock in trade or both were received by the specified person; and

(ii) ***chargeable to income-tax*** *as income of such specified entity* ***under the head "Profits and gains of business or profession" or under the head "Capital gains"****, in accordance with the provisions of this Act.*

Section 9B(3)

- *For the purposes of this section,*
- ***fair market value of the capital asset or stock in trade*** *or both*
- *on the date of its receipt by the specified person*
- *shall be* ***deemed to be the full value of the consideration*** *received or accruing*
- *as a result of such deemed transfer of the capital asset or stock in trade or both*
- *by the specified entity.*

Section 9B(4)

- *If any difficulty arises in giving effect to the provisions of this section and sub-section (4) of section 45,*
- *the Board may,*
- *with the approval of the Central Government,*
- *issue guidelines for the purposes of removing the difficulty.*

Section 9B(5)

- *Every guideline issued by the Board under sub-section (4) shall,*
- *as soon as may be after it is issued,*
- *be laid before each House of Parliament, and*
- *shall be binding on the income-tax authorities and*
- *on the assessee.*

Explanation.— For the purposes of this section,—

*(i) "**reconstitution of the specified entity" means**, where—*

*(a) **one or more of its partners** or members, as the case may be, of such specified entity **ceases to be partners** or members; or*

*(b) **one or more new partners** or members, as the case may be, are **admitted** in such specified entity **in such circumstances that one or more of the persons who were partners or members, as the case may be, of the specified entity, before the change, continue as partner or partners or member or members after the change**; or*

*(c) **all the partners** or members, as the case may be, of such specified entity **continue with a change in their respective share or in the shares of some of them;***

(ii) "specified entity" means a firm or other association of persons or body of individuals (not being a company or a co-operative society);

(iii) "specified person" means a person, who is a partner of a firm or member of other association of persons or body of individuals (not being a company or a co-operative society) in any previous year.'.

Analysis of Section 9B of Income Tax Act, 1961

Condition/Event	Possible Interpretation	Issues
specified person receives during the previous year	What is necessary is an actual receipt and not a constructive receipt during the previous year	Thus, if Partner's Account is debited and asset account credited in the Books of Firm this will not trigger.
any capital asset or stock in trade or both from a specified entity	Strictly receipt should be of these assets	[Section 45(4) covers money too and hence this distinction is necessary] The term "capital asset" is defined in section 2(14). The definition applies unless the context otherwise requires. However, it **appears** that an asset which is not capital asset within the meaning of section 2(14) is not a capital asset for the purposes of section 9B. To illustrate, agricultural land which is not a capital asset under section 2(14) cannot be regarded as a capital asset for the purposes of section 9B and the transfer of such an asset will not result in any tax implication under section 9B. On the other hand, all capital assets (whether movable or immovable or actionable claim, etc.) are covered by the expression capital asset.

Condition/ Event	Possible Interpretation	Issues
in connection with the dissolution or reconstitution of such specified entity,	Receipt during the previous year of assets should be in connection with dissolution or reconstitution	**Previously the words used were on dissolution or otherwise.** **Now the words are in connection with.** **Thus, if dissolution has taken place in FY 19-20 and assets are distributed in FY 2021 this section will trigger.** **So what is essential is nexus between dissolution / reconstitution and distribution.** **Both these events need not be in the same previous year .**

Condition/ Event	Possible Interpretation	Issues
then the specified entity shall be deemed to have transferred such capital asset or stock in trade or both, as the case may be, to the specified person in the year in which such capital asset or stock in trade or both are received by the specified person.	In such an event Firm shall be deemed to have transferred assets in the year in which such asset is received by Partner. (**Not before and Not later)**	**Time gap between Dissolution and Distribution. On dissolution Firm ceases to exist.** **How you will do the assessment of the Firm in the year when Partner receives this Asset.** **(Possible Solution is in the wording of Section 189 which is quite extensive.)**

Issues
189(1) ➢ Where any business or profession carried on by a firm ➢ has been discontinued or ➢ where a firm is dissolved, ➢ the [Assessing] Officer shall make an assessment of the total income of the firm ➢ as if no such discontinuance or dissolution had taken place, and ➢ all the provisions of this Act, ➢ including the provisions relating to the levy of a penalty or any other sum chargeable under any provision of this Act, ➢ shall apply, ➢ so far as may be, ➢ to such assessment.

Section 9B(3)

For the purposes of this section, fair market value of the capital asset or stock in trade or both on the date of its receipt by the specified person shall be deemed to be the full value of the consideration received or accruing as a result of such deemed transfer of the capital asset or stock in trade or both by the specified entity.

Where ever intention of the legislature was to consider a specific FMV, indication is available in the Section.

One notes that there is no such indication in Section 9B or Section 45(4).

Therefore, provisions of Section 2(22B) shall apply.

2(22B)

"fair market value", in relation to a capital asset, means—

(i) the price **that the capital asset** would ordinarily fetch on sale in the open market on the relevant date; and

(ii) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with the rules made under this Act;

Thus this will not apply to Stock in Trade

Applicability of Section 45(1) for charging capital gain on such deemed transfer of capital asset:

Consequently the normal provision of section 45(1) read with section 48 and section 49 will apply on such distribution of capital asset on its dissolution or reconstitution by the firm to its partner

Applicability of Section 28 for charging income tax under the head "Profits and gains of business or profession" on such deemed transfer of stock in trade:

As far as the deemed transfer of stock in trade by a firm to its partners on its dissolution or reconstitution is concerned, the normal provision of section 28 will apply for determining profits and gains from such deemed transfer of stock in trade for the purpose of charging income tax on such deemed transfer.

Accordingly the difference between the cost of acquisition or manufacture or purchase and the fair market value is chargeable to tax in the hands of the firm as profits and gains of business or profession.

Meaning of Reconstitution of the firm:

For the purpose of this section, reconstitution of the firm means:

(a) Retirement of **one or more** of its partners;

(b) Admission of one or more new partners in such a circumstances that one or more existing partners continue as partner after the change;

(c) Change in profit sharing ratio of such firm.

Applicability of above provisions in case of other association of persons or body of individuals (AOPs or BOIs):

The above provisions are also applicable mutatis mutandis in case of other association of persons or body of individuals (not being a company or a co-operative society.)

Reconstitution Examples

A, B, C, D are partners of X & Co.

Situation	Whether Reconstitution
If A (or any of the partner) retires,	X Co. is considered to be reconstituted under clause (a)
If E joins as a partner and A, B, C, D continue as partners.	X Co. will be considered as reconstituted under clause (b) since E has joined and old partners remain.
IF E, F join and none of the existing partners continue to remain as partner.	The requirement of clause (b) is that new partner should join and at least one or more of the old partners (being A, B, C, D) should continue. In this case, none of the existing partners continues. Hence, there is no reconstitution under clause (b). However, as per clause (a), there is a reconstitution even if one partner retires. Hence, due to retirement of old partners, the event would be considered as reconstitution under clause (a), although not under clause (b).

Reconstitution Examples

A, B, C, D are partners of X & Co.

Situation	Whether Reconstitution
There is a change in profit sharing ratio (PSR) from equal to A-30%; B-20%; C-30%; D- 20%.	Yes, the **change in PSR will constitute reconstitution under clause (c),** since all partners are continuing and there is change in PSR of all of them.
There is a change in PSR from equal to A-30%; B-20%; C-25%; D- 25%.	**The PSR of only A&B has changed where PSR of C&D has remained same. The wordings used in clause (c) are "a change in their respective share or in the shares of some of them". Thus, even if there is a change in PSR of only some of the partners, it would still constitute reconstitution.**
A retires and new PSR is B-33%, C-33%, D-34%.	It **would not be reconstitution under clause (c) since all the existing partners are not continuing**; however, **it would constitute reconstitution under clause (a), since an existing partner ceases to exist as a partner.**

Reconstitution Examples

A, B, C, D are partners of X & Co.

Situation	Whether Reconstitution
If E admitted and the PSR changes from equal to A-20%; B-20%; C-20%; D-20%; E-20%.	**Since all the partners continue, and there is change is PSR, clause (c) applies.** **It can also be said to be reconstitution under clause (b).**

Method of Computation of Capital Gain on such deemed transfer

Particulars	Amount
Sale Consideration	xxxxxxxxx
Less: Expenses incurred in connection with such transfer	xxxxxxxxx
Less: Cost of Acquisition/ Indexed Cost of Acquisition	xxxxxxxxx
Less: Cost of Improvement/ Indexed Cost of Improvement	xxxxxxxxx
Less: The amount chargeable to income-tax in the hands of firm u/s 45(4) which is attributable to the capital asset being transferred by the firm, calculated in the prescribed manner*	xxxxxxxxx
Capital Gain (Short Term/ Long Term)	xxxxxxxxx

*Note- It is consequent to amendment made in section 48 of Income Tax Act, 1961 by the Finance Act, 2021.

Board is empowered to remove any difficulty by issuing guidelines:

Power has been given to the Board to remove, with the approval of the Central Government, any difficulty that may arise in giving effect to **the provisions of section 9B and section 45(4)** by issuing guidelines for the purposes of removing the said difficulty. Every guideline so issued by the Board will be laid before each House of Parliament, and will be binding on the income-tax authorities and on the assessee

Understanding the applicability of the above section i.e. section 9B

Basic information:

Firm Name	M/s ABC & Associates
Partner's Name	Mr. A, Mr. B, & Mr. C

Profit sharing ratio 1/3rd each

Illustration (1): Distribution of Capital Assets & Stock in trade in the case of dissolution

Date of dissolution 01.04.2021

Distribution to Partners

Immovable Property (Stamp Duty Value of Rs. 15 lakhs) given to Mr. A [Indexed cost of acquisition of immovable property- Rs. 8 lakh]

Stock in trade (FMV of Rs. 12 lakhs) given to Mr. B [Cost of Purchase of such stock- Rs. 9 lakh]

Shares (FMV of Rs. 10 lakhs) given to Mr. C [Indexed cost of acquisition of shares- Rs. 9 lakh]

Computation of Capital Gain under section 9B read with section 45(1) & section 48 (In the hands of firm i.e. M/s ABC & Associates)

Particulars	Immovable Property (Rs.)	Shares (Rs.)
Sale Consideration (FMV)	15,00,000	10,00,000
Less: Indexed cost of acquisition	8,00,000	9,00,000
Capital Gain	7,00,000	1,00,000
Total Capital Gain		8,00,000

Computation of Business Income under section 28 (In the hands of firm i.e. M/s ABC & Associates)

Particular	Stock in trade (Rs.)
Sale Consideration (FMV)	12,00,000
Less: cost of purchase	9,00,000
Business Income	3,00,000

Thus capital gain of Rs. 8,00,000 and business income of Rs. 3,00,000 will be chargeable to tax in above case.

Note- As this is the case of dissolution of firm, section 45(4) will not be applicable

ILLUSTRATIONS ON 45(4) R.W.S 9B

1. Mr. A - retires from Firm and receives the following

a) Stock

Cost	Rs. 2,00,000/-
Market Value	Rs. 2,40,000/-

b) **Money** Rs. 10,00,000/-

c) **Land**

Cost	Rs. 25,00,000/-
ICOA	Rs. 40,00,000/-
Stamp duty Value	Rs. 1,00,00,000/-

d) **Capital outstanding before retirement** Rs. 60,00,000/-

9B r.w.s 28 & 45(1)

Stock

Business Income 40,000 (Tax 40000 * 30% = 12000)

Land

Capital Gain 60,00,000 (1Crore - 40 Lakhs)

Tax 12,00,000 (60,00,000 * 20%)

Money - (NA for 9B)

(2 taxes are paid 12,000/- business income and 12,00,000/- capital gain)

Calculation of Capital Outstanding to the credit of partner D

Capital	60,00,000/-		
Business Profit (as per accounts)	40,000 - 12,000	=	28,000.00
Profit on sale of asset (as per accounts)	75,00,000 - 12,00,000	=	63,00,000.00
			63,28,000.00 / 3
			21,09,333.00

= 60,00,000.00 + 21,09,333.00 = 81,09,333.00

Section 45(4)

A = B + C - D

= (Money) + (land) - (existing capital standing to the credit of partner D + share of profit till retirement - tax paid).

= 10 Lakh + 1 Crore – (60,00,000 + 21,09,333) (working see earlier slide)

= 28,90,667/- Capital gain u/s. 45(4)

Capital Gain = 28,90,667/- to be allocated / attributed / apportioned to remaining assets.

2. Partner A is retiring

<u>Only one asset in the firm - Land</u>

Land cost - 25,00,000/-

Indexed Cost of Acquisition - 40,00,000/-

Stamp duty - 1,00,00,000/-

Capital gain 1,00,00,000 - 40,00,000 = 60,00,000 X 20% = 12 Lakhs Tax

Capital = Existing Capital + Profit

= 60,00,000 + 21,00,000 (75,00,000 - 12,00,000) / 3

= 81,00,000

A = B + C – D

0 + 1,00,00,000 - 81,00,000

Capital gain = 19 lakhs u/s. 45(4)

3. On dissolution of firm section 9B

Partners receive

Stock

Cost	3 Lakhs
Market Value	3.50 Lakhs

Non-depreciable asset

Land

Cost	25 Lakhs	
SDV	1 Crore	
ICOA	40 Lakhs	
Business income u/s. 28		3.5 – 3 = 0.50
Capital Gain 45(1)		1 Crore – 40 = 60

In case of dissolution 45(4) will not be attracted.

4. Partners A Receives on retirement

Money 30 Lakhs

Land

Cost	25 Lakhs
SDV	1 Crore
ICOA	40 Lakhs

Section 45(1) r.w.s 9B

Capital asset	1 Crore – 40,00,000
	= 60 Lakhs X 20% tax
	= 12 Lakhs

Firm will pay tax as per 45(1) r.w. 9B Rs. 12,00,000

Section 45(4)

A = B + C – D (let capital outstanding of A = 70 Lakhs)

= 30 + 1 Crore - (70 + 21)

= 30 + 1 Crore - 91

= 1.30 - 91

= 39 Long Term Capital Gain u/s 45(4)

Accounting profit

1 Crore - 25 lakhs = 75

Less : Tax paid Rs. 12 Lakhs. Therefore net change in capital = 75 lakhs – 12 lakhs = 63 Lakhs Rs. 63 Lakhs is distributed amongst the 3 partners in PSR.

= 21 Lakhs

Circular No. 14 of 2021 dated : 02nd July, 2021

Guidelines

- It is noticed that the amount taxed under section 45(4) of the Act is required to be attributed to the remaining capital assets of the specified entity, so that when such capital assets get transferred in the future, the amount attributed to such capital assets get reduced from the full value of the consideration and to that extent the specified entity does not pay tax again on the same amount.

- It is further noticed that this attribution is given in the Act only for the purposes of section 48 of the Act. It may be seen that section 48 of the Act only applies to the capital assets which are not forming block of assets.

- For capital assets forming block of assets, there is sub-clause (c) of clause (6) of section 43 of the Act to determine written down value of the block of the asset and section 50 of the Act to determine the capital gains arising on transfer of such assets.

- However, the Act has not yet provided that amount taxed under section 45(4) can also be attributed to capital assets forming part of block of assets and which are covered by these two provisions.

- To remove difficulty, it is clarified that **Rule 8AB** of the Income Tax Rules, 1962 notified vide **Notification No. 76 dated 02-07-2021** also applies to capital assets forming part of block of assets.

- **Wherever the terms capital asset is appearing in the Rule 8AB of the Rules, it refers to capital asset whose capital gains is computed under section 48 of the Act as well as capital asset forming part of block of assets**.

- **Further, wherever reference is made for the purposes of section 48 of the Act, such reference may be deemed to include reference for the purposes of sub-clause (c) of clause (6) of section 43 of the Act and section 50 of the Act**.

- It is further clarified that in case the capital asset remaining with the specified entity is forming part of a block of asset, the amount attributed to such capital asset under Rule 8AB of the Rules shall be reduced from the full value of the consideration received or accruing as a result of subsequent transfer of such asset by the specified entity, and the net value of such consideration shall be considered for reduction from the written down value of such block under sub-clause (c) of the clause (6) of section 43 of the Act or for calculation of capital gains, as the case may be, under section 50 of the Act.

For the purposes of understanding and for removing difficulties, the application of section 9B of the Act and sub-section (4) of section 45 of the Act is explained with the help of the following examples:

Example-1: Following is the Balance Sheet of Firm "FR" having partners A, B, C with equal profit-sharing ratio.

Liabilities	Amount in Lacs	Assets	Amount in Lacs
Partners' Capital Balances:		Capital Assets – Land :	
A	10	Land- S (FMV: 70 Lacs)	10
B	10	Land- T (FMV: 70 Lacs)	10
C	10	Land- U (FMV: 50 Lacs)	10
	30		30

All the three lands were acquired by the firm more than 2 years ago, thus, these are long term capital assets.

Partner “A” wishes to exit from the firm.

On his exit, the firm decides to give him Rs. 11 Lakh of money and land “U” to settle his capital balances.

Indexed cost of acquisition of land “U” is Rs. 15 Lacs.

Tax rate 20% on LTCG.

Solution:

- As per section 9B of the Act, it shall be deemed that the firm "FR" has transferred land "U" to partner "A" at FMV Rs. 50 Lacs.
- **Therefore, Long Term capital Gain in the hands of firm "FR" =**

Particulars	Amount in Lacs
Fair Market Value of Land "U"	50
Less: Indexed cost of acquisition	(15)
Long Term Capital Gain on deemed transfer of land "U"	35
Tax payable on LTCG @ 20% of 35 in hands of firm	7

- Net Book Profit on sale of land "U" to be credited to partner's capital account:

Particulars	Amount in Lacs
Sales consideration of Land "U"	50
Less: Book value of acquisition	(10)
Book Profit before tax	40
Less: Tax payable on LTCG	(7)
Net Book profit to be shared in 1:1:1	33
Thus, capital of each of the partners will be credited with Rs. 11 Lacs for the profit as calculated above.	

Capital Accounts of the partners

Particulars	A	B	C
Capital balances as given	10	10	10
Add: Profit on sale of land “U”	11	11	11
Total capital balances	21	21	21
Less: Settlement by way of cash and land	(61)		
Excess of settlement money as compared to capital balances	40		

- Thus, the excess money as calculated above Rs. 40 Lacs shall be charged to tax under section 45(4) of the Income Tax Act. This shall be in addition to an amount of Rs. 35 Lacs charged to capital gains tax.
- **According to Rule 8AB, the above Rs. 40 Lacs is attributed to remaining assets of the firm "FR" on the basis of increase in their value due to revaluation.**
- **In our example, both remaining assets "S" and "T" have their values increased by Rs. 60 Lacs. Thus, Rs. 40 Lacs will be attributed to both "S" & "T" in 60:60 i.e. Rs. 20 Lacs each.**
- **When either of these lands are sold in future, the above amount as attributed to them Rs. 20 Lacs shall be reduced from sales consideration under clause (iii) of section 48 of the Act.**

The amount of Rs. 40 Lacs which is charged to tax under section 45(4) of the Act shall be charged as long-term capital gains in view of Rule 8AB, since the amount of Rs. 40 Lac is attributed to land "S" and "T" which are both long term capital assets at the time of taxation of Rs. 40 Lacs under section 45(4) of the Act.

Example 2 in the guidelines contemplates situation where, instead of allotment of land U to the retiring partner, the specified entity sells land U to an outsider at FMV and settles retiring partner's capital account by paying only cash of 61.

In Example 1, the deeming fiction of section 9B operates by treating the allotment of land U to the retiring partner as a deemed transfer by the specified entity, while in Example 2, section 9B is not applicable but the normal capital gains taxation provisions in ITL are applicable at the time of sale of capital asset by the specified entity in favor of an outsider.

Note: The final result in both example-1 and 2 is same due to the operation of section 9B of the Act.

Example - 3

Following is the Balance Sheet of Firm "FR" having partners A, B, C with equal profit-sharing ratio.

Liabilities	Amount in Lacs	Assets	Amount in Lacs
Partners' Capital Balances:		Capital Assets	
A	100	Land- S (FMV Rs. 45 Lacs)	30
B	100	Patent -T (FMV Rs. 60 Lacs)	45 (WDV)
C	100	Cash	225
	300		300

The land was acquired by the firm more than 2 years ago and thus, it is a long-term capital asset.

The patent was acquired/developed/registered only 1 year back.

Partner “A” wishes to exit.

As per the valuation report, there is also a self-generated goodwill of Rs. 30 Lacs.

On the exit of partner “A”, the firm decides to give him Rs. 75 Lakhs in cash and land “S” to settle his balances.

Indexed cost of land “S” is Rs. 45 Lacs.

Solution:

As per section 9B of the Act, it shall be deemed that the firm "FR" has transferred land "S" to partner "A" at its FMV Rs. 45 Lacs.

Therefore, Long Term capital Gain in the hands of firm "FR" =

Particulars	Amount in Lacs
Fair Market Value of Land "S"	45
Less: Indexed cost of acquisition	(45)
Long Term Capital Gain on deemed transfer of land "S"	Nil
Tax payable on LTCG @ 20% in the hands of firm	Nil

This exercise is carried out since section 9B of the Act mandates that it is to be deemed that the firm “FR” has transferred the land “S” to the partner “A”.

However, since the LTCG as calculated above is “Nil”, there will be no capital gain tax on application of section 9B of the Act.

- For partner “A”, the cost of acquisition of land “S” shall be taken as Rs. 45 Lacs.

Net Book Profit on deemed transfer of land "S" to be credited to partner's capital account:

Particulars	Amount in Lacs
Fair Market Value of Land "S"	45
Less: Book value of Land "S"	(30)
Book Profit before tax	15
Less: Tax payable on LTCG	Nil
Net Book Profit to be shared in 1:1:1	15
Thus, capital of each of the partners will be credited with Rs. 5 Lacs for the profit as calculated above	

Capital Accounts of the partners

Particulars	A	B	C
Capital balances as given	100	100	100
Add: Profit on deemed transfer of land "S"	5	5	5
Total capital balances	105	105	105
Less: Settlement by way of cash	(75)		
Less: settlement by way of land "S"	(45)		
Excess of settlement money as compared to capital balances	15		

A = B(Money) + C(FMV of land) – D (existing capital balance + profit - tax)

75 + 45 – (5 + 100)

120 – 105 = 15

- Thus, the excess money as calculated above Rs. 15 Lacs shall be charged to tax under section 45(4) of the Income Tax Act. This shall be in addition to any amount charged to tax under section 9B of the Act which is “Nil” in this example.

- **According to Rule 8AB, the above Rs. 15 Lacs is attributed to remaining assets of the firm “FR” on the basis of increase in their value due to revaluation of existing capital assets, or due to recognition of the value of self-generated goodwill, based on the valuation report of registered valuer.**

- **In our example, the value of patent “T” has increased by Rs. 15 Lakhs (60-45) and the self-generated goodwill value has been recognised at Rs. 30 Lakhs.**

- **So, Rs. 15 Lacs will be attributed between patent and the self-generated goodwill in the ratio of 15:30 or 1:2. Thus, Rs. 5 lakhs will be attributed to patent "T" and Rs. 10 Lacs attributed to self-generated goodwill.**

- **The amount of Rs. 15 Lacs which is to be charged to tax under section 45(4) of the Act shall be charged as short-term capital gains, as Rs. 5 Lacs as attributed to the Patent "T" is a depreciable asset and Rs. 10 Lacs is attributed to self-generated goodwill.**

- **In accordance with sub-rule (5) of Rule 8AA of the Rules, both of these are to be characterised as short-term capital gains.**

- **Rs. 5 lacs as attributed to patent "T" shall not be added to the block of the assets and no depreciation shall be available on the same.**

- **When patent "T" gets transferred subsequently, this Rs. 5 Lacs attributed shall be reduced from the full value of consideration receiving or accruing as a result of transfer of patent "T" by the firm "FR" and the net value shall be considered for reduction from the written down value of the intangible block under section 43(6)(c) of the Act or for calculation of capital gains as the case may be, under section 50 of the Act.**

- **Let us say that patent "T" is sold for Rs. 25 Lacs. Then, net sales consideration will be taken as Rs. 20 Lacs (25-5) and Rs. 20 Lacs shall be considered for reduction from the WDV of the intangible block or for calculating short term capital gain u/s 50.**

- **Similarly, when the goodwill is sold subsequently, Rs. 10 Lacs would be reduced from its sales consideration under clause (iii) of section 48.**

Note**: For the purpose of calculation of depreciation u/s 32 of the Act, the WDV of the block of intangible of which patent "T" is also a part, would remain Rs. 45 Lacs and would not be increased to Rs. 60 Lacs due to revaluation during the year.**

In this regard, following provisions are relevant in determination of the amount on which depreciation is allowable under the Act:

(a) Explanation 2 of sub-section (1) of section 32 of the Act provides that the term "written down value of the block of assets" shall have the same meaning as in section 43(6)(c) of the Act.

(b) Section 43(6)(c) of the Act provides that the aggregate of the written down values of all the assets falling within that block of assets at the beginning of the previous year is to be increased by the actual cost of any asset falling within that block, acquired during the previous year. This clause does not allow any increase on account of revaluation.

(c) Sub-section (1) of section 43 of the Act which defines "Actual cost" as actual cost of the assets to the assessee. In revaluation, there is no actual cost to the assessee.

Further, section 32 of the Act does not allow depreciation on self-generated goodwill or asset.

Notification no 76 dated 02.07.2021

G.S.R. 470(E).—In exercise of the powers conferred by **section 48 read with section 295 of the Income-tax Act, 1961** (43 of 1961), the Central Board of Direct taxes hereby makes the following rules further to amend the Income-tax Rules,1962, namely:—

1. Short title:- (1)These rules may be called the Income tax Amendment (18th Amendment), Rules, 2021.

2. In the Income-tax Rules, 1962, (hereinafter referred to as the principal rules) in **rule 8AA**, **after sub-rule (4), the following sub-rule shall be inserted, namely:-**

(5). In case of **the amount which is chargeable to income-tax** as income of specified entity **under subsection (4) of section 45 under the head - Capital gains,-**

(i) the amount or a part of it shall be **deemed to be from transfer of short term capital asset, if it is attributed to -**

(a) capital asset which is short term capital asset at the time of taxation of amount under subsection (4) of section 45; or

(b) capital asset forming part of block of asset; or

(c) capital asset being self-generated asset and self-generated goodwill as defined in clause (ii) of Explanation 1 to sub-section (4) of section 45; and

(ii) the amount or a part of it shall be deemed to be from transfer of long term capital asset or assets, if it is attributed to capital asset which is not covered by clause (i) and is long term capital asset at the time of taxation of amount under sub-section (4) of section 45.

3. In the principal rules, after rule 8AA, the following rule shall be inserted, namely:-

"8AB. <u>Attribution of income taxable under sub-section (4) of section 45 to the capital assets remaining with the specified entity, under section 48.-</u>

(1) For the purposes of clause (iii) of section 48, **<u>where the amount is chargeable to income-tax as income of specified entity under sub-section (4) of section 45, the specified entity shall attribute such amount to capital asset remaining with the specified entity in a manner provided in this rule.</u>**

(2) Where the **aggregate of the value of money and the fair market value of the capital asset** received by the specified person from the specified entity, **in excess of the balance in his capital account**, chargeable to tax under sub-section (4) of section 45, **relates to revaluation of any capital asset or valuation of self-generated asset or self-generated goodwill, of the specified entity, the amount attributable to the capital asset remaining with the specified entity for purpose of clause (iii) of section 48** shall be the amount which bears to the amount charged under sub-section (4) of section 45 the **same proportion as the increase in, or recognition of, value of that asset because of revaluation or valuation bears to the aggregate of increase in, or recognition of, value of all assets because of the revaluation or valuation.**

(3) Where the **aggregate of the value of money and the fair market value of the capital asset** received by the specified person from the specified entity, **in excess of the balance in his capital account,** charged to tax under sub-section (4) of section 45 **does not relate to revaluation of any capital asset or valuation of self generated asset or self-generated goodwill, of the specified entity**, the amount charged to tax under sub-section (4) of section 45 **shall not be attributed to any capital asset for the purposes of clause (iii) of section 48.**

Excess money received and capital asset at cost

(4) Notwithstanding anything contained in sub-rules (2) or (3), where the **aggregate of the value of money and the fair market value of the capital asset** received by the specified person from the specified entity, **in excess of the balance in his capital account,** charged to tax under sub-section (4) of section 45 **relate only to the capital asset received by the specified person from the specified entity, the amount charged to tax under sub-section (4) of section 45 shall not be attributed to any capital asset for the purposes of clause (iii) of section 48.**

Excess relates only due to revalued capital asset.

(5) The specified entity shall **furnish the details of amount attributed to capital asset remaining with the specified entity in Form No. 5C.**

(6) **Form No. 5C shall be furnished electronically either under digital signature or through electronic verification code and shall be verified by the person who is authorised to verify the return of income of the specified entity under section 140**.

(7) **Form No. 5C shall be furnished on or before the due date** referred to in the Explanation 2 below subsection (1) of section 139 for the **assessment year in which the amount is chargeable to tax under subsection (4) of section 45**

(8) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall –

(i) specify the procedure for filing of Form No. 5C;

(ii) specify the procedure, format, data structure, standards and manner of generation of electronic verification code, referred to in sub-rule (6), for verification of the person furnishing the said Form; and

(iii) be responsible for formulating and implementing appropriate security, archival and retrieval policies in relation to the Form No 5C so furnished.

Explanation 1: For the purposes of this rule, the amount chargeable to tax under sub-section (4) of section 45 shall relate to **revaluation of any capital asset or valuation of self-generated asset or self-generated goodwill, of the specified entity, if the revaluation is based on a valuation report obtained from a registered valuer as defined in clause (g) of rule 11U.**

Explanation 2: For the removal of doubt it is clarified that **revaluation of an asset or valuation of self-generated asset or self-generated goodwill does not entitle the specified entity for the depreciation on the increase in value of that asset on account of its revaluation or recognition of the value of self-generated asset or self-generated goodwill due to its valuation.**

Explanation 3: For the purposes of this rule, the expressions self-generated asset and self-generated goodwill‖ shall have the same meaning as assigned to them in clause (ii) of Explanation 1 to sub-section (4) of section 45.”

4. In the principal rules, in Appendix II, after Form No. 5B, the following Form shall be inserted, namely:—

"Form No. 5C (See rule 8AB)

Details of amount attributed to capital asset remaining with the specified entity

1. Name of the specified entity
2. Permanent Account number
3. Assessment Year
4. Amount taxable under sub-section (4) of section 45
5. Attribution of amount taxable under sub-section (4) of section 45 to capital assets remaining

Sr.No.	Capital Asset		Book Value	Revalued amount/valued amount for self-generated asset	Amount attributed	Short term/ long term
	name	Whether self generated yes/no				
	Total					

6. Name and registration number of the valuer based on whose valuation report information at serial no 5 is provided.

VERIFICATION

I, ____son/ daughter of_____ solemnly declare that to the best of my knowledge and belief, the information given in the form is correct and complete and is in accordance with the provisions of the Income-tax Act, 1961. I further declare that I am furnishing the form in my capacity as__(drop down to be provided in e-filing utility) and I am also competent to furnish this form and verify it. I am holding permanent account number_____.

Place:

Date : Signature……..

[Notification No. 76/2021/F. No. 370142/22/2021-TPL]

SECTION 48(iii)

Mode of computation.

48. The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :-

- **[***(*iii*) in case of value of any money or capital asset received by a specified person*
- *from a specified entity referred to in subsection (4) of section 45,*
- *the amount chargeable to income-tax as income of such specified entity*
- *under that sub-section which is attributable to the capital asset being transferred by the specified entity,*
- *calculated in the prescribed manner*:**]**

ISSUES OF SECTION 45(4) AND 9B

Issue - 1. When was section 9B of the Income tax Act 1961 introduced?

Answer:

Section 9B of the income tax Act, 1961 was not proposed in the finance Bill,2021, It was later introduced in the finance Act, 2021(2021) 432 ITR (St) 52. Section 5 and section 16 of the Finance Act, 2021 introduced Section 9B of the Income-tax Act, 1961.

Therefore, as the same does not form part of " the Memorandom explaining the provisions of the Finance Bill, 2021 " and as there were no Constitutional Assembly Debates while passing the Finance Bill, 2021, there is no literature explaining the intention of the Legislature. The Central Board of Direct taxes have prescribed guidelines under section 9B and section 45(4) of the Income tax Act, 1961 vide Circular No. 14 of 2021 dated July 02,2021.

Issue - 2. Whether section 9B / 45(4) of the Income tax Act, 1961 passes the test of Constitutional Validity?

Answer:

Section 9B / 45(4) the Income- tax Act, 1961 passes the test of Legislative competence, it is not violative of any Fundamental right guaranteed in Part III of the Constitution of India, nor does the provision infringe or is ultra *Vires* any other provision of the Constitution. Therefore, Section 9B of the Income-tax Act, 1961 passes the test of Constitutional validity.

In the case of **Sardar Baldev Singh v. CIT (1960) 40 ITR 605 (SC)** it was held that the legislative competence to enact the section can be clearly upheld on the ground that it was to prevent evasion of income-tax and that would be enough to dispose of the argument that the section was an impotent piece of legislation.

Issue - 3. Can section 9B / 45(4) of the Income-tax Act, 1961 have retroactive applicability?

Answer:

Section 9B / 45(4) of the Income tax Act, 1961 introduced vide Finance Act, 2021 is effective from Assessment Year 2021 – 22 onwards i.e. the same is applicable to Financial Year 2020-21.

With respect to the retroactivity of the newly inserted provision, there is no bar on the legislature to make retroactive amendments.

The Hon'ble Supreme Court in the case of **Chhotabhai Jethabhai Patel and Co, v Union of India 1962 SCR Supl**. (2) (1) has held that if a power to impose taxation has been conferred by a constitution, then the legislature could equally make the law retroactive and impose the duties from a date earlier than the date from which it was imposed.

Issue - 4. Whether section 9B of the Income-tax Act, 1961 applicable on cash payment?

Answer:

No. Section 9B of the Income tax Act, 1961 is only applicable on distribution of Capital Asset or Stock-in Trade or both.

Issue - 5. How is Fair Market value of the asset or Stock on trade computed?

Answer:

As per section 2(22B) of the Income-tax Act, 1961. “ fair market value” in relation to a capital asset, means

i) The price that the capital asset would ordinarily fetch on sale in the open market on the relevant date: and

ii) Where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with the rules made under this Act.

Further on perusal of the examples contained in the CBDT Circular 14 of 2021 dated July 02, 2021, considers the Fair Market value as arrived under Rule 11U of the Income-tax Rules, 1962 for the purpose of the determining profits and Gains under section 9B of the Income-tax Act, 1961.

Issue - 6. Whether deeming sections like section 43CA section 50C or Section 56(2)(x)(b) applicable to transactions covered under section 9B of the Income-tax Act, 1961?

Answer:

Section 9B of the Income-tax Act, 1961 is a deeming provision. Section 43CA, section 50C or section 56(2)(x)(b) of the Income-tax Act, 1961 are also deeming provisions. Therefore, one deeming fiction cannot be applied to another.

In the case of **Asst. CIT v Amartara (P) Ltd [2021] 128 taxmann.com 125 (Mum – Trib)** held since case of assessee fell under scope of section 45(3) which itself is a deeming section and provided for deeming consideration to be adopted for computation of capital gains under section 48, section 50C could not be extended to compute deemed full value of consideration accruing as a result of such transfer for computation of capital gain.

In the case of **Network Construction Company v. ACIT[2020] 185 ITD 318/ 119 taxmann.com 186(Mum-Trib)** it was held that provisions of section 50C of the Income-tax Act, 1961 will not operate where section 45(3) of the Act is operating.

Further, since the provisions of 9B of the Income-tax Act, 1961 Invoke the fair Market Value, the effect of the deeming provisions would be subsumed and there would be no tax leakage.

Issue - 7. Whether section 9B of the Income-tax Act, 1961 is applicable to distribution of rural Agricultural Lands

Answer :

As per section 9B(2) of the Income-tax Act, 1961, the deemed transaction shall be chargeable to Income-tax as income of such specified entity under the head " Profits and gains or business of profession" or under the head" Capital gains "in accordance with the provisions of the Income-tax Act, 1961.

Therefore, since transfer of rural agricultural land is not a capital asset, distribution/deemed transfer of the same would not attract any capital gain tax on the specified entity.

In the case of **Premchand Jain V Asst. CIT [2020] 183 FTD 372/117 taxmann.com 370(Jaipur-Trib)** dealing with section 56(2) (vii)(b) of the Act has held that if the agricultural land does not fall in definition of capital asset, difference between district level value and sales consideration cannot be brought to tax. The same principle will apply.

Issue - 8. Can the Assessing Officer assess a Firm after dissolution as per section 189(1) of the Income-tax Act, 1961?

Answer:

As section 9B of the Income-tax Act, 1961 allows the ld. Assessing Officer to assess the Firm the year subsequent to dissolution. Whereas, section 189(1) premits the Ld. Assessing Officer to assess a dissolved firm as if it is not dissolved. Therefore, the application of section 189(1) of the Income-tax Act, 1961 is debatable.

Issue - 9. Whether deduction claimed under section 29 of the Income-tax Act, 1961 will be applicable to 'profit & gains" computed as per section 9B of the Income–tax Act, 1961?

Answer :

As per section 9B(2) of the Income-tax Act, 1961, the deemed transaction shall be chargeable to Income-tax as Income of such specified entity under the head " Profits and gains of business or Profession" or under the head " Capital gains " in accordance with the provisions of the Income – tax Act, 1961.

Therefore the expenses/deductions available under the head " Income from Business and Professions" should be allowed.

Issue - 10. Whether Cost of acquisition/ Cost of improvement will be applicable as deduction to ‘ Capital Gains’ Computed as per section 9B of the Income-tax Act, 1961?

Answer:

As per section 9B(2) of the Income-tax Act, 1961, the deemed transaction shall be chargeable to Income - tax as income of such specified entity under the head “ Profits and gains in business or profession “ or under the head “ Capital gains “ in accordance with the provisions of the Income-tax Act, 1961.

Hence the computation mechanism for Capital Gains under the Income-tax Act, 1961 will be followed and statutory deductions will be allowed.

Issue - 11. How is Capital Gains on transfer of self – generated assets and self-generated goodwill as per section 9B of the Income-tax Act, 1961?

Answer:

The Book value of the self-generated asset or self – generated goodwill is immaterial.

In the event where on reconstitution or dissolution of a specified entity, a self-generated asset is distributed to a specified person, then the entire sum will be taxable as Capital Gains taking the cost of acquisition as nil.

As per Rule 8AA of the Income-tax Rules, 1962, transfer of a self-generated asset or self – generated goodwill is deemed to be a short-term Capital Asset for the purpose of computing Capital gains under section 45(4) of the Income-tax Act, 1961.

However, such a deeming provision does not exist, therefore the Capital Gains on transfer of self generated goodwill can be both long term capital gain or short term capital gain.

Issue - 12. Will the specified entity get the benefit under section 48(iii) of the Income-tax Act, 1961?

Answer:

Section 48(iii) of the Income - tax Act, 1961, allows deduction of the amount chargeable to Income-tax as Income of such specified entity on the value of any money or capital asset received by a specified person from a specified entity under section 45(4) of the Income - tax Act, 1961.

Therefore, the said provision does not apply to section 9B of the Income tax Act, 1961.

Issue - 13. When was section 45(4) of the Income – tax Act, 1961 introduced?

Answer:

In the Finance Bill, 2021, **(2021) 432 ITR (St) 39** it was proposed to introduce a new section i.e., Section 45(4A) of the Income – tax Act, 1961 with a view to rationalize the provision of transfer of capital asset to partner on dissolution or reconstitution.

However, section 45(4A) of the Income tax Act, 1961 was never introduced and the Finance Act, (2021) **432 ITR (St) 52** replaced the existing section 45(4) of the Income tax Act, 1961 with a new section.

Issue - 14. What is the difference between the erstwhile section 45(4) of the Income – tax Act, 1961 and the new provision?

Answer:

The difference between the erstwhile section 45(4) and the new section 45(4) of the Income –tax Act, 1961 are as under :

Sr. No	Particulars	Erstwhile section 45(4) of the Income –tax Act, 1961	New section 45(4) of the Income – tax Act, 1961
1.	Applicability	On Dissolution	On reconstitution
2.	Tax Liability	In the hands of the Firm	In the hands of the specified Entity.
3.	Point of taxation	In the year in which the transfer takes place	In the year the money or capital asset is received by the specified person
4.	Computation Mechanism	As per section 48 of the Income-tax Act, 1961	Formula for computation of Capital gains is provided in the new section

Sr. No	Particulars	Erstwhile section 45(4) of the Income –tax Act, 1961	New section 45(4) of the Income – tax Act, 1961
5.	Determining	Fair Market value on the date of transfer is deemed to be the consideration	The Fair Market Value on the asset is used in the formula
6.	Deduction	Cost of acquisition, Cost of improvement and expenses related to transfer are allowed as deduction	The Capital Contribution, ignoring any revaluation is allowed as deduction
7.	Benefit of indexation	Indexation is allowed	The question of indexation doesn't arise

Issue - 15. Whether section 45(4) of the Income-tax Act, 1961 applicable on dissolution?

Answer:

No. Section 45(4) of the Income-tax Act, 1961 is not applicable on dissolution of the specified entity.

Issue - 16. Does section 45(4) of the Income-tax Act, 1961 override section 45(1) of the Income – tax Act, 1961?

Answer:

Yes, section 45(4) of the Income-tax Act, 1961 overrides section 45(1) of the Income-tax Act, 1961.

Section 45(4) of The Income-tax Act, 1961 contains a non obstante clause which expressly overrides provision of section 45(1) of the Income-tax Act, 1961.

In the case of **Aswini Kumar Ghosh v. Arabinda Bose 1952 AIR 369** it was held that there is no escape from the conclusion that ambit, scope and effect of the non obstante clause are to supersede the other provisions and any other Act, only in so far as they regulate the conditions referred to therein.

Issue - 17. Whether revaluation of capital accounts to be considered for the purpose for computation of Capital Gains under section 45(4) of the Income-tax Act, 1961?

Answer:

As per second proviso to section 45(4) of the Income-tax Act, 1961, it is expressly clarified that the balance in the capital account of the specified person in the books of account of the specified entity is to be calculated without taking into account the increase in the capital account of the specified person due to revaluation of any asset or due to self-generated goodwill or any other self-generated asset.

Issue - 18. What are the implications if the Capital account balance is negative?

Answer:

Where a specified person in a Partnership Firm has a negative capital balance and the same is not made good by the specified person and subsequently waived by the specified entity might amount to receipt of cash.

A negative figure may be used in the formula computation as per section 45(4) of the Income-tax Act, 1961.

Issue - 19. Whether the Capital Gains under section 45(4) of the Income-tax Act, 1961 is Long-term or short term Capital Gains?

Answer:

As per Rule 8AA and Rule 8AB of the Income-tax Rules 1962, the Profits/gains arising on account of section 45(4) of the Income-tax Act, 1961 have to be bifurcated in the ratio of the profits on revaluation.

Post bifurcation the part of the profits/gains attributed to a particular asset will be treated as short-term Capital Gain or Long-term Capital according to the nature of the Capital Asset.

Issue - 20. How are assets revalued?

Answer:

Assets are revalued taking into consideration their fair market value as per Rule 11U of the Income-tax Rules, 1962,

As per Explanation 1 under Rule 8AA of the income-tax Rules, 1962, revaluation for the purpose of section 45(4) of the Income-tax Act, 1961 should be based on a valuation report obtained from a registered valuer as defined in Rule 11U(g) of the Income-tax Rules, 1962.

Issue - 21. How to claim the benefit of revaluation of assets?

Answer:

Rules 8AB of the Income-tax Rules, 1962 has been prescribed for the purpose of attribution of Income taxable under section 45(4) of the Income-tax Act, 1961 to the capital assets remaining with the specified entity, under section 48 of the Income-tax Act, 1961.

As per sub-rule (5) to Rule 8AB of the Income-tax Rules, 1962 The specified entity shall furnish the details amount attributed to capital asset remaining with the details of amount attributed to capital asset remaining with the specified entity in **Form No.5C.**

Issue - 22. Whether depreciation is allowed on the amount of revaluation?

Answer:

No. Depreciation is not allowed on the amount of revaluation of assets.

As per Explanation 2 under Rule 8AA of the Income-tax Rules, 1962 it is clarified that revaluation of an asset or valuation of self-generated asset or self-generated goodwill does not entitle the specified entity for the depreciation on the increase in value of that asset on account of its revaluation or recognition of the value of self-generated asset or self-generated goodwill due to its valuation.

Issue - 23. How and when to file Form 5C?

Answer:

As per sub-rules (5), (6) and (7) to Rule 8AB of the Income-tax Rules, 1962, Form No. 5C shall be furnished electronically either under digital signature or through electronic verification code and shall be verified by the person who is authorised to verify the return of income under Income tax Act, 1961.

Form No. 5C Shall be furnished on or before the due date referred to in the Explanation 2 to section 139(1) of the Income-tax Act, 1961 for the assessment year in which the amount is chargeable to tax under section 45(4) of the Income-tax Act, 1961.

Issue - 24. Whether any share of profits is to be considered for the purpose of section 45(4) of the Income-tax Act, 1961?

Answer:

Yes, Share of profit is not on account of any revaluation of capital balance or assets.

Therefore, share of profits should be added to the capital account balance for the purpose of computation of Capital Gains under section 45(4) of the income Tax Act, 1961.

Issue - 25. Whether revaluation of stock on trade is accounted for the purpose of section 45(4) of the Income-tax Act, 1961?

Answer:

All assets including Stock-in-trade has to be revalued at fair Market value for settling of Accounts.

Issue - 26. Whether section 45(4) of the Income-tax Act, 1961 is applicable to slump sale?

Answer:

Section 45(4) of the Income tax Act, 1961 will not be applicable to Slump sale.

Section 45(4) of the Act is attracted when cash or assets are distributed to a specified person by a specified entity on account of reconstitution of the specified entity.

In case of a slump sale the entire undertaking is sold lock, stock and barrel.

In the case of **Ambo Agro Products ltd. V principal CIT [2017] 81 taxmann.com 305/165 ITD 20(Kol-Trib.)** it has been held that section **50B of the Income-tax Act, 1961 is a code in itself and contains both charging and computation provision of capital gains in the case of 'SLUMP SALE'.**

Therefore, the special provision i.e. section 50B of the Income tax Act, 1961 should apply.

In the case of **Hindustan Electro Graphics Ltd., v CIT [1998] 96 Taxman 163 (MP)(HC)** it has been held that a **special provision will override the general provisions also known as generalia Specialibus non derogant.**

Issue - 27. Whether section 45(4) / 9B of the Income-tax Act, 1961 is applicable to payments made to the legal heirs of the specified persons?

Answer:

The provision of section 45(4) / 9B of the Income-tax Act, 1961 is applicable to payments made to the legal heirs of the specified persons is debatable.

There is no clarification to this effect.

Assuming a deeming provision has to be strictly construed a " legal heir " is not within the definition of a specified person.

Therefore it is a debatable issue.

Therefore, it can be argued that provision of section 9B of the Income-tax Act, 1961 may not be applicable when payments are made to legal heir.

Judicial precedents need to throw light on the subject matter or the CBDT should provide a clarification.

Issue - 28. Whether the specified entity can claim the benefit of deduction under section 54EC and section 54EE of the Income-tax Act, 1961 on Capital Gains under section 45(4) of the Income-tax Act, 1961?

Answer:

There is no clarification to this effect. The nature of taxation will be as per Rule 8AB of the Income –tax Rules, 1962

On a liberal Interpretation, there is no bar on claiming deduction under section 54EC and section 54EE of the Income-tax Act, 1961.

INTERPLAY BETWEEN SECTION 9B & SECTION 45(4) OF THE INCOME-TAX ACT, 1961

Issue - 29. When will both Provisions be applicable?

Answer:

Both section 9B and section 45(4) of the Income-tax Act, 1961 will be applicable on distribution of capital assets to a specified person by a specified entity on account of reconstitution of the specified entity.

Issue - 30. Which section will be made applicable first?

Answer:

As per the CBDT Circular No. 14 of 2021 dated July 02,2021, section 9B of the Income-tax Act, 1961 has to be applied first and then section 45(4) of the Income-tax Act, 1961.

Issue - 31. What is the impact of ‘gains’ and ‘profit’ computed as per the Income-tax Act, 1961 on computation under section 45(4) of the Income-tax Act, 1961?

Answer:

Section 9B of the Income-tax Act, 1961 pertains to deemed transfer in the specified circumstances. The post-tax earnings / gains on such deemed transfer would be added to the capital balances of such specified persons for computation of Capital gains under section 45(4) of the Income-tax Act, 1961.

Issue - 32

Assessee is Partnership firm of two persons, father and son. Firm has assets which includes immovable property on which depreciation is claimed and also other current assets like stock in trade etc. On 04.07.2021, one of the partners i.e. father expired. Since there are no legal heirs, the other partner i.e. son became the proprietor of the business. Whether provisions of Sec. 9B and 45(4) are applicable and implications in the hands of sole surviving member in the family.

Answer :

The Hon'ble Supreme Court in the case of **Mohd Laiquiddin v. Kamala Devi Misra (Dead)** by **L.Rs. and Ors. (2010) 2 SCC 407** placed its reliance on the decision of the **Hon'ble Madras High Court in the case of S. Parvathammal (Smt.) v. CIT [1987] 163 ITR 161 (Mad) (HC)** and held that when there are only two partners constituting the partnership firm, on the death of one of them, the firm is deemed to be dissolved despite the existence of a clause which says otherwise.

Therefore, the firm would be deemed to be dissolved.

Section 45(4) of the Income-tax Act, 1961 (Act) would be attracted in the case of a reconstitution of a specified entity. Whereas section 9B of the Act would be attracted in the case of a reconstitution and dissolution of a specified entity.

Therefore, in the given case, section 9B of the Act would be attracted.

As per section 9B of the Act, the capital asset or stock-in-trade or both received by the partner from a firm on dissolution of the firm will be considered as a deemed transfer, and the firm shall be liable to tax on such transfers in accordance with the provisions of the Act.

This deemed transfer would be in the year in which such capital asset or stock in trade or both are received by the specified person.

Any profits and gains arising from such deemed transfer is deemed to be the income of such specified entity of the previous year in which such capital asset or stock in trade or both were received by the specified person.

Further, it is chargeable to income-tax as income of such specified entity under the head “Profits and gains of business or profession” or under the head “Capital gains”, in accordance with the provisions of this Act.

It has also been provided that the fair market value of the capital asset or stock in trade or both, on the date of its receipt by the specified person, shall be deemed to be the full value of the consideration received or accruing as a result of such deemed transfer.

Issue - 33

Sec. 45(4) and 9B of the Income Tax 1961.

Assessee is partnership firm having 5 partners, engaged in the business of construction. The firm has undertaken the construction of housing project. In the partnership deed, it is agreed by and between the partners that all partners will contribute the capital equally and their profit sharing is equal. It is also agreed that in case capital contribution is not made equally, then the profit sharing which is decided as equal will be changed as per the capital contribution by executing the fresh partnership deed.

Accordingly partners have decided to execute the partnership deed and change the profit sharing ratio as per the capital introduced by the each partner. Whether it amounts to reconstitution and whether there will be any tax implications in view of new provisions of sec 9B and 45(4) of the Income Tax Act. 1961

As per explanation (i)(c) to section 9B of the Income-tax Act, 1961 (Act), it is clarified that a change in the share of partners would amount to reconstitution of the firm.

Explanation 1 to section 45(4) of the Act, the expression "reconstitution of the specified entity" shall have the meaning respectively assigned to them in section 9B of Act.

Therefore, there is no doubt that a change in the partnership ratio would amount to reconstitution for the purposes of section 9B of the Act and section 45(4) of the Act.

For section 9B of the Act to attract, there has to be a pay-out by way of a capital asset or stock in trade or both.

This is not the case in the given case. Therefore, section 9B of the Act is not attracted.

For section 45(4) of the Act, there has to be a pay-out by way of capital asset or money or both. As we understand, there is no pay-out on account of reconstitution. The partners will receive profits in the ratio of their contribution. Therefore, section 45(4) of the Act is not attracted.

There is a possibility that the Department might take a view that the higher profits received by a partner is on account of the reconstitution as the words of section 45(4) are "specified person receives … from a specified entity in connection with reconstitution of such specified entity". However, this interpretation doesn't seem robust.

Issue - 34

Interest u/s 234C due to sec. 45(4) and 9B

Section 45(4) and Section 9B were introduced in Finance Act 2021 having retrospective applicability from Financial Year 20-21 relevant to Assessment Year 21-22.

It has been observed that in many cases, reconstitution has taken place in the year 2020-21 that was not taxable under the Income Tax Act till the introduction of Finance Act 2021, thus the assessees may not have paid advance tax on the same.

Since the Finance Act, 2021 was passed in Parliament on 24 March 2021; nobody could have paid advance tax on cases of reconstitution on which there was no tax earlier.

However, such assessees on whom the above sections are applicable would still be made liable to Interest u/s 234C for non-payment of advance tax, and they would be liable to pay interest on such tax of which they had no knowledge.

Since the Act came into force w.e.f. 01/04/2021, so at earliest possible the tax would have been paid in the month of April, so liability for interest u/s 234B will also arise for April 2021.

Issue - 35

Receipt vs. Credit

- Taxability arises only if the specified person 'receives'
- Real receipt or constructive receipt
- Mere credit to the account cannot be regarded as receipt
- **CIT vs. Toshoku Ltd. 125 ITR 525 (SC)**

Issue - 36

Waiver of Debit Balance

- Debit Balance in Capital Account waived upon reconstitution
- Can it be considered as a receipt of money by the partner in connection with the reconstitution?
- **CIT vs. Mahindra & Mahindra Ltd. [2018]302 CTR 213 (SC)**
- Waiver of loan by the creditor results in the debtor having extra cash in his hand
- It is receipt in the hands of the debtor/assessee.

Issue - 37

Capital Balance

- Amount of balance in the capital account (represented in any manner)
- Interest, Remuneration & Share of Profits to be included :What if they were not in accordance with the deed?
- Accruals till the date of reconstitution should also be included
- Balance in other related accounts
- Current account - should be included
- Loan account?
- Proportionate share in the Reserves & Surplus?
- Tax cost of settlement
- If recovered from the outgoing partner
- If not recovered from the outgoing partner

Issue - 38

Set-off of Loss

Whether the losses (b/f or of same year) can be set-off against deemed income?

- No express provision prohibiting set-off like other Sections
- Subject to other restrictions provided in Sec. 70, 71
- Impact of Sec. 78(1)?

- Proportionate share of retiring partner in b/f losses

- available for set-off against deemed income of 9B or 45(4)?

- 'his share of profits' - whether the whole of CG arising u/s. 45(4) can be considered?

Issue - 39

Exemption

Whether the Specified Entity can claim exemption u/s. 54EC?

- Sec. 9B - deemed transfer of the capital asset
- Sec. 45(4)- only deems it to be the income of the Specified Entity under the head Capital Gain.

Date of transfer - date of reconstitution or date of receipt of capital asset by the Specified Entity?

- Sec. 9B - deemed to have been transferred in the year in which such capital asset is received by the Specified Person.

Investment needs to be made by the Specified Entity and not by the Specified Person.

Issue - 40

Transfer of Depreciable Asset

Transfer of a depreciable asset by the Specified Entity to the Specified Person.

- Sec. 9B r.w.s. 50
- STCG = FMV - WDV of Block-cost of other assets of that block which are acquired during the year.

Sec. 9B r.w.s. 43(6)(c)

- Whether the FMV can be considered as 'moneys payable'?

Issues on reconstitution of specified entities

Issue - 41. Whether provisions of sections 45(4), 9B and 48(iii) have any application to drawings by partners without any reconstitution or dissolution?

No.

Issue - 42. Whether provisions of sections 45(4), 9B and 48(iii) apply to a case where there is no admission or retirement of partners but only changes in profit sharing ratio of existing partners and the partner/(s) whose profit sharing ratio are reduced are paid monetary compensation ?

Yes. The definition of reconstitution also covers a case "all the partners or members, as the case may be, of such specified entity continue with a change in their respective shares or in the shares of some of them".

Therefore, section 9B is surely attracted if compensation to partner for profit share reduction is by way of transfer of a capital asset/stock-in-trade to him.

Section 9B has no application if compensation is paid only by way of money.

Section 45(4) shall be attracted only if the amount paid exceeds adjusted capital account balance. Section 48(*iii*) shall not apply.

Issue - 43. Whether provisions of sections 45(4),9B and 48(iii) apply to a case where there is no admission or retirement of partners but only changes in profit sharing ratio of existing partners and the capital accounts of partner/(s) whose profit shares are reduced are credited with monetary compensation with corresponding debits to capital accounts of partners whose shares have increased in Gain ratio?

There is nothing in either section 45(4) or in section 9B which deems mere credit to capital account as "receipt of money". Section 9B will not apply as there is neither receipt of capital assets nor stock-in-trade by partner. Mere credit in capital account is neither receipt of capital asset not stock-in-trade nor money. Even if the amount credited is withdrawn by partner in money, section 9B will not apply. If partner withdraws it in the form of capital asset or stock-in-trade, then section 9B will apply.

The transfer of the property to an existing partner by mere adjustment of book entries otherwise than in connection with dissolution of the partnership or retirement of the partner from the partnership not accompanied by a duly registered deed of conveyance, does not constitute a transfer

- CIT v. Kedarnath Poddar & Co. [1993] 201 ITR 639 (Cal.)

Issue - 44. Whether tax paid by firm under new substituted sub-section (4) of section 45 can be recovered from the retiring partner?

No. Long time back when Fringe Benefits Tax (FBT) was around section 115WKA was inserted in the Act to enable employer to recover from employee the FBT paid by employer on the perquisite of ESOP or sweat equity shares allotted.

And section 115WKB was inserted in the Act to provide that the FBT paid by employer and recovered from employee on ESOP/sweat equity shall be deemed to be tax paid by employee on such ESOP/sweat equity.

Absent such similar provisions in respect of capital gains tax paid by the firm under section 45(4), it appears that the tax so paid cannot be recovered from concerned retiring partner.

Issue - 45. Circulars issued by CBDT which are adverse to the assessee can be challenged by him before appellate authorities. Does this apply to removal of difficulties guidelines issued by CBDT u/s 9B(4)?

No. These guidelines come with kind of "the Quiz Master's decision is final" clause. Section 9B(5) says that removal of difficulties guidelines issued under section 9B(4) will be "binding on the income-tax authorities and on the assessee".

Thanks to my computer operators

Sri. Vinay Kumar.H and Sri.N.Beeresh

HYDERABAD BRANCH OF SIRC OF ICAI

SEMINAR ON DIRECT TAXES

T.BANUSEKAR, CHENNAI
05.08.2023

ADDRESSING NOTICES U/S.148A OF THE INCOME TAX ACT

The provisions relating to reassessment are governed by sections 147 to 152 of the Act. The Finance Act 2021 has substituted new sections in place of Sections 147 to 151 and has further introduced a new section 148A. Further amendments were made to the newly inserted provisions by the Finance Act, 2022 and Finance Act, 2023

ISSUE OF NOTICE U/S.148

Erstwhile Provisions

Under the erstwhile provisions, the following were the procedure for issue of notice for reopening an assessment.

- Primarily, the Assessing Officer should have a reason to believe that income has escaped assessment and record his satisfaction

- After recording his satisfaction the Assessing Officer has to get approval from the JCIT / CIT as the case may be for issue of notice u/s.148

- After filing of return of income in response to notice u/s.148 the assessee can seek reasons recorded for reopening from the Assessing Officer

- The assessee can then file his objections on the reasons recorded for reopening

- The Assessing Officer after considering the objections raised by the assessee has to pass a separate speaking order disposing off the objections and not as a part of the final assessment order

New Provisions

Under the newly inserted provisions, the procedure for issue of notice u/s.148 is as follows:

- Procedure for issue of notice u/s.148 is provided for under the newly inserted section 148A of the Income Tax Act

- To follow the procedure laid down u/s.148A the Assessing Officer should either have information as detailed below or a survey should have been conducted in the case of the assessee u/s.133A.

Assessing Officer should have information which suggests that the income chargeable to tax has escaped assessment. The term information means the following:

*(i) any information **[*]** in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time; **[*word "flagged" has been omitted w.e.f. 01.04.2022]***

(ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or

(iii) any information received under an agreement referred to in section 90 or section 90A of the Act; or

(iv) any information made available to the Assessing Officer under the scheme notified under section 135A; or

(v) any information which requires action in consequence of the order of a Tribunal or a Court.

Prior to insertion of (ii) to (v) by Finance Act, 2022 w.e.f. 01.04.2022 clause (ii) read as follows:

(ii) any final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act.

- The Assessing Officer can conduct any enquiry on the information, if required with prior approval of specified authority

- The Assessing Officer has to provide an opportunity of being heard to the assessee with the prior approval of the specified authority by serving a notice u/s.148A(b) to show cause why notice u/s.148 should not be issued based on the information available with him.

- The Finance Act, 2022 w.e.f. 01.04.2022 has removed the requirement to obtain prior approval of specified authority to provide an opportunity of being heard to the assessee

- The Assessing Officer has to grant a time ranging from 7 days to 30 days to the assessee for responding to the notice. Time limit can also be extended on the basis of an application from assessee

- Thereafter the Assessing Officer has to consider the reply filed by the assessee.

- After considering the reply, the Assessing Officer can decide on the basis of material available on record and pass an order u/s.148A(d) with the prior approval of the specified authority on whether it is a fit case or not for issue of notice u/s.148.

- Time limit granted for passing this order u/s.148A(d) is one month from the end of the month in which the reply is received from the assessee or one month from the end of the month in which the time limit granted for furnishing a reply expires, if no reply is received.

- After passing an order u/s.148A(d), the Assessing Officer can issue notice u/s.148 if it is a fit case

- ***Second proviso to section 148 has been inserted by Finance Act, 2022 w.e.f. 01.04.2022*** where by for issue of notice u/s.148 approval u/s.151 need not be obtained from the specified authority in respect of the cases where order u/s.148A(d) has been passed.

The procedure to be followed by the Assessing Officer u/s.148A are not applicable to the following cases:

- Where search is conducted u/s.132 or requisition is made u/s.132A on or after 01.04.2021

- Where search is conducted u/s.132 or requisition is made u/s.132A on or after 01.04.2021 and where money, bullion, jewellery or other valuable article or thing or books of accounts or documents seized or requisitioned belong to or pertain to another person

- Where the AO has received information under the scheme notified u/s.135A (faceless collection of information) ***[inserted by the Finance Act, 2022 w.e.f. 01.04.2022 as point (d) under proviso to section 148A]***

However, approval u/s.151 has to be obtained from the specified authority for issuing notice u/s.148 in respect of the above cases

The following table provides the details of time limit for issue of notice u/s.148, the conditions under which the assessment can be reopened and the specified authority from whom the approval has to be obtained for issue of notice u/s.148

Time Limit	**Conditions under which assessment can be reopened**	**Approval to be obtained from**
Upto 3 years from the end of the relevant assessment year	Where AO has information which suggests that income chargeable to tax has escaped assessment	PCIT / PDIT / CIT / DIT. ***No approval is required if AO with prior approval has passed an order u/s.148A(d) [w.e.f 01.04.2022]***
Upto **10*** years immediately preceding the assessment year relevant to the previous year in which search / requisition / survey has happened in the case of the assessee (In respect of search or requisition or survey conducted on or after 01.04.2021)	The AO shall be deemed to have information which suggests that income chargeable to tax has escaped assessment	PCIT / PDIT / CIT / DIT
Upto **10*** years immediately preceding the assessment year relevant to the previous year in which search / requisition has happened. (In respect of search or requisition on or after 01.04.2021)	The AO is satisfied that any money, bullion, jewellery or other valuable article or thing seized or requisitioned in case of any other person belongs to the assessee	PCIT / CIT
Upto **10*** years immediately preceding the assessment year relevant to the previous year in which search / requisition has happened. (In respect of search or requisition on or after 01.04.2021)	The AO is satisfied that any books of account or documents seized or requisitioned in case of any other person pertains to or any information contained therein relate to the assessee	PCIT / CIT

Time Limit	Conditions under which assessment can be reopened	Approval to be obtained from
Beyond 3 years but not more than 10 years from the end of the relevant assessment year	Where AO has in his possession books of accounts or other documents or evidence which reveal that income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to Rs.50 lakhs or more for that year. It has been amended w.e.f. 01.04.2022 to include that escaped income can also be represented in the form of Expenditure in respect of a transaction or in relation to an event or occasion or An entry or entries in the books of account.	PCCIT / PDGIT If no PCCIT / PDGIT then CCIT / DGIT **Finance Act 2023 has amended this whereby the specified authorities are PCCIT / PDGIT / CCIT / DGIT w.e.f. 01.04.2023**

***Earlier it was only 3 years. Amended with effect from 01.04.2022**

Note:

No notice u/s.153A or u/s.153C can be issued in respect of search initiated u/s.132 or assets requisitioned u/s.132A, on or after 01.04.2021.

FILING OF RESPONSES TO NOTICE ISSUED U/S.148A(b)

Immediately on receipt of a notice u/s.148A(b) under the new provisions of the Income Tax Act, an assessee has to check out the following:

1. What is the year for which the notice u/s.148A(b) has been issued and whether the notice is a valid notice or time barred

   By virtue of the 1st proviso to section 149, no notice can be issued u/s.148 if the said notice could not have been issued at that time on account of being beyond the time limit specified under the newly inserted section 149(1)(b) as it stood immediately before the commencement of the Finance Act, 2021.

   For example the assessment for the assessment year 2014-15 cannot be reopened as on 01.04.2021 since the time limit for reopening the said assessment year is 6 years from the end of the relevant assessment year and that the same has expired on 31.03.2021 as per the old law. Therefore under the new law, no notice can be issued u/s.148 for reopening the assessment for the assessment year 2014-15.

Therefore as on 31.03.2023, notices u/s.148 can be issued under the provisions of new law only for assessment years 2016-17 and later years

2. Whether the Assessing Officer has provided the information based on which he has issued the notice u/s.148A(b), whether the information suggests that income has escaped assessment in the hands of the assessee and whether the said information meets the definition of term “information” as provided in Explanation 1 to section 148

3. Information in accordance with the ‘risk management strategy formulated by the Board’ means information available on the **Insight Portal** of the Department and received by the AO from the **Insight Portal**

4. Whether the assessment year for which the assessment has been reopened is within 3 years or beyond 3 years but within 10 years, from the end of the relevant assessment year sought to be reopened.

5. If the reopening is of an assessment year beyond the period of 3 years but within 10 years, it has to be checked whether the quantum of escaped of income is a sum of Rs.50 lakhs or more and that whether it is represented in the form of

   (a) An asset or
   (b) An Expenditure in respect of a transaction or in relation to an event or occasion or
   (c) An entry or entries in the books of account

6. Whether the notice has been issued with the prior approval of the specified authority as laid down in section 151. Sanction by an unauthroised authority would render the approval bad in law since when the statute authorizes a specified officer to accord approval, then it is that office who has to accord approval and not any other officer even if he is a superior officer.

7. The assessee has to obtain information to check whether the Assessing Officer has obtained the sanction from the appropriate authority prior to issue of notice u/s.148A or u/s.148, since issue of notice prior to obtaining necessary sanction would render the reopening proceeding *void ab initio*

8. Whether a minimum period of 7 days has been granted to the assessee to file its response to the notice issued u/s.148A(b). If not, the same amounts to violation of natural justice which is not a curable defect. Lack of opportunity before the Assessing Officer cannot be rectified by the Appellate Authority by giving such opportunity.

After analyzing all the above stated points, the assessee has to file a detailed reply

- Objecting the defects or shortcomings in the notice and

- On the merits of the case as to why there is no escapement of income in the hands of the assessee in respect of the issue stated by the Assessing Officer

- The assessee can also seek an opportunity for personal hearing before the Assessing Officer prior to passing an order u/s.148A(d)

A detailed reply at the first stage i.e filing of reply in response to notice u/s.148A(b) will help the assessee in subsequent appellate proceedings or in a proceeding before the High Court if a writ petition is filed challenging the notice issued u/s.148A(b)

FILING OF RESPONSE TO ORDER PASSED U/S.148A(d)

The Assessing Officer after considering the reply filed in response to notice u/s.148A(b) by the assessee and on the basis of material available on record has to pass an order u/s.148A(d) with the prior approval of the specified authority within one month from the end of the month in which the reply of the assessee is received by the Assessing Officer

The assessee has to check the following on receipt of the order u/s.148A(d):

1. Whether the order has been passed within one month from the end of the month in which the reply of the assessee is received by the Assessing Officer

2. If the order is not passed within the said time limit, then the same would become time barred and that the said order can be challenged in writ petition before the High Court

3. Whether a notice u/s.148 has been served along with the order u/s.148A(d)

4. Whether in the order passed u/s.148A(d), the Assessing Officer has recorded a finding of income escaping assessment on the basis of 'information' which suggests that income has escaped assessment in the hands of the assessee. If the Assessing Officer has recorded his finding for escapement of income on the basis of some other ground and not on the basis of information which was referred to in the show cause notice issued u/s.148A(b), then the order u/s.148A(d) would become invalid.

5. If the order passed by the Assessing Officer u/s.148A(d) is a non speaking order without dealing with the objections raised by the assessee, then the order passed u/s.148A(d) would become invalid and can be challenged in a writ petition before the High Court

6. Whether proper sanction has been obtained from the specified authority before passing the order u/s.148A(d) and for issuing a notice u/s.148

7. In the case of search assessments and in a case where any information is received under the scheme notified u/s.135A, no order would be passed u/s.148A(d). However the notice u/s.148 has to be issued with the prior approval of the specified authority u/s.151 for such cases.

After checking the above points, the assessee has to file return of income in response to the notice issued u/s.148 of Income Tax Act.

- Earlier the time limit for filing the return of income was to be specified in the notice u/s.148.

- The time period within which a return of income in response to notice u/s.148 has to be filed has been amended by the Finance Act, 2023.

- The time limit for filing the return of income as per the amendment is within 3 months from the end of the month in which the notice u/s.148 is issued, or any such extended period as may be granted by the Assessing Officer on the basis of an application from the assessee.

- A third proviso has been inserted in section 148 to provide that if the return in response to the notice u/s.148 is filed beyond the period allowed, then the same shall not be deemed as a return filed u/s.139.

- As a result of this the issue of notice u/s.143(2) would not be mandatory for such returns.

- These amendments take effect from 01.04.2023

If the assessee wishes to challenge the order passed u/s.148A(d) and the notice issued u/s.148, a writ petition can be filed before the High Court before or after filing a return of income in response to the notice issued u/s.148. Filing of return of income does not cause any prejudice to the filing of writ petition.

REASSESSMENT

What is reassessment

The term reassessment is not defined in the Act. However, it may be said that though the term reassessment indicates that an assessment is being redone, in fact it could be done even when there has been no assessment and could be the first assessment made on an assessee. Thus where no notice u/s.143(2) had been issued and no assessment completed u/s 143(3), a notice u/s.148 may still be issued to complete a reassessment. *[ACIT v Rajesh Jhaveri Stock Brokers (P) Ltd [2007] 291 ITR 500 (SC), Sri Krishna Mahal v ACIT [2001] 250 ITR 333 (Mad)].* In this connection it may be worthwhile to notice the following decisions:

- ✓ As long as there is some tangible material to support the belief that income chargeable to tax has escaped assessment, reopening is permissible. Such

tangible material need not be "new" or be alien to the record *[Gujarat Power Corporation Ltd v ACIT in Special Leave Application No.29792 of 2007 dated 30.07.2012]*

- ✓ Even in the case of a section 143(1) intimation, the AO must have "tangible material" that income has escaped assessment. *[Telco Dadajee Dhackjee Limited v DCIT in ITA No.4613 / Mum / 2005 (TM)]*

- ✓ Even in a case where only a section 143(1) Intimation is passed, the power to reopen can be exercised only where there is "reason to believe that income has escaped assessment" and not merely to **"**scrutinize**"** the return or "verify" the expenditure. *[Inductotherm (India) Pvt Ltd v DCIT [2013] 356 ITR 481 (Guj)]*

A reassessment can be made even where an intimation u/s.143(1)(a) has already been issued *[Punjab Tractors v ACIT [2002] 254 ITR 242 (P&H)]*. It has been held in *KLM Royal Dutch Airlines v ADIT [2007] 292 ITR 49 (Delhi)* and in *CIT v Ved & Co [2008] 302 ITR 328 (Del)* that no notice of reopening u/s.148 can be issued when the time for issuance of notice u/s.143(2) is still available.

A similar view is taken in

CIT v Qatalys Software Technologies Ltd [2009] 308 ITR 249 (Mad)
CIT v TCP Ltd [2010] 323 ITR 346 (Mad)
CIT v K.M.Pachayappan [2008] 304 ITR 264 (Mad)
Fateh International v DCIT [2007] 104 ITD 305 (Mum)
B.R.Industries v ITO [2008] 114 TTJ (Jp) 103

Amended provisions

Post the amendment by the Finance Act 2021, the above discussed position continues to exist – i.e re-opening can be done whether or not assessment u/s 143(3) has been done. The ratio of the abovementioned precedents would therefore continue to be relevant.

Important factors under erstwhile provisions

Conditions for invoking reassessment proceedings:

Under the erstwhile provisions reassessment could be made provided the following conditions were satisfied.

- ➿ The Assessing Officer had reason to believe that the income chargeable to tax had escaped assessment.

- ➿ Such reasons were recorded in writing by the Assessing Officer.

- ➿ A notice u/s.148 was served on the assessee.

The settled legal position in relation to the reopening of assessments has been summarized by the Gujarat High Court in *Sheth Bros. v JCIT [2001] 251 ITR 270 (Guj)* as follows:

- There must be material for the belief
- Circumstances must exist and cannot be deemed to exist for arriving at an opinion
- Reason to believe must be honest and not based on suspicion, gossip, rumour or conjecture
- Reasons referred to must disclose the process of reasoning by which the Assessing Officer holds "reasons to believe" and change of opinion does not confer jurisdiction to reasess.
- There must be nexus between material and belief
- The reasons referred to must show application of mind by the Assessing Officer.

Where a reassessment is held to be invalid the additions cannot be upheld on merits. *Rawatmal Harkchand v CIT [1981] 129 ITR 346 (Cal).*

Reason to Believe

The term "reason to believe" is not defined in the Act. The words "has reason to believe" are stronger than the words "is satisfied". The belief entertained by the Income Tax Officer must not be arbitrary or irrational; it must be reasonable, or in other words must be based on reasons, which are relevant or material. The Court cannot of course investigate into the adequacy or sufficiency of reasons, which have weighed with the Assessing Officer in coming to the belief. But the Court can certainly examine whether the reasons are relevant or have a bearing on the matters in regard to which he is required to entertain the belief before he can issue a notice. *[Ganga Saran & Sons Pvt. Ltd. v ITO [1981] 130 ITR 1 (SC), ITO v Nawab Mir Barkat Ali Khan Bahadur [1974] 97 ITR 239 (SC), ITO v Lakhmani Mewal Das [1976] 103 ITR 437 (SC)]*

The belief must be that of an honest or reasonable person based upon reasonable grounds, and that the Assessing Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Assessing Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. [Sheo Nath Singh v AAC [1971] 82 ITR 147 (SC)]

Further the belief does not mean a purely subjective satisfaction on the part of the Assessing Officer. The belief must be held in good faith; it cannot merely be a pretence *[S.Narayanappa v CIT [1967] 63 ITR 219 (SC)]*

So long as the Assessing Officer comes to the conclusion honestly even though the belief or conclusion is erroneous, the jurisdiction of the Assessing Officer to reassess will not be affected. *[Calcutta Discount Co. Ltd v ITO [1952] 21 ITR 579 (Cal)]*

The belief should be based on material which has direct nexus between the conclusion of fact arrived at by the authority concerned and the primary facts upon which that

conclusion is based. The use of extraneous and irrelevant material in arriving at that conclusion would vitiate the conclusion of fact. *[CIT v Daulat Ram Rawatmull [1973] 87 ITR 349 (SC), ITO v Lakshmani Mewal Das [1976] 103 ITR 437 (SC)]*

The mere fact that proceedings were not initiated u/s.143(2) will not mean that the Assessing Officer does not have reason to believe that income has escaped assessment so as to render the reassessment invalid. *[Pradeep Kumar Har Saran Lal v Assessing Officer [1997] 94 Taxman 124 (All), Mahanagar Telephone Nigam Ltd v Chairman, CBDT [2000] 246 ITR 173 (Delhi)]*.

The belief u/s 147 that income has escaped assessment has to be the reasonable belief of the Assessing Officer himself and cannot be an opinion and/or belief of some other authority. The AO cannot blindly follow the opinion of an audit authority for the purpose of arriving at a belief that income has escaped assessment**.** On facts, the recorded reasons are identical to the objection of the audit authority. The reasons do not rely upon any tangible material in the audit report but merely upon an opinion and the existing material already on record. This itself indicates that there was no independent application of mind by the AO before he issued the notice u/s.148.

G&G Pharma India Limited v ITO [2015] 43 CCH (Trib) 18 (Del)
CIT v Shree Rajasthan Syntex Ltd. [2009] 313 ITR 231 (Raj)
CIT v SPL's Siddhartha Ltd [2012] 345 ITR ITR 223 (Del)
Purusotam Paramanandka v DCIT in ITA No.2076 / Mds / 2015
ICICI Home Finance Co Ltd v ACIT, Mumbai dated July 20, 2012

Where there is no application of mind by the Assessing Officer on the reasons recorded, then the reassessment would become invalid. *[Signature Hotels (P) Ltd v ITO [2011] 338 ITR 51 (Del), PCIT v Meenakshi Overseas (P) Ltd [2017] 395 ITR 677 (Del)*

In the following cases it was held that reopening could not be made in the absence of new tangible material

CIT v Amitabh Bachchan [2012] 349 ITR 0076 (Bom)
CIT v Orient Craft Ltd. [2013] 87 DTR 0313 (Del) (HC)
CIT v Shri Atul Kumar Swami [2014] 88 CCH 0169 (Del) (HC)
Madhukar Khosla v ACIT [2014] 90 CCH 0023 (Del) (HC)
Inductotherm (India) Pvt Ltd v DCIT or his successor [2013] 356 ITR 481 (Guj)
Telco DadajeeDhackjee Ltd. v DCIT 2010 (5) TMI 690 (Mum)(TM)
Ashok Kumar Tandon v ACIT [2014] 40 CCH 0669 (Del) (Trib)
ACIT v Alstom Projects India Ltd. (2015) 44 CCH 0540 MumTrib
Tulip Engineering Pvt. Ltd. v ITO (2015) 92 CCH 0060 DelHC
United Shippers Limited v ACIT (2015) 92 CCH 0030 MumHC

The Hon'ble Madras High Court in *Tanmac India v DCIT [2017] 78 taxmann.com 155 (Mad)* has held that in the absence of any new or fresh material indicating escapement of income the Assessing Officer cannot resort to the provisions of section 147 where he has chosen not to utilize the opportunity granted to him for scrutinizing the assessment.

Similar view has been taken in the following decisions

PCIT v Tupperware India Pvt Ltd [2016] 65 taxmann.com 17 (Del)
Khubchandani Healthparks (P) Ltd v ITO [2016] 384 ITR 322 (Bom)
Tenzing Match Works v DCIT in TCA No.702 of 2009 – Mad HC

Sufficiency of Reasons for Belief

Assessees can challenge notices of reopening on the ground that no or insufficient reasons have been recorded. The Court must in such cases call for and examine the reasons. *Comunidado of Chicalim v ITO [2000] 113 Taxman 331 (SC)*

In determining whether there was sufficiency of reasons for the Assessing Officer to believe that by reason of omission or failure of the assessee to make a true and full disclosure of all material facts income had escaped assessment, is not for the Court to judge. It is however open to an assessee to establish that there in fact existed no belief or that the belief was not at all a *bona fide* one, or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Assessing Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Assessing Officer and further whether the material had any rational connection or a live link with the formation of the requisite belief. *CIT v Jamnadas Dwarkadas & Co. [1994] 209 ITR 1 (Bom)*

The Court will only see whether there was prima facie *some material on the basis of which the department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at that stage. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts came to the knowledge of the Assessing Officer after completion of the assessment proceeding.* Raymond Woollen Mills Ltd v ITO [1999] 236 ITR 34 (SC)

However the information regarding escapement of income at the time of issue of notice need not be complete and accurate. The Assessing Officer need not have definite information in figures before the issue of notice. The expression “in the course of proceedings” is wide in its amplitude and it will therefore be proper to conclude that the information at the time of issue of notice need not be complete and accurate. Reliable evidence should however be available *[G.Sukesh v DCIT [2001] 252 ITR 230 (Ker)].* It has been held in *S.P.Agarwalla v ITO [1983] 140 ITR 1010 (Cal)* that where a statement has been recorded from a third party that he was a mere name lender but not making a reference to the assessee, the reassessment was invalid.

Recording reasons

The recording of reasons is a condition precedent to the reopening of an assessment. Thus if reasons have not been recorded or if the reason recorded are inadequate, the proceedings of reassessment will lack jurisdiction. The decisions that may be looked at in this regard are:

CIT v Kerala State Cashew Development Corporation [1992] 198 ITR 520 (Ker)
CIT v Sukh Lal Ice Cold Storage Co. [1992] 196 ITR 562 (All)
H.C.L. Ltd v CIT [1993] 199 ITR 291 (Del)
Baldeo Ram Salig Ram Ltd v ITO [1991] 189 ITR 554 (All)
CIT v Agarwalla Bros [1991] 189 ITR 786 (Pat)
ITO & Others v Biju Patnaik [1991] 188 ITR 247 (SC)
Shambhu Nath Sheo Prasad [1993] 113 CTR 166 (Pat)

In the decision of the Kerala High Court in *198 ITR 520 (supra)* it was further held that a mere anterior note in the order sheet for some other purpose is not sufficient for the purpose of the reopening. Reasons should be recorded exclusively for the reopening.

Similarly the Gujarat High Court in *Birla VXL Ltd v ACIT [1996] 130 CTR 281 (Guj)* and *VXL India Ltd v ACIT [1995] 127 CTR 204 (Guj) [Affirmed ACIT v VXL India Ltd. [2001] 247 ITR 820 (SC)]* has held that for holding a belief "there must be material and there should have been nexus to holding such opinion contrary to what had been expressed earlier". "Merely saying that excessive loss or depreciation allowance has been computed without disclosing reasons which led the assessing authority to hold such belief does not confer jurisdiction on the Assessing Officer to take action under section 147 or 148".

The reasons recorded should most obviously state the opinion of the Assessing Officer, the quantum that has escaped assessment and the reason that gives rise to such belief.

The quantum of escapement of income has to be definitely mentioned in the reasons recorded where the reopening is done beyond 4 years from the end of the relevant assessment year

Novo Nordisk India (P.) Ltd. v DCIT [2018] 95 taxmann.com 225 (Kar)
Bakulbhai Ramanlal Patel v ITO [2011] 56 DTR 212 (Guj)
Mahesh Kumar Gupta v CIT & Anr [2014] 363 ITR 300 (All)

Though he need not elaborately set out all the relevant facts, he must broadly indicate the fact or facts which constitute non disclosure and which has led to assessable income escaping assessment. *[KCP Ltd v ITO [1984] 146 ITR 284 (AP)]*. However mere notes of an Income Tax Officer in a file cannot be construed or elevated as reasons recorded even placing the most charitable construction. *[Vijayalakshmi Oil Industries v ITO [1985] 155 ITR 748 (Kar)]*. Similarly, in the absence of reasons recorded in the file of the Assessing Officer the reasons set out in the letter of the Income Tax Officer in response to the assessee's request for reasons for exercise of power will not be sufficient compliance of the requirement stipulated in section 148. *[Morarjee Goculdas Spinning & Weaving Co. Ltd v P.N.Bansal, IAC [1993] 71 Taxman 445 (Bom)]*.

Reason for reopening must mention the failure to disclose fully and truly all material facts where the reopening is done beyond 4 years from the end of the relevant assessment year

Global Signal Cables (India) Pvt. Ltd. v DCIT [2014] 368 ITR 0609 (Del)
CIT v Schwing Stetter India P. Ltd. [2015] 378 ITR 380 (Mad)
Balasubramanian Ramachandran v ITO [2014] 90 CCH 0226 (Del) (HC)
Gujarat Fluorochemicals Ltd. v DCIT [2009] 319 ITR 0282 (Guj)
Sound Casting (P) Ltd v DCIT & Ors [2012] 250 CTR (Bom) 119
CIT v Orient Craft Ltd. [2013] 354 ITR 536 (Del) (HC)
Ranglal Bagaria HUF v ACIT [2016] 384 ITR 477 (Cal)

Reasons recorded should be elaborate and cannot be ratified or strengthened by subsequent investigations or evidences. *[Hindustan Lever Ltd v ACIT [2004] 268 ITR 332 (Bom)]*

Recently the Supreme Court in *New Delhi Television Ltd v DCIT [2020] 116 Taxmann.com 151 (SC)* has held that if the AO intends to rely upon the second Proviso to section 148 for the extended period of 16 years limitation, the same should be stated either in the notice or in the reasons in support of the notice. It cannot be done in the order rejecting the objections or at a later stage.

Why Reasons should be Recorded

It is only if this condition is satisfied that the Court will be able to look into whether the power of reopening was exercised in a fair manner. The power conferred u/s.147 cannot be an unbridled one. It is hedged with several safeguards concealed in the interest of eliminating room for abuse of this power by the Assessing Officer *Sri Krishna Pvt. Ltd. v ITO [1996] 221 ITR 538 (SC)*

Whether the safeguards have been properly followed can only be determined by the recording of such reasons.

Communication of Reasons

The law only requires that reason should be recorded in writing. It does not talk of communicating such reason to the assessee. Considerable divergence of judicial opinion exists in this regard. It has been held in a number of cases that at the request of the assessee the reasons need to be communicated.

Though divergence of opinion exists in this regard, there is no divergence on that reasons need not be disclosed to the assessee through the notice u/s.148. If at all the reasons need to be disclosed, the same needs to be done only after the compliance by the assessee to the notice.

The view that reasons need to be communicated has been taken on the basis of the requirement to comply with the principles of natural justice and also to prevent the abuse of this provision. This view is affirmed by the decision of the Supreme Court in *GKN Driveshafts (India) Ltd. v Income Tax Officer and Others [2003] 259 ITR 19 (SC)* where it has been held that the reasons must be communicated to the assessee on request from the assessee after his compliance with the notice u/s.148.

At this stage it may be noted that filing of a letter requesting the earlier return filed to be treated as one filed in response to the notice u/s.148 would be sufficient compliance with the notice *[Iqbal Singh Atwal v CIT [1984] 147 ITR 599 (Cal)].*

In *Hotel Woodside v ACIT TS-136-ITAT-2020 (Bang)* it has been held that though filing of return of income in response to notice u/s.148 is mandatory for getting copy of reasons, no condition is provided for as to whether request for reasons to be made before or after filing return of income.

On receipt of such reasons, the assessee would have a right to file his objections and the Assessing Officer would be bound to dispose of the reasons through a speaking order before proceeding to pass a final order of reassessment. It has also been held in *Allana Cold Storage Ltd v ITO & Ors [2006] 287 ITR 1 (Bom)* that there is a mandatory requirement to dispose of the objection through a separate order and not as part of the order of assessment. However in the case of *K.M.Bansal v CIT [1992] 195 ITR 247 (All)* it was held that

- the Assessing Officer need not divulge the source of information to the assessee.
- The Assessing Officer needs to divulge only such material and information that he wishes to use against the assessee.

It has also been held in *S.Prasad Raju v DCIT [2005] 96 TTJ (Hyd) 832* that failure to communicate reasons to an assessee is not a curable defect and would render the assessment made without such communication invalid. Further in *CIT v Videsh Sanchar Nigam Ltd [2012] 340 ITR 66 (Bom)* it has been held that reassessment order cannot be upheld where the reasons recorded for reopening was not furnished to the assessee till completion of the assessment. The said decision was rendered following the Special Leave Petition dismissed by the Apex Court vide order dated 16.07.2007 in *CIT v Fomento Resorts & Hotels Ltd*. *2006 (11) TMI 645 (Bom).* Similarly in *TATA international Ltd. v DCIT [2012] 52 SOT 465 (Mum)* it has been held that non-supply of recorded reasons *before* passing reassessment order renders the reopening void and subsequent supply of the reasons does *not* validate reassessment order. A similar view can also be found in *Gujarat Fluorochemicals Ltd v DCIT (2008) 15 DTR (Guj) 1, PCIT v V.Ramaiah [2019] 103 Taxmann.com 201 (Kar) – Revenue's SLP dismissed in [2019] 262 Taxman 16 (SC).*

<u>Disposal of objections raised by assessee</u>

The objections raised by the assessee should be disposed of by a speaking order and cannot be merely included in the final order u/s 143(3) r.w.s.147. The decisions that may be looked at in this regard are:

GKN Driveshafts (India) Ltd. v ITO and Others [2003] 259 ITR 19 (SC)
Allana Cold Storage Ltd v ITO & Ors [2006] 287 ITR 1 (Bom)
Sica Educational Trust (Regd) v UOI & Ors [2008] 214 CTR (MP) 244
General Motors India Pvt. Ltd. v DCIT – 353 ITR 244 (Guj.)
Arvind Mills Ltd. v ACIT [2004] 270 ITR 0469 (Guj)
Garden finance Ltd. v ACIT [2004] 268 ITR 0048 (Guj)

Suresh Chandra v Income-tax Officer, ITA No. 3061 /Del/2012

However contrary view that reassessment cannot be treated as invalid for failure to pass a speaking order is held in the following cases:

Home Finders Housing Ltd. v ITO [2018] 404 ITR 611 (Mad), SLP Dismissed in [2018] 94 taxmann.com 84 (SC)
PCIT v Modinagar Rolls Ltd. [2017] 82 taxmann.com 360 (Allahabad)
Rajatha B.Eshwar v ITO 2020 (4) TMI 54 Kar HC

In *Sahkari Khand Udyog Mandal Ltd v ACIT [2015] 370 ITR 107 (Guj)*, the time limits for issue of reasons, filing of objections and disposing off of objections has been explained in a detailed manner.

Challenging order / notice in writ petitions

Writ petitions cannot be entertained against orders when alternative remedy of filing appeal before Commissioner (Appeals) is available

CIT v Chhabil Das Agarwal [2013] 357 ITR 357 (SC)
JCIT v Kalanithi Maran [2014] 366 ITR 453 (Mad)

However the Bombay High Court in *Aroni Chemicals [2017] 393 ITR 637 (Bom)* observed that decision of the Madras High Court in Kalanithi Maran's case is not acceptable since alternate remedy cannot be a bar to file writ petition. If basic conditions for issue of a valid notice are not satisfied, then the writ is maintainable.

It has been held in *G.P.Agarwal v ACIT [1994] 208 ITR 795 (All)* that where writ petitioner had a remedy available to him under taxing statute against a notice issued to him by Assessing Officer having jurisdiction to issue such notice, petitioner should pursue statutory remedy and writ petition under article 226 was not maintainable

However in *Jeans Knit (P) Ltd v DCIT [2017] 390 ITR 10 (SC)* the Supreme Court has held that a Writ Petition to challenge the issue of a reopening notice u/s 148 is maintainable as per the law laid down in *Calcutta Discount 41 ITR 191 (SC)* and that the law laid down in *Chhabil Dass Agarwal 357 ITR 357 (SC)* deals with the maintainability of a Writ to challenge the reassessment order and does not apply to a challenge to the reassessment notice.

The Madras High Court in *TCV Engineering P Ltd v ACIT [2019] 413 ITR 319 (Mad)* held a different view in the context of reopening beyond four years. The contention of the assessee that it was entitled to the benefit of proviso to section 147 could be considered only with reference to the facts and materials on record before AO and that exercise could not be done by the Writ Court under Article 226

The writ remedy being a discretionary remedy, the discretion can be exercised in favour of the writ petitioner only if his conduct has been in conformity with law. If it is not, the Court may refuse to exercise the discretion in favour of the writ petitioner. *[Adobe*

Systems Software Ireland Ltd v ADIT [2014] 363 ITR 174 (Del), SLP granted in [2016] 239 Taxman 391 (SC)]

Amended provisions

Substitution of new Sections 147 and 148

Income escaping assessment.

"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 or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year).

Explanation.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, irrespective of the fact that the provisions of section 148A have not been complied with.".

Issue of notice where income has escaped assessment.

*"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 *[**a period of three months from the end of the month in which such notice is issued, or such further period as may be allowed by the Assessing Officer on the basis of an application made in this regard by the assessee],** a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:*

[* Substituted for "such period, as may be specified in such notice" by the Finance Act, 2023 w.e.f. 01.04.2023]

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.

Provided further that no such approval shall be required where the Assessing Officer, with the prior approval of the specified authority, has passed an order

under clause (d) of* section 148A *to the effect that it is a fit case to issue a notice under this section. [Inserted by Finance Act, 2022 w.e.f. 01.04.2022]

Provided also that any return of income, required to be furnished by an assessee under this section and furnished beyond the period allowed shall not be deemed to be a return under section 139. [Inserted by Finance Act, 2023 w.e.f. 01.04.2023]

Explanation 1.—For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means, —

*(vi) any information **[*]** in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time; **[*word "flagged" has been omitted w.e.f. 01.04.2022]***

(vii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or

(viii) any information received under an agreement referred to in* section 90 *or* section 90A *of the Act; or

(ix) any information made available to the Assessing Officer under the scheme notified under* section 135A*; or

*(x) **any information which requires action in consequence of the order of a Tribunal or a Court.***

Prior to insertion of (ii) to (v) by Finance Act, 2022 w.e.f. 01.04.2022 clause (ii) read as follows:

(iii) any final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act.

Explanation 2.—For the purposes of this section, where,— (i) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned 47 under section 132A, on or after the 1st day of April, 2021, in the case of the assessee; or (ii) a survey is conducted under section 133A in the case of the assessee on or after the 1st day of April, 2021; or (iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or (iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee, the Assessing Officer shall be

deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee ***where***** the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.*

****[Substituted for "for the three assessment years immediately preceding the assessment year relevant to the previous year in which" with retrospective effect from 01.04.2021]***

Explanation.3—For the purposes of this section, specified authority means the specified authority referred to in section 151."

Insertion of new section 148A.

After section 148 of the Income-tax Act, the following section is inserted.

Conducting inquiry, providing opportunity before issue of notice under section 148

"148A. The Assessing Officer shall, before issuing any notice under section 148, —

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

(b) provide an opportunity of being heard to the assessee, with the prior approval of specified authority, by serving upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (a);

(c) consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);

(d) decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148, by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (c) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (b) expires:

Provided that the provisions of this section shall not apply in a case where,—

(a) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021; or

(b) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under section 132 or requisitioned under section 132A, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, **** [****relate to, the assessee; or***

(d) the Assessing Officer has received any information under the scheme notified under section 135A pertaining to income chargeable to tax escaping assessment for any assessment year in the case of the assessee.**]**

**** Substituted for "relate to the assessee" by the Finance Act, 2022 w.e.f. 01.04.2022***

Explanation. —For the purposes of this section, specified authority means the specified authority referred to in section 151

Insertion of new section 148B by the Finance Act, 2022 with effect from 01.04.2022
Prior approval for assessment, reassessment or recomputation in certain cases.

148B. *No order of assessment or reassessment or recomputation under this Act shall be passed by an Assessing Officer below the rank of Joint Commissioner, in respect of an assessment year to which clause (i) or clause (ii) or clause (iii) or clause (iv) of Explanation 2 to section 148 apply except with the prior approval of the Additional Commissioner or Additional Director or Joint Commissioner or Joint Director.*

The substitution of the sections results in the following basic differences

a. "Reason to believe" done away with in Section 147

Income escaping assessment under erstwhile provisions

The reason to believe should be that income chargeable to tax has escaped assessment.

The word "escape" has not been defined in the Act. It includes both a non-assessment as well as an under assessment. *Ram Prasad v ITO [1995] 82 Taxman 192 (All)*.

The word “escape” is not confined only to cases where no return has been submitted by the assessee. *Maharaj Kumar Kamal Singh v CIT [1959] 35 ITR 1 (SC).*

The term “escape” means “free oneself from (a person’s grasp or control); to get safely out of (painful or dangerous conditions); to avoid capture, punishment or threatened evil; to avoid (observation, search etc); to elude notice (of a person); to get safely when pursued or imperiled; to get clear away from (pursuit or a pursuer); to elude (a person’s grasp); to succeed in avoiding (anything painful or unwelcome). This meaning of the term contained in Murray’s Oxford Dictionary has been treated as a true connotation of this term as was held in *Madan Mohan Lal v CIT [1935] 3 ITR 438 (Lahore) (FB)*. Thus, the Court held that in the following cases income can be said to have escaped assessment.

1. An item of income is not included in the return
2. Where the ITO refuses to charge an item of income whether on legal or illegal grounds
3. Income has not been charged on account of oversight

They further held that no restrictions should be placed on the generality of the meaning of this term.

The term “income chargeable to tax escaping assessment” is of very wide scope and also includes a deeming fiction. This deeming fiction arises out of explanation 2 to Sec.147.

The explanation broadly divides reassessments into 2 categories:

- ✓ where an assessment has been completed
- ✓ where no assessment has been completed

In case where no assessment has been completed the further two categories are

- ✓ where a return has been furnished and
- ✓ where no return has been furnished

Where an assessment has been completed by a deeming fiction, income is said to have escaped assessment, when

- ✓ the income has been under assessed or
- ✓ the income has been assessed at too low a rate or
- ✓ the income has been made the subject of excessive relief or
- ✓ excessive loss or depreciation or other allowance has been allowed

Where no assessment has been completed but a return filed, income is deemed to have escaped assessment when

- ✓ the assessee has understated the income

- ✓ the assessee has claimed excessive loss, deduction/allowance or relief in the return

Where no assessment has been completed and no return filed, income is deemed to have escaped assessment when the assessed income has exceeded the maximum amount not chargeable to tax.

Illustrations of Income Escaping Assessment – under erstwhile provisions

Where excessive expenditure is allowed as a deduction or where expenditure not allowable is allowed as a deduction, it results in an underassessment. *Addl. CIT v Kamalapat Moti Lal [1977] 110 ITR 769 (All).*

Where a deduction is allowed wrongly reassessment is justified. *P.C.Mallick & D.C.Aich, In re [1940] 8 ITR 236 (Cal)*

Where an assessee has been assessed in an incorrect status and therefore, at a low figure reassessment is justified on the basis that the assessment has been completed at too low a rate. *Rai Bahadur Chotay Lal v CIT 5 ITC 466 (All), Lakshmi Narain Godatia & Co, In re [1943] 11 ITR 491 (Lahore).*

Where excess interest has been paid on advance tax, it is not a case where excess relief has been allowed and a reassessment cannot be made to withdraw the same. *P.S.Subramanyan, ITO v Simplex Mills Ltd [1963] 48 ITR 182 (SC)*.

Where an excessive rebate has been granted from tax charged it can be said that there is an assessment of income at too low a rate. *Sundaram & Co. Pvt Ltd v CIT [1967] 66 ITR 604 (SC)*.

Where excess credit has been given for TDS it cannot be said that the income has been made the subject of excessive relief. *CIT v Bombay Gas Co. Ltd [1979] 120 ITR 822 (Bom)*.

Where an income has been assessed in the hands of the wrong person it does not preclude an Assessing Officer to initiate reassessment proceeding in the hands of the person who in law is liable to the taxed. *Ram Prasad v ITO [1995] 82 ITR 199 (All).*

Where the residential status of an assessee has been wrongly taken at the time of original assessment, reassessment proceedings would be justified. *Gordon Woodroffe & Co. Ltd v ITO [1964] 51 ITR 12 (Mad), K.E.M.Mohammad Ibrahim Maracair v CIT [1964] 52 ITR 890 (Mad), Dr.Surmukh Singh Uppal v CIT [1983] 144 ITR 191 (P&H).*

Where there is a difference between the price of property as shown in the Registration Deed and the price shown for the stamp duty purposes, the issue of a reassessment notice was valid. *[Ved Prakash Nagori v ITO [2001] 251 ITR 161 (P&H)]*

Where the petitioner assessee had been called upon to explain the source of payments made by him to Members of Parliament, his acquittal against criminal charges and charges under Prevention of Corruption Act would not absolve him from his liability to explain source under the Income Tax Act and reassessment notices cannot be quashed *[Bhajanlal v CIT [2001] 250 ITR 399 (P&H)]*

Where there is a vast difference between the value shown by the assessee and the value estimated by the DVO the assessing officer was justified in reopening the assessment *[Vippy Processors Pvt. Ltd. v CIT [2001] 249 ITR 7 (MP)]*.

Reopening for the reason that the assessee had ignored losses while computing the deduction under section 80HHC under explanation 2 is justified. *[IPCA Laboratories Ltd. v Gajanand Meena, DCIT (No.3) [2001] 251 ITR 420 (Bom)]*

Amended provisions

As seen in the preceding paragraphs, the whole reassessment procedure prior to the amendments hinged on the Assessing Officer having a "reason to believe" that income had escaped assessment. Where the assessee could demonstrate that there was no "reason to believe", or that the reasoning was borrowed, or where the reasons had not been recorded or communicated, or where objections to the reasons were not disposed of by a speaking order, the assessee got the benefit and the reassessment was held to be invalid. Now, the requirement of "reason to believe" has been done away with. Now the Assessing Officer can carry out reassessment if "any income chargeable to tax has escaped assessment". The wordings of the new Section 147 appear to require that escapement has to be **established** before starting the process of reassessment, whereas in the earlier version of the section, the Assessing Officer had to only have a "reason to believe" before proceeding to reassess.

b. Assessing Officer should have information suggesting that income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year

Amended provisions

The amended Section 148 provides that the primary condition for issue of notice u/s.148 is that the Assessing Officer is in possession of information which suggests that income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year.

This is in contrast to the erstwhile provisions which state that the Assessing Officer must have "reason to believe" that income has escaped assessment in the case of the assessee. The section did not lay down the basis on which such reason to believe should be present, though subsequently court decisions have brought some clarity on this aspect.

The new section also defines what is "information suggesting that income chargeable to tax has escaped assessment", in Explanation 1 to Section 148 as follows:

Explanation 1.—For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means, —

*(i) any information **[*]** in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time; **[*word "flagged" has been omitted w.e.f. 01.04.2022]***

(ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or

(iii) any information received under an agreement referred to in* section 90 *or* section 90A *of the Act; or

(iv) any information made available to the Assessing Officer under the scheme notified under* section 135A*; or

(v) ***any information which requires action in consequence of the order of a Tribunal or a Court.***

Prior to insertion of (ii) to (v) by Finance Act, 2022 w.e.f. 01.04.2022 clause (ii) read as follows:

(ii) any final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act.

From the above definition it is clear that unless the information with the Assessing Officer falls within the above parameters, action u/s 148 cannot be initiated. To this extent, the discretion of the Assessing Officer has been severely curtailed, or, it can also be said that standardization and objectivity are given more emphasis. The Assessing Officer is not required to "apply his mind".

Prior to insertion of clauses (ii) to (v) by the Finance Act, 2022 with effect from 01.04.2022, the second clause considers those cases where the Comptroller and Auditor General of India has raised any final objection on an assessment and such objection survives even after the departmental discussions. Therefore these would be cases where assessment u/s 143(3) has been carried out. Further, it may be seen that the point restricts itself to cases where the Comptroller and Auditor General has objected that "*the assessment has not been made in accordance with the provisions of the Act*". Whether this means that only procedural aspects would

be considered and not those issues where differing opinions can be had (debatable issues), is a moot point.

However clause (ii) has been amended to state any audit objection which means even objections raised by the Internal Audit Party also can now be a criteria for reopening the assessment with effect from 01.04.2022 and that the audit objection need not also be a final objection

If the audit objection is not for the relevant assessment year or is a case where it cannot be said to be not in accordance with the provisions of the Act, the same cannot be a basis for reopening. For example, if the Assessing Officer has followed an order of an appellate authority while the audit party has a view different from that of the appellate authority it would not be possible to say that the audit objection is one which brings out a case of assessment which is framed and which is not in accordance with the provisions of the Act. Thus in effect one will have to see that the twin conditions (a) audit objection being for the relevant year and (b) the assessment has been made and which is not in accordance with the provisions of the Act. On this basis one can also urge that if no assessment has been framed but a return of income has been accepted u/s.143(1) no assessment has been made and the said clause in Explanation (1) to section 148 cannot be invoked.

Unless the information with the Assessing Officer falls within the above five categories, reassessment cannot be initiated.

Whether this would bring about more certainty in assessments and reassessments, will have to be seen.

There is also a third category where the Assessing Officer is “deemed” to have information that suggests that income chargeable to tax has escaped assessment:

When the section was introduced with effect from 01.04.2021 in the following cases, the Assessing Officer is deemed to have information that income chargeable to tax has escaped assessment for the three years immediately preceding the assessment year relevant to the previous year in which the search is initiated or books or other documents or any assets are requisitioned or survey is conducted, or money, bullion, jewellery, or other valuable thing or article or books of account or documents are seized or requisitioned in case of any other person:

- Where search is initiated u/s 132, or books of account, other documents or other assets are requisitioned u/s 132A, on or after 01.04.2021 in the case of the assessee;

- Survey is conducted in the case of the assessee u/s 133A (other than under Section 133a(2A) or 133A(5)), on or after 01.04.2021

- The Assessing Officer with the approval of the Principal Commissioner or Commissioner is satisfied that any money, bullion, jewellery or other valuable

article or thing seized u/s 132 or requisitioned u/s 132A in case of any other person, on or after 01.04.2021, belongs to the assessee

- The Assessing Officer, with the approval of the Principal Commissioner or Commissioner, is satisfied that any books of account or other documents seized u/s 132 or requisitioned u/s 132A, on or after 01.04.2021, in the case of any other person, pertains to, or any information contained therein belongs to the assessee.

However by the Finance Act, 2022 the words "for the three assessment years immediately preceding the assessment year relevant to the previous year in which" has been removed with retrospective effect from 01.04.2021 which means that not only for the three assessment years immediately preceding the assessment year relevant to the previous year in which the search was initiated or books of account, other documents or any assets are requisitioned or survey is conducted but the Assessing Officer is deemed to have information that income chargeable to tax has escaped assessment for the entire 10 year period.

c. **Modification in procedural aspects**

Erstwhile provisions

i. Issue of Notice

The proceedings of reassessment are commenced on the issue of a notice u/s 148. The notice is a condition precedent for making a valid assessment for the purpose of initiating reassessment proceedings. This notice is not a mere procedural requirement. Where no notice was served under section 148 the appearance of a person in response to a notice u/s.142(1) could not be deemed to be the knowledge of proceedings u/s.147 *[CIT v Mintu Kalita [2001] 117 Taxman 388 (Gauhati)]*. The law does not prescribe of any standard form of the notice. The notice can be in any form so long as it brings to the attention of the person to whom it is served, the matters required to be answered or dealt with and things required to be furnished. *[Burn & Co In re [1934] 2 ITR 30 (Cal), Jawala Prasad Chobey v CIT [1935] 3 ITR 295 (Cal), Sardar Harvinder Singh Sehgal v ACIT [1997] 227 ITR 512 (Gauhati)].* The notice must necessarily be in writing and must bear the signature of the Assessing Officer. *[B.K.Gooyee v CIT [1966] 62 ITR 109].* There is however no requirement that the notice should state that the Assessing Officer has formed a belief for the reopening of the assessment. *[Md.Serajuddin & Bros v ITO [1980] 122 ITR 465 (Cal)].* If no notice is issued or the notice is shown to be invalid, the proceeding taken by the Assessing Officer would be illegal and void.

Y.Narayana Chetty v ITO [1959] 35 ITR 388 (SC)

This view has also been taken in the following cases

CIT v Kurban Hussain Ibrahimji Mithiborwala [1971] 82 ITR 821 (SC)
CIT v Thayaballi Mulla Jeevaji Kapsi (Decd) [1967] 66 ITR 147 (SC)

S.Naryanappa v CIT [1967] 63 ITR 219 (SC)

In the following cases it has been held that the notice is not invalid:

- ♣ Non recital in the notice or the order that conditions precedent have been satisfied does not invalidate the notice though the onus lies on the authority relying on the notice or order to establish that the conditions precedent have been satisfied. If the notice or order contains such recital the onus lies on the party challenging the notice or order to show by evidence that the recital is incorrect. *[Baijnath Hari Shankar v CIT [1973] 91 ITR 208 (All)]*

- ♣ Where the notice does not contain or mention the source from which income has escaped assessment. *[Radhakant Jagannath Prasad v V.K.Johri [1960] 39 ITR 182 (Bom)]*

- ♣ Non specification of the amount of escaped income in the notice. *[East Coast Commercial Co. v ITO [1981] 128 ITR 326 (Cal)]*

- ♣ Non mention in the notice of the income which is believed to have escaped assessment. *[H.M.Istifa Khan v CIT [1942] 10 ITR 435 (Oudh)]*

- ♣ Where the status of an assessee was wrongly described and even where the sanction has been obtained in that name and where that was the first assessment and there were no two separate assessments in different statuses. *[CIT v Barick Screen Corporation [1983] 139 ITR 457 (Cal)]*

- ♣ Clerical mistake in mentioning assessment year in the notice though correct year had been inferred by the assessee. *[CIT v Bansarilal Rajgarhia [1964] 51 ITR 659 (Patna)]*

- ♣ Notice served by registered post which was received back with endorsement of refusal or where the same was served by affixure. *[CIT v Har Parshad [1989] 178 ITR 591 (P&H), Sheo Narain Jaiswal v ITO [1989] 176 ITR 362 (Patna)]*

- ♣ Notice of reassessment issued for more than one ground and if only one of such grounds survive. *[Jameson & Magnidar Co. Pvt. Ltd. v ITO [1987] 167 ITR 77 (Cal)]*

- ♣ Where the notice though valid has not been served validly. *[Mahendra Kumar Agarwalla v ITO [1976] 103 ITR 688 (Pat)]*

- ♣ A clerical mistake in mentioning the assessment year though the assessee has inferred the right year. *[CIT v Bansarilal Rajgarhia [1964] 54 ITR 659 (Pat)]* or notices issued mentioning both the assessment and previous years would not invalidate the notice. *[CIT v Vidarbha Housing Board [1988] 171 ITR 481 (Bom)]*

- ♣ If a sanction has been obtained to initiate proceedings against the correct person a misdiscription of his status in the notice is not material. *[Chooharmal Wadhuram v CIT [1968] 69 ITR 88 (Guj)]*

In the following cases it has been held that the notice is invalid:

- ☙ Where a notice was addressed to "S & Others" and the notice was not clear whether it was addressed to "individual" or "AOP". *[Bhagwan Devi Saraogi v ITO [1979] 118 ITR 906 (Cal), CIT v B.Ranga Reddy [1979] 118 ITR 897 (AP), Shyam Sundar Bajaj v ITO [1973] 89 ITR 317 (Cal)]*

- ☙ Where the reassessment notice does not specify the assessment year or specifies it incorrectly. *[Nyalchand Malukchand Dagli v CIT [1966] 62 ITR 102 (Guj), P.N.Sasikumar v CIT [1988] 170 ITR 80 (Kerala)]*

- ☙ Notice is issued in relation to one assessment year while assessment of another is reopened. *[CIT v Kurban Hussain Ibrahimji Mithiborwala [1971] 82 ITR 821 (SC)]*

- ☙ Where two entities have the same name and address and the notice is sent without clearly mentioning the entity. *[ITO v Chandi Prasad Modi [1979] 119 ITR 340 (Cal)]*

- ☙ Notice issued and addressed to an individual to reassess an AOP. *[Abdul Sattar Mokashi v CIT [1988] 174 ITR 368 (Kar), Ravinder Narain v ITO [1974] 96 ITR 612 (Delhi), R.Dalmia v UOI [1972] 84 ITR 616 (Delhi)]*

- ☙ Notice issued and addressed to an AOP to reassess an individual member. *[P.R.Easwaran v 6th ITO [1969] 72 ITR 263 (Mad)]*

- ☙ Notices served on persons not authorised to receive the notice. *[C.N.Nataraj v 5th ITO [1965] 56 ITR 250 (Mys)]*

- ☙ Service of notice on an agent of a non-resident in his representative capacity without passing an order treating him as an agent u/s.163. *[CIT v Belapur Sugar & Allied Industries Ltd [1983] 141 ITR 404 (Bom), CIT v S.G.Sambandam & Co [2000] 242 ITR 708 (Mad)*

- ☙ When a prejudice is caused due to a misleading notice of reassessment, the notice can be quashed. *[Mangal Sen v ITO [1964] 52 ITR 621 (All)]*

- ☙ Where a notice u/s.148 has already been issued and where no assessment has been completed pursuant to such notice and where reassessment is already pending. *[Trustees of H.E.H. The Nizam's Supplemental Family Trust v CIT [2000] 242 ITR 381 (SC)]*

- Where a notice u/s.143(2) has already been issued and where no assessment has been completed pursuant to such notice and where assessment is already pending. *[Smt.Nilofer Hameed & Anr v ITO [1999] 235 ITR 161 (Ker)]*

ii. <u>Waiver of Notice by Assessee</u>

Where a notice is not issued but the assessee cooperates in the reassessment, the reassessment would still be invalid. The assessee cannot waive his right to a notice u/s 148 as such notice is a condition precedent for the exercise of jurisdiction by the Assessing Officer to assess or reassess u/s 147.

Tansukrai Bodulal v ITO [1962] 46 ITR 325 (Assam)
This view has also found favour in

Bhagwan Devi Saraogji v ITO and Others [1979] 118 ITR 906 (Cal)
Sewlal Daga v CIT [1965] 55 ITR 406 (Cal)

However as per the provisions of section 292BB inserted by the Finance Act with effect from 01.04.2008,if the assessee has not raised any objection for non service of any notice under the Income Tax Act before completion of such assessment or reassessment then it shall be deemed that such notice which is required to be served upon him has been duly served and that he shall be precluded from taking any objections in any proceedings or inquiry under the Act that the notice was –

(a) Not served upon him or
(b) Not served upon him in time or
(c) Served upon him in an improper manner

Amended provisions

Procedure to be followed before issuing notice u/s 148

Section 148A has been inserted, which lays down an entire new procedure for "establishing" that income has escaped assessment. The requirements of compliance with natural justice, which were hitherto court-made, have now been incorporated in the statute in Section 148A, which lays down an entire new procedure comprising of

- Conducting enquiry, if required.
- Issuing show cause notice, and providing the assessee an opportunity of being heard
- Considering the reply of the assessee, and passing an order on whether the case is fit for issue of notice u/s 148

Apart from the enquiry to be carried out at the discretion of the Assessing Officer, all the other steps are mandatory.

Further, at every step of the above procedure (including carrying out of enquiry), approval of the specified authority is required to be obtained.

Specified authority has been defined in Section 151, and depends on the number of years elapsed from the end of the relevant assessment year – If the number of years lapsed is three or less, the specified authority is *Principal Commissioner or Principal Director or Commissioner or Director.* Where the number of years lapsed is more than three, the specified authority is *Principal Chief Commissioner or Principal Director General or where there is no Principal Chief Commissioner or Principal Director General, Chief Commissioner or Director General*

Where the order of the Assessing Officer concludes that the case is fit for issue of notice u/s 148, the same will be issued after obtaining approval of the specified authority.

It may be noted that there is no right of appeal against the order u/s.148A(d) before the Commissioner of Income Tax (Appeals) or the Income Tax Appellate Tribunal. However the assessee could challenge the order in writ before the High Court.

Timelines have also been prescribed in Section 148A for the various steps:

Time for assessee to reply to notice asking him to show cause why notice u/s 148 should not be issued	7 to 30 days from the date on which show cause notice is issued. Assessee may apply for extension of time which may be granted at the discretion of Assessing Officer
Order of Assessing Officer concluding whether notice u/s 148 should be issued	Within one month from the end of the month in which reply to show cause notice is received, or, if no reply is received, one month from the end of the month in which the time / extended time given for reply expires.

Validity of notices issued u/s.148 after 01.04.2021 based on time limit as extended by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020

The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 vide Notifications No.20/2021 and 38/2021, extended the time limits to issue notice u/s.148 which ended as on 31.03.2021. Further, the said notifications stated that the notices could be issued under erstwhile section 148 and that the provisions of section 148, 149 and 151 as they stood before the commencement of Finance Act, 2021 would apply to such notices.

However, the reassessment provisions as amended by the Finance Act, 2021 which came into force with effect from 01.04.2021, state that any notice u/s.148 has to be issued only after following the procedure as contemplated by the amended provisions.

Due to the apparent conflict between the Act and the notifications issued under the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020,

several writ petitions were filed in High Courts across the country as assessees challenged the notices issued under erstwhile section 148 without following the amended provisions.

The following High Courts quashed the notices issued under erstwhile section 148 and held that where a notice u/s.148 has been issued after 01.04.2021 as per the extended time limit under the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020, without complying with the mandatory procedure of section 148A of the Act and the substituted sections 147 to 149 &151 then the notice issued u/s.148 is not valid.

Ashok Kumar Agarwal v UOI [2021] 131 taxmann.com 22 (All),
Bpip Infra (P) Ltd v ITO [2021] 133 taxmann.com 48 (Raj)
Mon Mohan Kohli & Ors v ACIT [2021] 133 taxmann.com 166 (Del)

Contrary view was taken by Hon'ble Single Judge of the Chhattisgarh High Court in *Palak Khatuja v UOI & Ors in WP(T) No.149 of 2021*

Though various High Courts held that notices issued u/s.148 is not valid, the Supreme Court in *UOI v Ashish Agarwal [2022] 444 ITR 1 (SC)* has held that reassessment notice if issued on or after 01.04.2021 under unamended section 148, needs to be set aside. However it has further held that the same being a bona fide mistake, notice should not be set aside, rather deemed to have been issued under substituted section 148A.

The CBDT had also issued *Instruction No.1/2022 of F.No.279/Misc./M-51/2022-ITJ dated 11.05.2022* for implementing the decision of the Supreme Court.

Other matters

1. *Notice u/s.143(2) – Mandatory under erstwhile provisions*

Issue of notice u/s.143(2) is necessary where the return of income filed by the assessee needs to be verified. In *ACIT v Hotel Blue Moon [2010] 321 ITR 362 (SC)*, it has been held that for the purpose of determination of undisclosed income for the block period under the provisions of section 158BC the provisions of section 143(2) and 143(3) are applicable and no assessment could be made without issuing notice u/s.143(2)

Similar view has been rendered in the following cases in the context of reopening of assessment u/s.148:

ACIT & Anr v Hotel Blue Moon [2010] 321 ITR 362 (SC)
CIT v M.Chellappan [2006] 281 ITR 444 (Mad)
CIT v Rajeev Sharma [2011] 336 ITR 678 (All)
Raj Kumar Chawla & Ors v ITO [2005] 94 ITD 1 (Del) (SB)
CIT v Gissons Engineering Co. [2015] 370 ITR 444 (Mad)
PCIT v Jai Shiv Shankar Traders Pvt. Ltd. [2016] 383 ITR 448 (Del)
CIT v Alstom T & D [2014] 45 taxmann.com 424 (Mad)

Sapthagiri Finance & Investments v ITO [2012] 25 taxmann.com 341 (Mad)
DCIT v Indian Syntans Investments Pvt Ltd [2007] 107 ITD 457 (Chen).

However a contrary view has been taken in *Tulip Engineering Pvt Ltd v ITO 2015 (2) TMI 733 (Del)* where it has been held that issuance of notice u/s.143(2) is empty formality where assessee has co-operated in assessment proceedings.

Amended provisions

Even in the post amendment scenario the requirement of issue of notice u/s.143(2) is mandatory and that there will not be any change in the same.

2. *Sanction for Issue of Notice*

Erstwhile provisions

As has been stated earlier it is required that proper sanction must be obtained before commencing reassessment proceedings. What is required is the prior approval of the sanctioning authority which itself is one of the pre conditions for initiating reassessment proceedings. No reassessment can be valid where reasons have not been recorded in writing and prior approval has not been obtained from the higher authorities when required. What is required is therefore an approval prior to the commencement of the proceedings.

Though approval from higher authorities is pre requisite for issue of notice u/s.148, approval from CIT for issue of notice u/s.148 cannot be obtained when it has to be obtained from JCIT

CIT v Aquatic Remedies Pvt Ltd [2018] 406 ITR 545 (Bom)
Yum Restaurants Asia Pte Ltd. v DDIT [2017] 397 ITR 639 (Del)
Ganshyam K.Khabrani [2012] 346 ITR 443 (Bom)
PCIT v Khushbu Industries in ITA No.1035 / 2017 (Bom)
Jai Prakash Ahuja v ITO in ITA No. 341 / LKW / 2014

Amended provisions

In light of the prescribed procedure u/s 148A, the above may not be entirely relevant post amendments by the Finance Act 2021, since each stage in the process has been subject to approval by the specified authority.

3. *Application of Mind Before Sanction*

Erstwhile provisions

It follows that this approval or sanction must be given by the higher authorities only after due application of mind. *[East Coast Commercial Co. Ltd v ITO [1981] 128 ITR 326 (Cal)]*. The application of mind is required both for the Assessing Officer and the higher authority giving the sanction, the Assessing Officer at the time of recording reasons and the higher authority while granting his approval or sanction. *[UOI v Rai Singh Deb Singh Bist [1973] 88 ITR 200 (SC)].* Thus where the higher authority finds that the Assessing Officer has not properly and judicially applied his mind with regard to the material and information in his possession, he should refuse to grant the approval. Thus it was held in *Sitaram Jindal v ITO [1972] 84 ITR 162 (Cal)* that where the Assessing Officer merely passes on information received through another Assessing Officer to the Commissioner of Income Tax it cannot be said that the Assessing Officer has applied his mind. No Assessing Officer can issue a notice of reassessment in obedience to or pursuant to directions of the Commissioner. *[Sheo Narain Jaiswal v ITO [1989] 176 ITR 352 (Pat), CIT v T.R.Rajakumari [1974] 96 ITR 78 (Mad)]*

Similarly in *Chhugamal Rajpal v S.P.Chaliha and Others [1971] 79 ITR 603 (SC)* the Court held that where the Assessing Officer has stated that proper investigation was necessary the same was not sufficient for giving the sanction.

Where it has been found that the reasons recorded were factually incorrect, no sanction should be accorded and if accorded, the same would be invalid.

Suganchand Chandanmal v ITO and Others [1976] 105 ITR 743 (Cal)
Soorajmal Srigopal v ITO [1979] 117 ITR 326 (Cal)

Similarly if it is found that the facts on the basis of which the sanction is granted is wrong, the sanction and hence the reassessment will be illegal. *[Bhupindra Food and Malt Industries v CIT [1997] 95 Taxman 203 (HP)]*

The CIT / JCIT has to apply his mind before sanctioning the issue of notice u/s.148. It has been held in the following cases that mere writing of "Yes I am satisfied" is not sufficient while according sanction for issue of notice

CIT v S.Goyanka Lime & Chemical Ltd. [2016] 237 Taxman 378 (SC)
Chhugamal Rajpal v S.P.Chaliha & Ors [1971] 79 ITR 603 (SC)
Yum! Restaurants Asia Pte Ltd. v DDIT [2017] 397 ITR 665 (Del)
German Remedies Ltd. v DCIT [2006] 287 ITR 494 (Bom.)
United Electrical Co. P. Ltd. v CIT [2002] 258 ITR 317 (Del)
PCIT v N.C.Cables Ltd in ITA No.335 / Del / 2015 – Delhi ITAT
Ghanshyam v ITO in ITA No.238 / Agra / 2018 – Agra ITAT

Amended provisions

As seen in the previous paragraphs, Explanation 1 to the substituted Section 148 defines "information that suggests income chargeable to tax has escaped assessment", and reassessment u/s 147 can be carried out only where such prescribed information is available with the Assessing Officer. Under the newly inserted section 148A, the Assessing Officer before issuing a notice u/s.148 has to issue a show cause notice to the concerned assessee with the prior approval of the specified authority, to show cause as to why a notice u/s.148 should not be issued based on the information that suggests escapement of income. The Assessing Officer can also conduct any enquiry with regard to the information available with him, if required, even before issue of the show cause notice to the assessee. After providing sufficient time to the assessee, which may vary between 7 days to 30 days, the Assessing Officer based on the reply filed by the assessee and the material available on record decide whether it is a fit case for issue of notice u/s.148 by passing an order. It may be noted that at each stage u/s.148A i.e to conduct an enquiry on the information available, to issue a show cause notice to the assessee and to provide an opportunity of being heard to the assessee, to pass an order considering the reply of the assessee and the material available on record, the Assessing Officer has to obtain prior approval from the specified authority. Therefore application of mind of the Assessing Officer as well as of the specified authority is mandatory at each stage specified u/s.148A, before issue of notice u/s.148.

4. *Sanction – Other Points*

Erstwhile provisions

It is important that the sanction is accorded by naming the assessee correctly and in the correct status. The wrong description of the status has been held to invalidate reassessment proceedings in the following cases

CIT v Barick Screen Corpn [1983] 139 ITR 457 (Cal)
Mahabir Prosad Poddar v ITO [1971] 82 ITR 299 (Cal)
CIT v K.Adinarayana Murthy [1967] 65 ITR 607 (SC)

The sanction can be granted by the Joint Commissioner of Income Tax. The term Joint Commissioner of Income Tax is defined in section 2(28C) to include an Additional Commissioner. Therefore where an Additional Commissioner issues a sanction in place of a Joint Commissioner of Income Tax, the reassessment would still be valid. Reference may be made to the decisions in
Ladhuram Laxmi Narayan v ITO [1976] 102 ITR 595 (Gauhati)
ITO v Mahadeo Lal Tulsyan [1978] 111 ITR 25 (Cal)
Chandra Lakshmi Tempered Glass Co. Pvt Ltd v ACIT [1997] 225 ITR 199 (HP)

It has been held in *Ghanshyam Khabrani v ACIT [2012] 346 ITR 443 (Bom)* that where the sanction is to be granted by a Joint Commissioner , the same cannot be granted by a Commissioner of Income Tax and it is only a person of the rank of a Joint commissioner who can grant such approval.

Amended provisions

The above matters would hold good under the amended provisions as well.

5. *Opportunity before Sanction*

Erstwhile provisions

Before according a sanction there was no requirement in the erstwhile provisions that an opportunity of being heard must be granted. This view has been taken in *Indian National Tannery, In re [1941] 9 ITR 618 (All)* and in *Haji Ali Mohamed v CIT [1940] 8 ITR 243 (Nag).* The Calcutta High Court however in *[1994] Tax LR 468* has held that even though the statute does not contain any express provision for such opportunity, there is a judicial presumption that the legislature never intended that the principles of natural justice should not be observed where adverse consequences are likely to result. They therefore concluded that the Commissioner of Income Tax must give a fair hearing to the assessee before according the sanction and that the sanction must be accorded by passing a speaking order.

Amended provisions

Under the amended provisions Section 148A requires show cause notice to be issued to assessee which has to be disposed of by a speaking order and only then can notice u/s.148 be issued.

6. *Extension of Time for issue of Notice*

Erstwhile provisions

The time limits stipulated in section 149 are sacrosanct and no notice can be issued after this time. However section 150 does create an exception to this rule and lifts the bar on limitation of time for issue of notice in certain circumstances.

The exception created by section 150 is a position where an assessment, reassessment, recomputation is to be made in consequence of or to give effect to any finding or direction contained in an order passed by an appellate or revisional authority or on a reference under this Act or by a Court in any proceedings under any other law. Therefore what is fundamental is that there must be a finding or direction. The Supreme Court in *ITO v Murlidhar Bhagwan Das [1964] 52 ITR 335 (SC)* has explained the words finding or direction as follows:

"that a "finding", therefore, can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. The Appellate Assistant Commissioner may hold on evidence that the income shown by the assessee is not the income for the relevant year and thereby exclude that income from the assessment of that year under appeal. The finding in that context is that the income does not belong to the relevant year. He may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the year of assessment in question. The expression "direction" cannot be construed in vacuum, but must be collated to the directions, which the Appellate Assistant Commissioner can give under section 31 (corresponding to section 246 of this Act). Under this section, he can give directions, inter alia, under section 31(3)(b), (c) or (e) or section 31(4). The expression "direction" in the proviso could only refer to the directions which the Appellate Assistant Commissioner or the Tribunal can issue under the powers conferred on him or it under the respective sections. Therefore, the expression "finding" as well as the expression "direction" can be given full meaning, namely, that the "finding" is a finding necessary for giving relief in respect of the assessment of the year in question and the "direction" is a direction which the appellate or the revisional authority, as the case may be, is empowered to give under the section mentioned therein. It was further held that "the words in consequence of or to give effect to" do not create any difficulty, for they have to be collated with, and cannot enlarge, the scope of the finding or directions under the proviso. If the scope is limited as aforesaid the said words also must be related to the scope of the finding and directions".

This view has also been reaffirmed by the Supreme Court in *Rajinder Nath v CIT [1979] 120 ITR 14 (SC)* The finding or direction however must be with reference to the assessment year in question.

Peico Electronics and Electricals Ltd v Dy CIT and Others [1994] 210 ITR 991 (Cal)
Consolidated Coffee Ltd v ITO [1985] 155 ITR 729 (Ker)
SLP dismissed [1991] 187 ITR (St) 43 (SC)

However the finding or direction need not be in respect of the same person whose assessment has been the subject matter of an appeal or revision.

It may be noted that finding or directions of the Court under any other law may also be a reason why the time limit stipulated in section 149 may not apply. If for any reason it is found that the time stipulated u/s.149 does not apply it can be concluded that there are no time limits that apply to such reassessments.

Where the case falls within the exception u/s.150(1) and the time stands extended, it would automatically follow that no sanction as provided u/s.151 needs to be obtained in the case.

Sukhdayal Pahwa v CIT [1983] 140 ITR 206 (MP)

While section 150(1) creates an exception to section 149, section 150(2) creates an exception to section 150(1). This would mean that in cases falling under section 150(2) the position would go back to the normal situation where section 149 becomes applicable. Section 150(2) provides that section 150(1) shall not apply where the assessment, reassessment or recomputation of a particular assessment year has become time barred even at the time when the order appealed against or subject matter of revision was made. *[Praveen Kumari v CIT [1999] 237 ITR 339 (P&H)]*

Amended provisions

The amended Section 149 provides the following time limits for issue of notice u/s 148:

- Within three years from the end of the relevant assessment year.

- Beyond three years but not more than ten years from the end of the relevant assessment year, where the Assessing Officer has books of account or other documents or evidence showing that income chargeable to tax, in the form of asset, which has escaped assessment or is likely to escape assessment, amounts to or is likely to amount to Rs.50 lakhs or more for the relevant assessment year. However this provision has been substituted by the Finance Act, 2022 w.e.f. 01.04.2022 to include the following also in addition to “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

    As per explanation below section 149(1) the term “asset” has been defined to include immovable property, being land and building or both, shares and securities, loans and advances, deposits in bank account. However it may be

noted that cash is not found in the definition of the term “asset” which is an inclusive definition

- However, if such a notice (for assessment year 2020-21 or earlier) would have been time-barred under the erstwhile provisions, then it would also be barred under the changed provisions. This proviso has been amended by the Finance Act, 2022 with retrospective effect from 01.04.2021 to also include notices u/s.153A and 153C.

- If notice u/s 153A / 153C is required to be issued before 31.03.2021, then also the modified provisions will not apply, and the earlier timelines would apply in such cases.

The Finance Act, 2023 has made the following amendments on the time limit for issue of notice u/s.148

Two provisos were inserted after the second proviso to section 149 which are as follows:

- In a case where search is initiated or the last of authorisations of the search is executed or a requisition is made after the 15th day of March of the relevant financial year, and the period for issue of notice u/s.148 expires on the 31st day of March of such financial year, then a period of 15 days would be excluded for the purpose of computing the limitation period and the notice issued u/s.148 would be deemed to have been issued on 31st day of March of such financial year.

- In a case where the information referred to in Explanation 1 to section 148 emanates from a statement recorded or documents impounded u/s.131 or 133A before 31st day of March of any financial year as a result of a search initiated or the last of authorisations of the search is executed or a requisition is made after the 15th day of March of the relevant financial year then a period of 15 days would be excluded for the purpose of computing the limitation period for issue of notice u/s.148A(b) and the notice issued u/s.148A(b) would be deemed to have been issued on 31st day of March of such financial year.

- It may be noted that the impounding or the recording of the statement in consequence of the search should be before the 31st March. The extension has been provided for the time consumed in the procedure for issuance of notice u/s.148 or u/s.148A as the case may be.

In the sixth proviso (after including the above two provisos) to section 149, earlier it stated that if after excluding the period referred to in the 5th proviso, the period of limitation available to the Assessing Officer for passing the order u/s.148A(d) ***is less than 7 days***, the remaining period shall be extended to 7 days. It is amended to provide that after excluding the period referred to in the 5th proviso, the period of limitation available to the Assessing Officer for passing the order u/s.148A(d) ***does not exceed 7 days***, the remaining period shall be extended to 7 days.

These amendments take effect from 01.04.2023.

7. *Contents of Notice*

Erstwhile provisions

There is no specified format for the notice. The notice therefore can be in such form as the Assessing Officer may deem fit but should specify

- ✓ The correct assessment year. *P.N.Sasikumar v CIT [1988] 170 ITR 80 (Ker)*
- ✓ The name of the particular assesssee. *P.N.Sasikumar v CIT [1988] 170 ITR 80 (Ker)*

8. *Who can initiate reassessment proceedings*

Only the Assessing Officer issuing original assessment order can initiate reassessment proceedings *[Dushyant Kumar Jain v DCIT [2016] 381 ITR 428 (Del)]*

This would hold good under amended provisions as well

9. *Merger with Appellate Order*

Where an order of assessment has been made the subject matter of appeal and an appellate order has been made the Assessing Officer is clearly prohibited from reopening an assessment in respect of the matters covered by the appellate order.

Manoo Lal Kedarnath v UOI [1978] 114 ITR 884 (All)
Raibahadur Chowdhury v ITO [1971] 79 ITR 274 (Cal)
CIT v G.Venkataraman [1978] 111 ITR 444 (Mad)
Sheth Bros V JCIT [2001] 251 ITR 270 (Guj]

This view will hold good even where the order of the appellate authority is patently erroneous.

CIT v Rao Thakur Narayan Singh [1965] 56 ITR 234 (SC)

10. *Furnishing of Return in Response to Notice*

Erstwhile provisions

Where a notice is served on an assessee it would be for the assessee to furnish a return in response to such notice. The return should be furnished within such time as may be allowed by the Assessing Officer. This return needs to be filed notwithstanding that a return may already have been filed under some other provision of the Act. It is not

however necessary that a return as such needs to be filed. Even if a letter is filed stating that an earlier return filed may be treated as filed in response to the notice, it would suffice. The Calcutta High Court in *Iqbal Singh Atwal v CIT [1984] 147 ITR 599 (Cal)* has held that even where an assessee has filed a return of income outside the dates prescribed u/s.139(4) and where a notice u/s.148 is served on the assessee, it would be sufficient if the assessee wrote a letter to the Assessing Officer stating that the return already filed may be treated as the return in response to the notice. In such a case the Assessing Officer is justified in completing the reassessment based on the return already filed. That the Assessing Officer may complete a reassessment based on the original return where the assessee informs the Assessing Officer that the original return may be treated as filed in response to notice u/s.148 is a view which has also been taken in *Tiwari Kanhaiya Lal v CIT [1985] 154 ITR 109 (Raj).* The word used in section 148 is “issue” and not “service”. Though the time limit for completion of reassessment under the earlier provisions commenced from the date of service of the notice for the purpose of validly initiating a proceeding, the condition precedent is only the issue of the notice and not its service. No notice under this section can be issued beyond the time limits stipulated u/s.149 or where required without the sanction as required u/s.151.

The erstwhile time limits and other conditions for the issue of notice u/s.148 are as follows:

TIME LIMIT AND OTHER CONDITIONS FOR ISSUE OF NOTICE U/S.148

Time limit for issue of notice u/s 148	Upto four years from the end of the relevant assessment year	Beyond four years but upto six years from the end of the relevant assessment year	Beyond four years but upto sixteen years from the end of the relevant assessment year
In the cases subject to scrutiny by way of assessment u/s.143(3) or 147	Assessment can be reopened whatever is the amount of income escaped *	If the escaped income is Rs.1,00,000/- or more for that year @	If the income in relation to any asset located outside India has escaped assessment
In other cases	Assessment can be reopened whatever is the amount of income escaped *	If the escaped income is Rs.1,00,000/- or more for that year @	If the income in relation to any asset located outside India has escaped assessment

NOTES:

* No Notice can be issued by an Assessing Officer who is below the rank of Joint Commissioner unless the Joint Commissioner is satisfied on the reasons recorded by the Assessing Officer that it is a fit case for the issue of such Notice.

@ No Notice can be issued by the Assessing Officer unless the Principal Chief Commissioner / Chief Commissioner / Principal Commissioner / Commissioner is satisfied on the reasons recorded by the Assessing Officer that it is a fit case for issue of Notice

A reassessment notice can be issued only within certain time limits. The time limit as has already been indicated in the table is dependent on two factors

- the nature of proceedings already concluded
- the quantum of income that is likely to have escaped assessment

The starting point to determine the time limit is in all cases the end of the relevant assessment year i.e. the assessment year in respect of which the income has escaped assessment. The ending point would be dependent on whether the assessment was originally completed u/s.143(3)/147 or of any other provision/situations where no assessments have been originally completed.

These time limits are mandatory and the failure to issue the notice within this time will render the reassessment proceedings invalid.

K.P.Changganlal Oil Mills v CIT [1959] 36 ITR 337 (AP)

Amended provisions

Under the amended provisions, the prescribed time limits and conditions under which assessment can be reopened are:

Time Limit	Conditions under which assessment can be reopened	Approval to be obtained from
Upto 3 years from the end of the relevant assessment year	Where AO has information which suggests that income chargeable to tax has escaped assessment	PCIT / PDIT / CIT / DIT. ***No approval is required if AO with prior approval has passed an order u/s.148A(d) [w.e.f 01.04.2022]***
Upto **10*** years immediately preceding the assessment year relevant to the previous year in which search / requisition / survey has happened in the case of the assessee (In respect of search or requisition or survey conducted on or after 01.04.2021)	The AO shall be deemed to have information which suggests that income chargeable to tax has escaped assessment	PCIT / PDIT / CIT / DIT
Upto **10*** years immediately preceding the assessment year relevant to the previous year in which search / requisition has happened. (In respect of search or requisition on or after 01.04.2021)	The AO is satisfied that any money, bullion, jewellery or other valuable article or thing seized or requisitioned in case of any other person belongs to the assessee	PCIT / CIT

Time Limit	Conditions under which assessment can be reopened	Approval to be obtained from
Upto **10*** years immediately preceding the assessment year relevant to the previous year in which search / requisition has happened. (In respect of search or requisition on or after 01.04.2021)	The AO is satisfied that any books of account or documents seized or requisitioned in case of any other person pertains to or any information contained therein relate to the assessee	PCIT / CIT
Beyond 3 years but not more than 10 years from the end of the relevant assessment year	Where AO has in his possession books of accounts or other documents or evidence which reveal that income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to Rs.50 lakhs or more for that year. It has been amended w.e.f. 01.04.2022 to include that escaped income can also be represented in the form of Expenditure in respect of a transaction or in relation to an event or occasion or An entry or entries in the books of account.	PCCIT / PDGIT If no PCCIT / PDGIT then CCIT / DGIT **Finance Act 2023 has amended this whereby the specified authorities are PCCIT / PDGIT / CCIT / DGIT w.e.f. 01.04.2023**

***Earlier it was only 3 years. Amended with effect from 01.04.2022**

Note:

- ✓ No notice u/s.153A or u/s.153C can be issued in respect of search initiated or assets are requisitioned on or after 01.04.2021

- ✓ The procedure to be followed u/s.148A are not applicable to search cases.

- ✓ While determining the above timelines, the time / extended time allowed u/s.148A will be excluded, or where period during which proceeding u/s.148A is stayed by a court order or injunction, such period shall also be excluded. If, after such exclusion the time available for passing order u/s.148A(d) is less than seven days, the period of limitation shall be extended to seven days.

- ✓ **After clause (ii) in section 151 a proviso has been inserted by the Finance Act, 2023 to give effect to the exclusion of 15 days' time limit as per the insertion / amendment of provisos to section 149(1), in computing the period of 3 years.**

In response to the notice issued u/s.148 after the passing of an order u/s.148A(d), the assessee has to file a return of income. Presently the time limit for filing the return of income is to be specified in the notice issued u/s.148.

The Finance Act, 2023 has amended the time limit for filing the return of income as "within 3 months from the end of the month in which the notice u/s.148 is issued or any such extended time period as may be granted by the Assessing Officer on the basis of an application from the assessee". Further a third proviso to section 148 is inserted to provide that if the return of income in response to notice u/s.148 is not filed with the time limit allowed, then the same shall not be deemed as a return filed u/s.139. As a result of this, issue of notice u/s.143(2) would not be mandatory for such returns. These amendments are made with effect from 01.04.2023

11. Service of Notice Mandatory

Erstwhile provisions

What is required is the issue of notice and not its service within the time stipulated. Thus where a notice has been issued within the time the notice would be valid even though it is served after the time shown in the table. Reference in this connection may be made to the following decisions:

CIT v Sheo Kumari Debi [1986] 157 ITR 13 (Pat)(FB)
CIT v Lalubhai Jogibhai [1995] 211 ITR 769 (Bom)
CIT v Major Tikka Kushwant Singh [1995] 212 ITR 650 (SC)
CIT v Robert J.Sas and Others [1963] 48 ITR 177 (SC)
Bansari Debi and Another v ITO [1964] 53 ITR 100 (SC)
ITO v Induprasad Devshanker Bhatt [1969] 72 ITR 595(SC)
P.K.Upadhyaya v Shanabhai P.Patel [1987] 166 ITR 163 (SC)

This does not mean that the notice need not be served. There must be an actual service of the notice by a means known to law though, may be outside the time limit stipulated u/s.149. *[Keshab Narain Banerjee v CIT [1999] 238 ITR 694 (Cal)]*

However AO cannot take shelter u/s.292BB if the issue of notice and not the service of notice is questioned by the assessee

CIT v Laxmandas Khandelwal in Civil Appeal Nos.6261 to 6262 / 2019 dated 13.08.2019 - SC
Travancore Diagnostics (P) Ltd. v ACIT [2017] 390 ITR 167 (Ker)
PCIT v Silver Line & Anr. [2016] 383 ITR 455 (Del)
Alok Mittal v DCIT [2017] 167 ITD 325 (KolTrib)
P.Shanmugam v ITO in ITA No.202 / Mds / 2016 – ITAT Chennai

12. Notice to Agent of Non-Resident

Erstwhile provisions

However where income escaping assessment belongs to a non resident and the reassessment is to be made on an agent of the non-resident in accordance with the provisions of section 163, the notice may be issued at any time within 2 years form the end of the assessment year for which the reassessment is to be made. Where a reassessment notice in such a case is issued after the aforesaid period of 2 years, the notice would be barred by limitation *[Chief CIT v Turner Morison &Co. Ltd [1978] 113 ITR 762 (Cal)]*. Sub-section (3) of section 149 has been amended with effect from 01.07.2012 wherein the time limit for issue of notice to the agent of a non-resident has been extended from 2 years to 6 years.

In order to sustain a reassessment notice on the agent of the non resident, the determination, which is contemplated u/s.163 after necessary opportunity being given to the assessee, is required to be made prior to the issue and service of reassessment notice. *[CIT v Belapur Sugar & Allied Industries Ltd [1983] 141 ITR 404 (Bom), CIT v Kanhaya Lal Gurmukh Singh [1973] 87 ITR 476 (P&H)]*. However nothing stops an Assessing Officer from issuing a notice on the non-resident himself within the time stipulated u/s.149 and as shown in the table above. This can be done even if the original assessment was made on the Indian Agent of the non-resident assessee. *Claggett Brachi Co. Ltd v CIT [1989] 177 ITR 409 (SC).*

Amended provisions

Under the amended provisions, no separate time limit has been prescribed for agent of non-resident.

13. Time Limit Only for Issue

What is required is that the notice should be issued within the limitation period. The service of the notice within the limitation period is not a prerequisite for conferment of jurisdiction on an Assessing Officer.

R.K.Upadhyaya v Shanabhai T.Patel [1987] 166 ITR 163 (SC)
CIT v Major Tikka Khushwant Singh [1995] 212 ITR 650 (SC)

14. Production of evidence at the Time of Original assessment

The first explanation to section 147 provides that production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure for the purpose of determining whether all material facts have been fully and truly disclosed. This would mean that it would be the assessee's duty to disclose and to draw attention to particular entries in account books and relevant portion of documents and evidences.

Calcutta Discount Co. Ltd v ITO [1961] 41 ITR 191 (SC)

Assessee has to justify that the material facts had been fully and truly disclosed in the assessment proceedings and there was no omission or failure on the part of the assessee. Explanation to section 147 stipulates that mere production of books of accounts or other evidence is not sufficient. Merely because material lies imbedded in material or evidence, which the AO could have uncovered but did not uncover is not a good ground to deny or strike down a notice for reassessment. Whether the AO could have found the truth but did not, does not preclude the AO from exercising the power of reassessment to bring to tax the escaped income. There was an omission and failure on the part of the assessee to point out the expenses incurred relatable to tax free / exempt income which prima facie have been claimed as deduction in the income and expenditure account. There was, therefore omission and failure on the part of the assessee to disclose fully and truly material facts.

Honda Siel Power Products Ltd v DCIT [2012] 340 ITR 53 (Del) affirmed by Supreme Court in [2012] 340 ITR 64 (SC)

The use of the words “not necessarily” it has been held in *Imperial Chemical Industries Ltd v ITO & Others [1978] 111 ITR 614 (Cal)* indicates that whether the production of books and evidence amounts to full disclosure or not will depend on the facts of each case. In this case it was held that where the Memorandum and Articles of a company were filed this was a disclosure and it was not required for the assessee to file a clause by clause explanation of these documents as the necessary legal inference was to be drawn by the Assessing Officer.

This does not mean that if the Assessing Officer could have found the correct position by probing further there is full and true disclosures of the primary and material facts.

Indo-Aden Salt Mfg & Trading Co. P. Ltd v CIT [1986] 159 ITR 624 (SC).

However only material which is available could have been produced at the time of original assessment and non-production of material not available or failure to disclose facts not in the knowledge of the assessee will not amount to non-disclosure.

Indian Oil Corporation v ITO [1986] 159 ITR 956 (SC)

However where there is a failure to fully and truly disclose primary facts, a reassessment would be valid. The disclosure of material should not only be full but also true.

K.P.Arthanariswamy Chettiar v 1st IT0 [1972] 84 ITR 51 (Mad)
Sujir Ganesh Nayak v ITO [1974] 97 ITR 372 (Ker)

A partial disclosure is not sufficient. A partial disclosure may often be misleading. What is required is a full and true disclosure of all facts material for an assessment.

Sri Krishna Pvt. Ltd. v ITO [1996] 221 ITR 538 (SC)

Rakesh Agarwal v ACIT [1996] 221 ITR 492 (Delhi)

Similarly, only such material facts as are in existence at the relevant time can be disclosed.

CIT v Shri Satyanarain Lohia [1993] 204 ITR 894 (Cal).

Reopening u/s 147 not valid if there is no finding regarding failure to disclose material facts

ICICI Home Finance Company Ltd. v Assistant Commissioner of Income tax 2012-TIOL-590-HC-MUM-IT

Where the reasons recorded showed that the inference that income had escaped assessment was based on the disclosure made by the assessee itself, and there was no finding in the recorded reasons that there was a failure to disclose necessary facts, reassessment was held to be invalid.

Bhavesh Developers vs. Assessing Officer & Ors. [2010] 329 ITR 249 (Bom)

Recently the Supreme Court in *New Delhi Television Ltd v DCIT [2020] 116 Taxmann.com 151 (SC)* has held that a*s regards "full & true disclosure of material facts", the assessee has the duty to disclose the "primary facts". It is not required to disclose the "secondary facts". The assessee is also not required to give any assistance to the AO by disclosure of other facts. It is for the AO to decide what inference should be drawn from the facts*

Amended provisions

Under the amended provisions the aspect of “full and true disclosure of material facts” would not be relevant as there is no express provision to provide for the same, as in the erstwhile provisions.

15. <u>Reassessment only for the benefit of revenue</u>

The proceedings u/s 147 are for the benefit of the revenue and not for the assessee. It is aimed at gathering the income of an assessee and the same cannot be allowed to be converted as revisional or review proceedings at the instance of the assessee. This would make the machinery unworkable.

CIT v Sun Engineering Works (P) Ltd [1992] 198 ITR 297 (SC)
Chettinad Corporation Pvt Ltd v CIT [1993] 200 ITR 320 (SC)

It has also been held in *Phool Chand Bajrang Lal v ITO [1993] 203 ITR 456 (SC)* that a party cannot willfully make a false or untrue statement at the time of original assessment and when that falsity comes to notice, turn around and say “you accepted my lie, now your hands are tied and you can do nothing”. They further observed that it is traversity of justice to allow the assessee that latitude. It has also been held in *198 ITR*

297 supra that an assessee cannot reagitate issues that have become final in the course of reassessment proceedings.

16. Section 147 Machinery

The provisions of section 147 are machinery for assessment and is not a charging section. The Supreme Court therefore in *Bhimraj Panna Lal v CIT [1961] 41 ITR 221 (SC)* held that while embarking on a study and interpretation of the provision under this section, the interpretation which makes the provision workable should be preferred.

17. Effect of reopening

Does the reopening of an assessment mean that the original assessment stands cancelled or is the original order of assessment still valid? Does the Assessing Officer have the power to assess all the items of income that have escaped assessment which comes to his knowledge during the reassessment or is it only in respect of items for which the proceedings have been initiated? Considerable doubt and controversy has arisen in respect of these questions.

The Supreme Court in *V.Jaganmohan Rao v CIT [1970] 75 ITR 373 (SC)* had held that once an assessment is reopened, the previous assessment is set aside and that the old assessment starts afresh. It was further held that once proceedings of reassessment are validly initiated, the jurisdiction of the Assessing Officer is not restricted to the portion of income that has escaped assessment but it is his duty to levy tax on the entire income that has escaped assessment. The Full Bench of the Bombay High Court in *CIT v Indian Rare Earth Ltd [1990] 181 ITR 22 (Bom) (FB)* held that once valid proceedings under section 147 are started, the Income-tax Officer has not only the jurisdiction but it is his duty to complete the whole assessment *de novo*. What is true of assessment must also be true of a reassessment because a reassessment is nothing but a fresh assessment.

However subsequently the Supreme Court in *CIT v Sun Engineering Works (P) Ltd [1992] 198 ITR 297 (SC)* has explained the decision of the Supreme Court in *Jaganmohan Rao's case* as that the reassessment wipes out the original assessment and the reassessment is not only confined to escaped income would mean that the entire proceedings would start *de novo*. They explained that the words "such income" in section 147 clearly refers to the income chargeable but which has escaped assessment but that the Assessing Officer has jurisdiction only over such income, which has escaped assessment. While this confusion prevailed in the law, section 147 has been amended deleting the words "such income". With the deletion of these words the confusion no longer subsists. The Bombay High Court in *Smt.Vasantibai N.Shah v CIT [1995] 213 ITR 805 (Bom)* has held that once the Income-tax Officer has validly initiated proceedings for reassessment, it is open to him to consider items other than those contained in notice under section 148. A similar view has been taken in *D.P.Byrne v CIT [2001] 249 ITR 311 (Delhi).* The third explanation to section 147 inserted with retrospective effect from 01.04.1989 provides that once an assessment is reopened, it would be open for an Assessing Officer to include issues which were not part of the reasons recorded for the reopening. It may however be noted that if all the reasons for

the reopening fails, the reassessment will also have to fail. It is only when atleast one reason survives that the reopening can survive even after considering the third explanation to section 147. This view is supported by the decisions in

CIT v Jet Airways (I) Ltd [2011] 331 ITR 236 (Bom)
CIT v Shri Ram Singh [2008] 306 ITR 343 (Raj)
CIT v Dr.Devendra Gupta [2011] 336 ITR 59 (Raj)
CIT v Mohamed Juned Dadani [2013] 355 ITR 172 (Guj)
Oriental Bank of Commerce v Ad.CIT [2014] 90 CCH 27 DelHC
Ranbaxy Laboratories Ltd. v CIT [2011] 336 ITR 136 (Del)
PVP Ventures Ltd. v ACIT [2015] 94 CCH 0147 (Chen HC)
Martech Peripherals Pvt. Ltd. v DCIT [2017] 394 ITR 733 (Mad)
Mumtaz Haji Mohmad Memom v ITO Special Civil Application No.21030 of 2017 – Guj HC
CIT v Infinity Infotech Parks Ltd in ITAT No. 60 of 2014 G.A.No. 1736 of 2014 dated 10.9.2014 (Calcutta HC)

However a contrary view has been taken by the Karnataka High Court in *N.Govindaraju v ITO & Anr [2015] 377 ITR 0243 (Kar)*

A reassessment is to be made of the entire income of the assessee. On the reopening of the original assessment order and making of a fresh order, of the entire assessed income, the earlier assessment was effaced by the fresh order.

ITO & Another v K.L.Srihari (HUF) & Others [2001] 250 ITR 193 (SC)

The original order of assessment remains good, valid and effective till it is substituted by the reassessment order. The original assessment order does not become void *ab initio* on the issue of the notice u/s.148.

Nawab Mir Barkat Ali Khan Bahadur v ITO [1988] 172 ITR 13 (AP)

18. Deductions in Reassessment

The Supreme Court in *Chettinad Corporation Pvt Ltd v CIT [1993] 200 ITR 320 (SC)* has held that an assessee could only be permitted to claim allowances/relief which are relevant to the items which are the subject matter of the enquiry during reassessment. The Bombay High Court in *K.Sudakar S.Shanbhag v ITO [2000] 241 ITR 865 (Bom)* has held that an assessee cannot be permitted to convert the reassessment proceedings as his appeal or revision in disguise and seek relief in respect of items earlier rejected or claim relief in respect of items not claimed in the original assessment unless relatable to escaped income and reagitate concluded matters. Allowance of such claims in respect of escaped income in case of reassessment has to be limited to the extent to which they reduce the income to that originally assessed. Income for the purpose of reassessment cannot be reduced beyond the income originally assessed.

While an assessee cannot reagitate claims already assessed it is open to an assessee in reassessment proceedings to put forward claims for deduction of any expenditure which is relatable to the income which is sought to be assessed as escaped income in the reassessment proceedings. *CIT v Caixa Economica De God [1994] 119 CTR (Bom) 250*.

It is apparent that it is not possible that income be reduced in a reassessment or that a loss be determined for the first time in a proceeding of reassessment.

Koppind Pvt. Ltd. v CIT [1994] 207 ITR 228 (Cal)
O.M.Ahamed Sahib v CIT [1952] 22 ITR 87 (Mad)
Himmatsingka Motor Works Ltd. v CIT [1993] 200 ITR 749 (Cal)

By filing Form No.10CCB in the course of reassessment proceedings (which form was not filed with the return of income, nor was it filed in the course of assessment proceedings, the assessee is not making any fresh claim for deduction u/s. 80IB but merely furnishing the documents to substantiate its claim made during the course of assessment and even reassessment proceedings and hence deduction to be allowed. (A.Y. 2003-04)

DCIT v Tide Water Oil Co.(I) Ltd, ITA No. 20151/Kol/10 dated 20-1-2012 (Kol.)(Trib.)

19. <u>Change of opinion</u>

Erstwhile provisions

Both under the law as it stood prior to assessment year 1989-90 and law as it stands from assessment year 1989-90 it can be said that a mere change of opinion cannot be a reason for reopening an assessment. The Andhra Pradesh High Court in *ITO & Anr. v Sirpur Paper Mills Ltd [1978] 113 ITR 393 (AP)* has held that the department cannot be permitted to bring fresh litigation because of new views they entertain on same facts or new vision that they present as to what should be the proper inference on the facts disclosed. If this is permitted they held that litigation could have no end except when legal ingenuity is exhausted and would multiply litigation. In this context, it has been held that reassessment is not valid in the following circumstances:

- ♣ Having second thoughts on the same material and the omission to draw the correct presumption during original assessment. *[ITO v Nawab Mir Bharkat Ali Khan Bahadur [1974] 97 ITR 239 (SC)]*
- ♣ Ignorance of the legal position on the part of the Assessing Officer even though relevant facts and materials were available. *[Century Enka Ltd. v ITO [1983] ITR 629 (Cal)]*
- ♣ Ignorance of board circulars. *[Dr.H.Habich v Makhija [1985] 154 ITR 552 (Bom)]*
- ♣ Where primary facts were available at the time of original assessment, omission to notice the same. *[Lokendrasingh v ITO [1981] 128 ITR 450 (MP)]*.
- ♣ Facts available before predecessor and taken note of in original assessment and successor holding a different view. *[CIT v Soh Kisan Cold Storage [1994] 209 ITR 700 (Patna)]*.

- ♣ Reopening on the basis of Supreme Court decision. *[Indra Co. Ltd. V. ITO [1971] 80 ITR 550 (Cal)]*.
- ♣ Reopening on ground that earlier inference was erroneous or on the basis of a change of opinion. *[Poonjabhai Vanmalidas & Sons (HUF) v CIT [1974] 95 ITR 251 (Guj) (FB), Sham Narain v ITO [1981] 131 ITR 105 (Del), Garden Silk Mills v DCIT [1996] 222 ITR 68 (Guj), CIT v Man Mohan Das [1996] 218 ITR 730 (MP), CIT v Raj Kumar Bafna [1997] 226 ITR 822 (Raj)]*
- ♣ The Indian Branch of an American Company prorated head office expenses and service charges on the basis of the system adopted by the branch and accepted by the Assessing Officer in earlier years. The fact that the Government of India fixed a ceiling on remittances in respect of head office expenses under FERA and sent letters to the assessee did not warrant a reassessment. *[Coca-cola Export Corporation v ITO [1998] 97 Taxman 475 (SC)]*
- ♣ In respect of issues which have been scrutinized in the original assessment. *[PCIT v Magna Casting & Machine Works Pvt Ltd 21.01.2019 ITXA/917/2016 – Bombay HC, PCIT v Hanil Era Textiles Ltd ITXA/203/2017 15.04.2019 – Bombay HC, ACIT v Rolta India Ltd [2011] 132 ITD 98 (Mumbai) (TM), CIT v SICOM LTD in ITA No.137 of 2014 dt 08.08.2016 - Bombay HC]*

It must be shown that some opinion was formed on the basis of the material at the original assessment stage. If initially no opinion was formed it could not be said that there was a change of opinion. *Nawab Ganj Sugar Mills Co. Ltd. v CIT [1980] 123 ITR 287 (Del)*.

All the decisions stated above in the context of a change of opinion not being a basis for reassessment were rendered on the basis of the law as it existed prior to assessment year 1989-90. In the context of the law as it stands presently the Allahabad High Court in *Foramer v CIT & Another [2001] 247 ITR 436 (All)* affirmed *246 ITR 566 (SC)* and the Delhi High Court in *Jindal Photo Films Ltd. v DCIT and Another [1998] 234 ITR 170 (Del)* have held that there is no difference between the law relating to the issue of notice for reassessment as it stood prior to assessment year 1989-90 and as it stands presently. In either case, a mere change of opinion cannot warrant reassessment.

Though the law as amended with effect from assessment year 1989-90, no longer uses the language “omission or failure to disclose fully and truly all material facts” it is felt that there can be no reassessment even under the law as it stands from assessment year 1989-90 in the light of the decision of the Andhra Pradesh High Court in *113 ITR 393 (supra),* where the court observed that if this is permitted it will lead to multiplicity in litigation, which is to be avoided.

However merely because the case of the assessee was accepted as correct in the original assessment for the relevant assessment year, it does not preclude the Income Tax Officer to reopen the assessment of an earlier year on the basis of his findings of fact made on the basis of fresh material in the course of assessment of a subsequent assessment year. *[Ess Ess Kay Engineering Co. Pvt Ltd v CIT [2001] 247 ITR 818 (SC]]* However in a case where there has been no assessment u/s.143(3) but has been made only u/s.143(1), there can be no question of a change of opinion since no opinion was at

all formed in the first place. *ACIT v Rajesh Jhaveri Stock Brokers Pvt Ltd [2007] 291 ITR 500 (SC)*.

In *Commissioner of Income tax v Kelvinator of India 320 ITR 561 (SC),* the Supreme Court held that the AO 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. This is supported by Circular No.549 dated 31.10.1989 which clarified that the words "reason to believe" did not mean a change of opinion. The Supreme Court in this case was approving the decision of the Full Bench of the Delhi High Court in the case of the same assessee in *256 ITR 1* where The Court held that when a regular order of assessment is passed in terms of section 143 (3) of the Act, a presumption can be raised that such an order has been passed on application of mind. It was held that if it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising quasi-judicial function to take benefit of its own wrong. It was held that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion

In a subsequent decision, however, it was held that if in the original assessment, the AO did not examine the claim of the assessee, did not raise queries or elicit answers, it cannot be stated that merely because the AO did not reject such a claim in the final order of assessment, he should be deemed to have expressed an opinion with respect to such a claim. As long as there is some tangible material to support the belief that income chargeable to tax has escaped assessment, reopening is permissible. Such tangible material need not be "new" or be alien to the record – *Gujarat Power Corporation Ltd. v ACIT* in Special Leave Application no. 29792 of 2007, subsequent to the decision of the Supreme Court in Kelvinator of India (supra)

In *Oracle India Pvt Ltd v ACIT 2017 (7) TMI 967 – Del HC*, the Hon'ble Delhi High Court has quashed the notice issued u/s.148 for reopening the assessment for the reason that all material were available with the Assessing Officer at the time of original assessment and the revenue does not require reassessment proceedings for the purpose of verification of the said material. It was further held that the Assessing Officer has not brought out in the reasons recorded for reopening as to what is the failure on the part of the assessee to disclose fully and truly the material facts. Similar view has been taken in *CIT v Narain Dass Taneja [2014] 91 CCH 22 (Del) (HC), DCIT v Wind World (India) Limited. [2018] 63 ITR (Trib) 0599 (Mum).*

A reopening based on an audit objection was found to be a case of mere change of opinion in *CIT v Lucas TVS Ltd 249 ITR 306 (SC)* where the audit party took an interpretation which was different from the one taken from the Assessing Officer which also was a possible view. In a case where the audit party merely brought out a factual error committed by the Assessing Officer it was however held that it was not a case of change of opinion in *CIT v P.V.S.Beedies Pvt Ltd [1999] 237 ITR 13 (SC)*.

Recently the Supreme Court in *New Delhi Television Ltd v DCIT [2020] 116 Taxmann.com 151 (SC)* has held that

(i) merely because the original assessment is a detailed one, the powers of the AO to reopen u/s 147 is not affected.
(ii) Information which comes to the notice of the AO during proceedings for subsequent AYs can definitely form tangible material to reopen the assessment

Amended provisions

The above aspect may not be completely relevant under the amended provisions since the new Section 148 clearly defines "information that suggests that income chargeable to tax has escaped assessment". It has been seen that these are based on the information in accordance with the prescribed risk management strategy, audit objection, information received under an agreement referred to in section 90 or 90A, information under scheme notified u/s.135A and information requiring action consequent to an order of the Tribunal or Court. Therefore the fact that full and true disclosure has been made by assessee may not be an effective defence under the amended provisions.

20. <u>Failure to Disclose Material Facts</u>

Erstwhile provisions

The scope of a reassessment under the provisions as amended is much wider than it was prior to the amendment made and under the law as it existed upto 31.03.1989. The amended provision are contextually different and cumulative conditions spelt out in clause (a) or (b) of section 147 prior to the amendment are not present in the amended provision. The only condition for action is that the Assessing Officer should have reason to believe that income chargeable to tax has escaped assessment which condition can be reached in any manner and is not qualified by the pre condition of full and true disclosure of material facts as contemplated in the pre amended section 147(a). Reassessment proceedings requires the formation of a belief which is not a judicial decision but an administrative one which must be exercised fairly and judiciously. Thus under the amended law an Assessing Officer would be justified in reopening an assessment on the basis of valuation report u/s.55A received from a departmental valuation officer after completion of the original assessment which indicated understatement of capital gain. *[Bawa Abhai Singh v DCIT [2001] 117 Taxman 12 (Delhi)].* It has also been held in the following cases that a reopening based on a DVO's report is not invalid:

ACIT v Dhariya Construction Company [2010] 328 ITR 515 (SC)
Vinayak Builders v BD Garsal (or) Successor [2012] 346 ITR 39 (Guj)
CIT v Arihant Builders [2008] 6 DTR 185 (Raj)
Bishnu Talkies v CIT [2006] 287 ITR 372 (Gau)
Hotel Regal International &Anr v ITO & Anr [2010] 320 ITR 573 (Cal).
CIT v Shirinbai Abdullabhai [1998] 232 ITR 895 (Cal)
Late Shri Jaghish P Bhatt v ITO [2017] 99 CCH 0069 Guj HC

Hotel Celebration v ITO [2017] 99 CCH 0068 Guj HC
Munir Ismail Voraji v CIT [2018] 404 ITR 696 (Guj)
Grover Nursing Home v ITO [2001] 248 ITR 493 (P&H)
Sri Krishna Mahal v ACIT [2001] 250 ITR 333 (Mad)
V.R.Ramathilagam, Legal Heir of Late V.S.RamasamyNaidu v ITO in ITA No.59 / Mds / 2015
C.R.Rajendran v ITO in ITA No.361 / Mds / 2015

Amended provisions

As seen earlier, the amended provisions are categorical on the circumstances when reassessment can be carried out, hence, the above arguments may not be relevant under the amended provisions.

21. <u>Other Issues on reopening</u>

- It is not possible to reopen an assessment based on clarificatory / retrospective amendment. *[Katira Construction Ltd v UOI [2013] 352 ITR 513 (Guj), Parixit Industries (P.) Ltd. v ACIT [2013] 352 ITR 349 (Guj)]*

- A subsequent decision of the High Court or Supreme Court i.e. a decision which was not available at the time of completing the original assessment cannot be a basis for reopening the said assessment. *[CIT v Baer Shoes (India) (P) Ltd. [2011] 331 ITR 435 (SC), Austin Engg Co Ltd v JCIT [2009] 312 ITR 70 (Guj)]*

- Where proceedings u/s.143(3) r.w.s. 263 are pending before the Assessing Officer, then in such circumstance reassessment proceedings cannot be initiated. *[Ador Technopack Ltd v DCIT [2004] 271 ITR 50 (Bom)]*

- Where an appeal by the department is pending before higher authorities, then notice u/s.148 cannot be issued since during pendency of such proceedings the assessment cannot be treated as final. *[Metro Auto Corporation v ITO & Ors [2006] 286 ITR 618 (Bom)]*

- Where there is a mistake which is tax neutral while computing the income, reassessment cannot be initiated as the basic condition of income escaping assessment is not satisfied. *[Givaudan Flavours India Pvt Ltd v DCIT in ITA Nos.3295 / Mum / 2012*

- Where an issue is decided by the Commissioner of Income Tax u/s.263, then the Assessing Officer cannot reopen the assessment. *[ACIT v Bothra Shipping Services [2014] 42 CCH 57 (Kol) (Trib)]*

- An assessment by way of a settlement order passed by the ITSC cannot be reopened by a different authority, viz., the Assessing Officer. *[Omaxe Ltd through Jai Bhagwan Goel v ACIT & Anr 2012 (7) TMI 529 (Del)*

Amended provisions

As seen earlier, the amended provisions are categorical on the circumstances when reassessment can be carried out, hence, the above arguments may not be relevant under the amended provisions.

22. Number of Reassessments

There is no restriction on the number of times section 147 may be invoked. What is relevant for a reassessment is a finding that the income in the original assessment or the return has been taken at a figure lower than what is rightly assessable

CIT v S.S.K.G.Arthanariswamy Chettiar [1982] 136 ITR 145 (Mad)
K.E.M.Mohammad Ibrahim Maracair v CIT [1964] 52 ITR 890 (Mad)
Jagmohan Goenka v K.D.Banerjee [1954] 26 ITR 637 (Cal)
CIT v Surendra Kumar Bhadani [1987] 164 ITR 323 (Pat)
Gurdayal Berlia v CIT [1966] 62 ITR 494 (Cal)
Atma Ram Bindra Ban v CIT [1960] 39 ITR 418 (Punj)
Ashok Kumar Dixit v ITO [1992] 198 ITR 669 (All)

However where a return has been filed within the time allowed in response to an invalid notice of reassessment, a second notice of reassessment treating such return as invalid is not valid.

CIT v S.Raman Chettiar [1965] 55 ITR 630 (SC)

Further all original proceedings must have been terminated before reassessment proceeding can be validly initiated.

Nizam's Supplemental Family Trust, The Trustees of H.E.H v CIT [2000] 242 ITR 381 (SC)
R.B.Seth Gujar Mal Modi v CIT [1972] 84 ITR 261 (SC)
S.B.Jain, ITO v Mahendra [1972] 83 ITR 104 (SC)
CIT v Jaideo Jain & Co [1997] 227 ITR 302 (Raj)

This view has also been taken in *Smt.Nilofer Hameed & Another v ITO [1999] 235 ITR 161 (Ker)*

This would be true even if the earlier proceedings which were pending at the time of issue of the reassessment notice are declared invalid.

R.B.Seth Gujar Mal Modi v CIT [1972] 84 ITR 261 (SC)
S.B.Jain, ITO v Mahendra [1972] 83 ITR 104 (SC)

Where reassessment proceedings were initiated but were dropped there can be an issue of fresh notice after the earlier notice can be said to have been concluded as a result of dropping of proceedings. *[Kohinoor Enterprises v ITO [1996] 89 Taxman 587 (MP)]*

Where the original was pending proceeding initiated for reassessment are invalid *[CIT v Rajendra G. Shah [2001] 247 ITR 772 (Bom)].*

23. Other Provisions

Section 152 deals with the other provisions relating to reassessment. This section provides that where a reassessment or recomputation is made, tax shall be chargeable at the rate or rates applicable to the assessment year in which the income is assessable.

This section also provides that an assessee may seek that proceedings of reassessment be dropped provided the following conditions are fulfilled:

(1) that he has not gone on appeal or revision against any part of the original order
(2) on the assessee showing that he had been assessed on an amount or to a sum not lower than what he would be rightly liable for even if the income alleged to escape assessment is taken into account in the recomputation

This section however makes it abundantly clear by a proviso that nothing contained in this section will empower an Assessing Officer to reopen matters concluded by orders made u/s.154, 155, 260, 262, 263.

Issues in reopening and reassessment post the decision of the Supreme Court in *UOI v Ashish Agarwal [2022] 444 ITR 1 (SC)*

Pursuant to the decision of the Supreme Court in the above referred case and the consequent Board Instruction No.1/2022 of F.No.279/Misc./M-51/2022-ITJ dated 11.05.2022 notices u/s.148A(b) were issued in respect of assesses where notice under the erstwhile provisions of section 148 have been issued on or after 01.04.2021 and upto 30.06.2021.

Though the Supreme Court is in agreement with the decision taken by various High Courts that the notices issued u/s.148 post 01.04.2021 are not valid since the procedure under the amended provisions of reassessment under the Income Tax Act, were not followed, yet it has decided that there would be no remedy to revenue if the High Court orders are sustained and that the revenue cannot be left remediless.

The Supreme Court has held that these extended reassessment notices issued under the old law shall be deemed to be the show cause notice issued under the amended provisions of section 148A i.e. u/s.148A(b) and further directed the Assessing Officers to follow the procedure with respect to such notices. The Supreme Court has also held that all the defences available to assessees including those available under section 149 of the new law and whatever rights are available to the Assessing Officer under the new law shall continue to be available.

Decision of Supreme Court – Applicable to whom

From the judgment of the Supreme Court, it may be noted that the said judgement is applicable only for those notices which are challenged by the assessee and which are

either pending before the High Courts or which were already decided by the High Courts. However, it may be noted that the Board Instruction No.1/2022 referred to supra states that the decision of the Supreme Court is applicable to all irrespective of the fact whether such notices have been challenged or not.

Notices whether barred by limitation

For assessment years 2013-14, 2014-15 and 2015-16, the 6 year time limit ended on 31.03.2020, 31.03.2021 and 31.03.2022 respectively. The notice u/s.148 under the amended provisions if issued after following the directions of the Hon'ble Supreme Court can only be issued in financial year 2022-23, which is beyond the time limit and hence the reopening would not be valid as per the first proviso to section 149. It may also be noted that the extended time limit for issue of notice u/s.148 as per the order of the Hon'ble Supreme Court would not be covered by the exclusion of period for computing the period of limitation provided in 3rd proviso to section 149.

It may further be noted that in respect of notices issued u/s.148 for assessment years 2013-14 and 2014-15 even as on the date of issue of notice u/s.148 under old law i.e. after 01.04.2021 but before 30.06.2021, the six year time limit has expired.

A notice u/s.148 cannot be issued under the new provisions, if it could not have been issued as per the provisions of section 149(1)(b) under the old reopening regime. In the case of assessment years 2013-14 and 2014-15, the 6 year limit for issuance of notice u/s.148 as per the old provisions has already expired on 31.03.2021. Therefore, no notice u/s.148 can be issued on the assessees for assessment years 2013-14 and 2014-15 even under the amended reopening provisions based on the decision of the Supreme Court.

For assessment years 2016-17, 2017-18 and 2018-19 the 3 year time limit ended on 31.03.2020, 31.03.2021 and 31.03.2022 respectively. The notice u/s.148 under the amended provisions if issued after following the directions of the Hon'ble Supreme Court can only be issued in financial year 2022-23. It may be noted that the extended time limit for issue of notice u/s.148 as per the order of the Hon'ble Supreme Court would not be covered by the exclusion of period for computing the period of limitation provided in 3rd proviso to section 149.

Therefore as per the relevant provisions of section 149, as they stood prior to the amendment made by Finance Act, 2022 reopening beyond 3 years is valid only if the conditions in section 149(1)(b) are satisfied i.e. the Assessing Officer should have **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.** Therefore, if the escapement of income represented in the form of asset does not exceed Rs.50 lakhs then the reopening is not valid in such cases for the assessment years 2016-17, 2017-18 and 2018-19.

It may further be noted that in respect of notices issued for assessment years 2016-17 and 2017-18 as on the date of issue of notices u/s.148 i.e. after 01.04.2021 but before

30.06.2021, the 3 year time limit as per the new law, has expired. Therefore if at all the escapement of income represented in the form of asset exceed Rs.50 lakhs then the reopening can be made for the assessment years 2016-17 and 2017-18.

However, it may be noted that the *Board Instruction No.1/2022* referred to supra states that the decision of the Supreme Court read with the time extension provided by TOLA will allow extended reassessment notices to travel back in time to their original date when such notices were to be issued and then new section 149 of the Act is to be applied at that point. Hence as per the Board Instruction reopening notices issued for assessment years 2013-14 to 2018-19 after 01.04.2021 but before 30.06.2021 are valid.

The Board also clarifies that in order to reduce the compliance burden of assesses the information and material may not be provided in a case for assessment years 2013-14 to 2015-16, if the income escaping assessment in that case for that year amounts to or is likely to amount to less than Rs.50 lakhs.

Recently the Gujarat High Court in ***Keenara Industries (P.) Ltd. v ITO [2023] 147 taxmann.com 585 (Gujarat)*** has held that the extensions given by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) 2020 [TOLA] are inapplicable to the amended section 149.

The crux of the decision is as follows:

Notices u/s.148 were issued for assessment years 2013-14 and 2014-15 during the period between 01.04.2021 and 30.06.2021 under the old regime. Assessees preferred writ petitions against the orders passed by the Revenue u/s.148A(d) initiating reassessment and consequential notices issued u/s.148.

These notices under dispute were issued subsequent to the Supreme Court decision in *Ashish Agarwal's* case where notices issued under the old regime during 01.04.2021 to 30.06.2021 were revived and deemed to be the notices issued u/s.148A(b).

However, the Court held that the extension of time provided by TOLA would not apply to notices issued under the new regime of reassessment coming into force from 01.04.2021. As per the CBDT's Instruction No.1/2022, the Supreme Court decision in the case of *Ashish Agarwal* reported in *[2022] 444 ITR 1(SC)* along with extension provided under TOLA would allow the reassessment notices to 'travel back in time'. This interpretation of the decision of the Supreme Court by the CBDT was held to be erroneous as it overlooked the fact that the Supreme Court had specifically kept all the defenses available to the assessees including those available u/s. 149 of the Act open. The Gujarat High Court laid down the principle that CBDT Instruction No.1/2022 cannot override the provisions of law or the decision of the Apex Court.

As per first proviso to amended Section 149(1)(b), if notices were already time-barred on account of lapse of six years from the end of the relevant assessment year, no notice could be issued by placing reliance on the above Instruction and the extension granted by TOLA. Since in the instant case, the six year period for both the assessment years

had already expired even before 01.04.2021, the said notices cannot be revived by provisions of TOLA. The Court held that the CBDT Instruction cannot run contrary to the statutory provisions.

It may be noted that Allahabad High Court in the case of ***Rajeev Bansal & Ors v UoI [2023] 147 taxmann.com 549 (Allahabad)*** also took a similar view and held that reassessment notices issued between 01.04.2021 and 30.06.2021 will not be eligible for extension under TOLA 2020 due to the specific bar in the first proviso to Section 149(1)(b).

However, the Delhi High Court in ***Touchstone Holdings (P) Ltd. v ITO [2023] 289 Taxman 462 (Del)*** held that in similar circumstances where the order u/s. 148A(d) and notice u/s. 148 were challenged for assessment year 2013-14, that as a result of the decision of the Supreme Court in *Ashish Agarwal's* case, the time limit for notice issued on 29.06.2021 was within the extended time limit which was upto 30.06.2021. Hence, the notice stood revived and was held valid. Further, the Court noted that since the time limit has been extended by the Supreme Court until 30.06.2021, the first proviso to Section 149(1)(b) will not get triggered.

The Supreme Court in a Special Leave Petition filed by the revenue in SLP No.6706 / 2023 has stayed the order passed by the Allahabad High Court in the case of Rajeev Bansal

Supply of information suggesting escapement of income

The Supreme Court in the case of ***Union of India v Ashish Agarwal [2022] 444 ITR 1 (SC)*** had directed that t*he respective assessing officers to provide to the assessees the information and material relied upon by the Revenue for reopening the assessment.*

Further the CBDT vide Instruction No.1/2022 dated 11.05.2022 issued for the implementation of the decision of the Hon'ble Supreme Court in Ashish Agarwal provided the procedure required to be followed by the Jurisdictional Assessing Officer in compliance with the order of the Supreme Court in which it has been stated that the Assessing Officers shall provide to the assessees the information and material relied upon for issuance of the extended reassessment notices.

In ***Alkem Laboratories Limited v PCIT TS-203-HC-2023 (Pat)*** the Patna High Court allowed assessee's writ petition and had set aside the notice issued u/s.148A(b) as unsustainable by holding that the Revenue failed in disclosing the nature of information suggesting the escapement of income. The High Court opined that the illegality in the issuance of notice is manifest, thus, considers it just and proper to 'nip in the bud' by giving the Revenue an opportunity to correct what was incorrectly done and remitted the matter for fresh issuance of notice and proceed in accordance with law after furnishing clear information as per Section 148A(b)