Reopening of Assessments – Clinical Study of Section 148A

Introduction:

The Apex Court had in the case of GKN Driveshafts (259 ITR 19) laid down the procedure to be followed in all cases where the back assessments of a person are opened by the Income Tax Authorities. The said decision recognised the right of a person to seek:

a) a copy of the "satisfaction' recorded by the AO for reopening the assessment; and

b) enabled the person to file his objections against the satisfaction of the AO on the ground that the information is either incorrect or incomplete or irrelevant.

Vide Finance Act 2021, the legislature has codified this dicta of the apex court. In the process, certain other interesting sub provisions have been introduced whereby the earlier scheme of reopening of the assessment has been completely done away with and is substituted with the new scheme. For instance the concept of "reason to believe" has been substituted with a much milder term "suggests" for the quality of satisfaction that the AO has to record now. The limitation of time period is reduced to 3 years at one end and expanded to 10 years on the other end. The competent authority for approving the action of AO is changed to "specified authority" who can only be PCIT and PCCIT and not JCIT.

In this article we will discuss one part of the new scheme of reopening of assessment i.e. the procedure to be carried out prior to issuance of notice u/s. 148 of the Act for reopening the assessment under the amended law and will try to cull out certain fresh concepts that would in future be at the doors of courts. Suffice to state that the new provisions will only increase

the litigation and not reduce it.

Section 147 of the Act has been amended and is an enabling clause for reopening the assessment of the assessee only if any "income chargeable to tax" has escaped assessment. However, the said provision is subject to the conditions and the procedure to be fulfilled u/s. 148 to section 153 of the Act.

Section 148 is amended to include that a notice for reopening the assessment can only be issued after proceedings u/s. 148A are carried out and order u/s. 148A(d) is passed. Various High Courts have already held that a notice issued u/s. 148 of the Act without following the due process of section 148A is a nullity as held by Allahabad High Court, Delhi High Court, Rajasthan High Court, Madras High Court and lately the Bombay High Court in the case of ***Tata Communications Transformation Services Limited v. ACIT bearing Writ Petition no. 1334 of 2021, order dated 29/03/2022.***

So, what is this section 148A and how does it provide safeguard to assessee against wrongful reopening. Let's discuss the various limbs of said section 148A to cull out why courts have treated it as a mandatory jurisdictional provision and not merely a directory procedural provision.

The said section has four sub sections laying down the procedure to be followed before the order u/s. 148A(d) can be passed. It further provides for four exceptions through a proviso. The process starts with a notice and culminates into an order. The said provision includes all the essentials of a valid proceeding like issuance of show cause notice, opportunity of hearing to assessee, recording of reasons, speaking order and approval of higher authority. Therefore, it's a self-sufficient code.

Section 148A: Safeguards to Assessee

The captioned section is added to codify the requirement of providing the

copy of information to assessee that suggests escapement of chargeable income, and to further seek objections of the assessee before a formal notice u/s. 148 for reopening is issued. The idea is that in the event of any incorrect or irrelevant reasons the process of reopening u/s. 148 is not carried out. This is aimed at reducing litigation. However, the manner in which this provision is worded, it's bound to lead to much more and new litigation.

Sub section (a) has been added to ensure that enquiry is made by the AO on the information before proceeding ahead with the notice u/s. 148. This aspect of "enquiry before notice" has been introduced so as to ensure that:

a) the AO is not operating on "borrowed information" but also applying his own mind to check whether income chargeable to tax has escaped assessment. Therefore, the receipt of "information" by the AO is succeeded by enquiry with respect to the said "information" as per section 148A(a). This means that the legislature realises and recognises that all the "information" received by the AO may not be either correct or complete or relevant. Moreover, all information may not lead to a conclusion of escapement of income. As a safeguard, the approval of specified authority is required before carrying out further enquiry. Therefore, the enquiry is at all required for the alleged information, cannot be decided solely by the AO. The possible questions which will be answered by judiciary are:

– Whether the AO was bound to carry out enquiry before proceeding ahead with the process of reassessment or whether it's a discretionary or directory provision?

– Whether the approval to be granted by the Specified Authority is an administrative act or a judicial / quasi-judicial act. Accordingly, whether such an approval can be challenged as mechanically issued?

– Whether the AO is duty bound to provide all material to the assessee as a consequence of enquiry, wherever such enquiry is carried out?

– Whether the enquiry is to be conducted only with respect to the "information" received or whether it can spill into other areas not forming part of such information?

– Can assessee request the AO to carryout enquiry u/s. 148A(a) on additional details supplied by Assessee?

Sub section (b) is the first interaction between the AO and the assessee in the entire scheme of reassessment. The AO issues a notice to the assessee inviting him to show cause why notice u/s. 148 should not be issued reopening the assessment. Along with the said notice the AO is required to provide the "information" on the basis of which the entire proceedings have commenced. The said notice is to be issued on the basis of:

(i) information suggesting escapement of chargeable income; and

(ii) result of enquiry conducted as discussed in sub section (a) above.

Therefore, the provision provides an opportunity of hearing to the

assessee to rebut the information and the material collected in the enquiry by the AO. If such information is incorrect or incomplete then the AO is duty bound to drop further proceedings. Thus, it's a big safeguard with the assessee against wrongful notices u/s. 148 of the Act.

Interestingly, no prior approval of specified authority is required for the issuance of notice u/s. 148A(b) of the Act. However, the Author is in receipt of certain notices u/s. 148A(b) wherein it is mentioned that approval of specified authority has been obtained before issuance of such notice. Such approval is mandated for notice u/s148 and not for 148A(b) of the Act.

The said notice is to be issued for a period not less than 7 days and not more than 30 days. However, such notice can be challenged on the ground that:

a) the period specified in the notice is less than 7 days and hence, invalid.

b) the notice is not accompanied by the "information" which suggests the escapement of income and therefore there is nothing to rebut.

c) the details of enquiry conducted have not been provided to the assessee.

d) the background "material" for alleged information and collected in enquiry is not provided to the assessee for rebuttal.

e) Copy of approval by specified authority is not provided.

The said provision is the most important provision for the assessee as he gets to know the entire case against him and he gets an opportunity to place his side of rebuttal and arguments even before reopening of assessment takes place. Ideally, a detailed submission covering challenge to all the facets is desirable.

Sub Section (c):

The said sub section obliges the AO to consider the reply of the assessee in response to show cause notice. It's strange that the legislature had to devote a separate sub section to compel the AO to consider the reply of the assessee. The Author believes that even without the said sub section, the AO is duty bound to consider the reply of the assessee else the opportunity of hearing as mandated under sub section (b) will become an empty formality. Moreover, the subsequent sub section (d) already covers the obligation of the AO to decide the matter on the basis of reply filed by the assessee. Hence, it's not clear as to what more sub section (c) is adding to the process. May be by using this sub section the Assessee can request the AO to conduct enquiry under sub section (a).

Sub section (d):

The said sub section is the culmination of the pre reopening process under section 148A. The said sub section provides for an order to be passed by the AO on the show cause notice issued under section 148A(b). The preconditions of the said order are:

a) prior approval of the specified authority.

b) to decide on the basis of the "material" available on record as well as the reply of the assessee.

c) the order to be passed within one month from the end of the month in which the reply of the assessee is received in response to SCN.

A perusal of the above precondition reveals that the "information" which suggests the escapement of income is merely a starting point of further proceedings. However, it cannot be the basis of the order u/s. 148A(d). Thus, the above procedure and intention cannot be diluted by the AO by merely stating that information is received on "insight portal". He is

required to go beyond that information. It's a beginning and not the end in itself for concluding escapement of income. To that extent the proceedings under section 148A is a quasi judicial proceedings and not merely an administrative exercise.

In the event of challenge by the assessee, the onus will be on the AO to prove that he actually carried out an enquiry in the matter. He is absolved from requirement of enquiry only where the said process is ousted in the exceptions enumerated in proviso to section 148A which are all related to search and seizure operations. And to that extent the phrase "if required" as appearing in sub section (a) of section 148A is to be restricted accordingly.

The author is of the opinion that even if the AO decides not to carry out enquiry he must record reasons for the said decision which will be open to judicial review because such enquiry is an essential safeguard for the assessee.

As opined, the said order is in the nature of a judicial order as it has to dispose of the objections of the assessee in a reasoned manner. It's an order against which no appeal is prescribed and hence the only remedy is the writ under Article 226 of the Constitution before the jurisdictional high court. The said order is akin to the order disposing of the objections under the erstwhile law of reopening. Therefore, all the following grounds can be raised for the challenge:

– non speaking order;

– Approval of specified authority not obtained or such approval mechanically granted;

– Material not provided before passing the order;

– The said order is time barred.

Requirement of Approvals:

The entire process of the pre notice enquiry under section 148A of the Act is laden with the approvals of the specified authority. The approval required from Specified Authority are as under:

a) before carrying out enquiry under section 148A (a); and

b) before order is passed under section 148A(d).

Thus, the process of prior approvals is an inbuilt safeguard for assessee. That's why approval is only from PCIT and PCCIT /CCIT and not of JCIT. It has been judicially held in a number of cases that the approvals by the authorities are not to be granted mechanically but there has to be complete application of mind. In case of challenge the authorities will have to prove that the process of approval was properly carried out. The jurisprudence on the manner of approval is already well laid down by the tribunals and high courts following the decision of apex court in the case of Chugamal Rajpal. The said jurisprudence will equally apply to the approvals under section 148A(a) and 148A(d).

CONCLUSION:

The process of the enquiry before issuing notice under section 148 is sought to achieve the objective of reduced litigation. However, with the dilution of the essential ingredient "reason to believe" the process will become more and more litigatious. Moreover, practically it has been the experience of the author that the AOs are not inclined to go against the information received from the "insight portal" of the department and they prefer to tread a line of safety. Hence, they tend to ignore the compelling submissions of the assessee opposing the information thereby pushing the assessee to exercise remedy under Article 226 before already overburdened high courts.