

# Re-assessments

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# Types of Assessment under the Income Tax Act, 1961

- Original Scrutiny assessment under S. 143(3) of the Act which has to be completed within 21 months from the end of the Assessment Year in which the income was first assessable – which period has been reduced to 18 months from Ay 2018-19 onwards.
- Re-assessment under S. 147/148 either after an original scrutiny assessment under S. 143(3) or after a return is processed under S. 143(1). We will come to the different legal principles applied by Courts and the various limitation periods after some time.
- Search assessments under S. 153A in case of searched person if some incriminating material is unearthed during search or under S. 153C if material belonging to or pertaining to a third person has been unearthed during search. Six AYs immediately preceding the year in which the search is made is reopened for assessment. The pending assessments abate.
- Assessments or reassessments in consequence of or to give effect to any finding or direction contained in an order passed by any authority under this Act in appeal, reference or revision or by a Court in any proceeding under any other law. [Section 150]
- Assessment as an Assessee-in-default under S. 201 when a person fails to deduct TDS or having deducted fails to pay the same.
- Assessment as a representative assessee under Section 163 where a person is treated as an “agent” of a non-resident assessee.
- Assessment can also be undertaken if so directed by a Commissioner by exercise of its revisionary powers under Section 263 of the IT Act when in its opinion any order passed by the AO is erroneous and prejudicial to the interest of the revenue.

Return processed under S. 143(1) does not amount to an assessment

- **Supreme Court has categorically held this to be the position of law as recently as 2015 in DCIT v. Zuari Estate Development and Investment Company, (2015) 15 SCC 248 following its earlier decision in CIT v. Rajesh Jhaveri Stock Brokers (P) Ltd., (2008) 14 SCC 208 that “*there being no assessment under Section 143(1), the question of change of opinion, as contended, does not arise.*”**
- **Out of 100 cases only 2 to 3 cases which is around 2-3% are picked up in scrutiny and the rest are processed under S. 143(1) without any scrutiny**

# Section 147

- “**147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :**
- **Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:**

(emphasis supplied by me)

# Basic criteria for reassessments

- **AO must have a “reason to believe” that**
- **“income has escaped assessment**
- **He may assess or reassess not only such income which has escaped assessment but also any other income which is chargeable to tax which has escaped assessment – Explanation 3 and the third proviso clarifies that even such matters which were not originally part of the reasons to believe can be the subject matter of assessment or reassessment under S. 147.**
- **Where the reopening is being done after a scrutiny assessment and after a period of 4 years from the end of the relevant AY then the escapement of income must have been occasioned by the failure on the part of the assessee to disclose truly and fully all material facts.**

# The power to reopen assessments under Section 147 – Tests evolved by the Judiciary

- **Calcutta Discount Co. Ltd. v. ITO, [1961] 41 ITR 191(SC)**  
Supreme Court held that the two conditions for reopening an assessment are essential – (i) ‘under assessment’ of income or escapement of income and (ii) omission or failure on the part of the assessee to disclose truly and fully all material facts. The Court held that the provision of law postulates a duty on every assessee to disclose all primary material facts. The Supreme Court summed up the principle of law quite neatly which still holds the field and is being followed in several subsequent decisions till date:
- “In view of the Explanation, it will not be open to the assessee to say, for example--' I have produced the account books and the documents : You, the assessing officer, examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account books and the documents”

# Limitations on the power of reassessment

- **There are broadly two limitations on the power of the revenue to reopen assessments – (i) there must be some tangible material based on which the reopening is being undertaken which leads to a reason to believe that there has been escapement of income and (ii) the reopening should not be a “mere change of opinion. Further if the case is sought to be reopened after a period of 4 years and after a scrutiny assessment has been completed, there is an additional burden on the revenue to establish failure on the part of the assessee to disclose truly and fully all material facts.**

# CIT v Kelvinator (2010 (2) SCC 723)

- **Supreme Court had succinctly summarised the legal requirements for a valid notice under Section 147 and stated inter alia that, "Hence, after 1-4-1989, the assessing officer has power to reopen, 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".**
- **Court has further held that "Change of Opinion" is an inbuilt test to check the abuse of power u/s 147/148 by the AO.**



# CIT v. Usha International [2012] 348 ITR 485 (Delhi)

- Full Bench decision of the Delhi High Court in the case of CIT v. Usha International [2012] 348 ITR 485 (Delhi) has gone to the extent of saying that the new information need not come from an outside source so long as it can be seen that the assessee had furnished certain incorrect material facts. The Court held as follows:
- *"if new facts, material, or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of 'change of opinion' will not apply .... Correct material facts can be ascertained from the assessment records also and it is not necessary that the same may come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the Assessing Officer proceeding on the basis of facts which are incorrect or wrong."*

# What is not a change of opinion

- **Points not decided while passing assessment order under section 143(3) is not a case of change of opinion. Assessment reopened validly - Yuvraj v. Union of India, [2009] 315 ITR 84 (Bombay)/[2009] 225 CTR 283 (Bombay)**
- **This view has been reiterated by the Supreme Court recently in the case of Income Tax Officer v. Techspan India Pvt. Ltd. and Anr.(2018) 6 SCC 685 – A Reassessment cannot be struck down on account of Change of Opinion if the Assessment Order is non-speaking, cryptic or perfunctory in nature.**

# What amounts to a change of opinion

- **The Courts have often taken a view that the reassessment would be bad on account of change of opinion where questionnaires have been issued and the subject matter, which is later the subject matter of reassessment, was in fact examined by the AO in the original proceedings. Most recent decision of the Delhi High Court on this aspect is Best Cybercity (India) Pvt. Ltd. Vs. ITO (Delhi High Court) where the Court held as follows:**
- *Therefore, in the present case all the material that was necessary for the AO to form an opinion regarding the transaction involving the Assessee and PACL was already available with the AO. There was no fresh tangible material on the basis of which the AO could have formed an opinion about any taxable having escaped assessment during the AY in*

No need for tangible material where return was processed under S. 143(1)

- **Where initial return of income is processed under section 143(1), it is not necessary in such a case for Assessing Officer to come across some fresh tangible material to form 'reasons to believe' that income has escaped assessment - Indu Lata Rangwala Vs DCIT - [2017]80taxmann.com102(Delhi)/[2016] 384 ITR 337 (Delhi)/[2016] 286 CTR 474 (Delhi)**

# Reopening under Section 147/148 after discovery of material upon search

- It is often argued by the assessee's counsels that a re-opening under S. 147/148 pursuant to a search is not valid since the appropriate course of action would have been issuance of notice under S. 153A/153C of the Act.
- However, the Delhi High Court in the case of CIT v. Sh. Raj Pal Bhatia and Ors. [2011] 333 ITR 315(Delhi), has held that where a notice under S. 153A or 153C could not be issued for want of jurisdictional requirements, then the proper course of action would be to issue a notice under Section 147. The Court held as follows:
- *The Tribunal has held that this statement could not be treated "books of accounts or other documents or assets" which only could be the basis for invoking the provision of Section 158BD of the Act. Admittedly, statement of Mrs. Charla is neither "books of accounts" or "assets". The question, therefore, is as to whether this statement can be treated as "other documents". Prima facie, it is difficult to accept this proposition. Statement was not the document which was found during search. In fact this was the document which came to be created during the search as the statement was recorded at the time of search. Therefore, it cannot be said that the statement was "seized" during the search and thus, would not qualify the expression "document" having been seized during the search. In such a scenario, proper course of action was reassessment Under Section 147 read with Section 148 of the Act.*

# What is 'Tangible Material'

- **Investigation Wing Report** has been held to be a tangible material warranting reopening of assessment under S. 147. But Courts have been anxious to verify whether the AO has applied his mind to the Investigation Wing report or not and whether such report has information which has a live link with the escapement of income. **AGR Investments v. Addl. CIT & Anr. (Del) 333 ITR 146** wherein it was held that on the basis of information received from the Investigation Wing, a Notice under Section 148 can be issued and an Assessment can be reopened under Section 147 of the Act.
- **Tax Evasion Petition** – The reopening of assessment on the basis of Tax Evasion Petition where the AO has applied his mind to the TEP has been held to be valid. In **Shumana Sen v. Commissioner of Income Tax XIV & Ors., (2013) 356 ITR 29 (Delhi)** - The source of the complaint or the tax evasion petition is not relevant; it is the substance of the contents of the tax evasion petition which has to be examined for the purpose of ascertaining whether there from a prima facie belief could have been formed by the Assessing Officer that income chargeable to tax had escaped assessment.
- **Findings/ observations in Assessment Order of subsequent year constitutes tangible material for the purpose of reopening assessment u/s 147 of the Act** - **Ess Ess Kay Engineering Co. P. Ltd. v. CIT: (2001) 247 ITR 818 (SC)**, **Sitara Diamonds Pvt. Ltd. v. ITO: (2013) 358 ITR 424 (Bom.)**, **Anusandhan Investments v. DCIT & Anr.: (2006) 287 ITR 482 (Bom.)**, **Siemens Information Systems Ltd. v. ACIT: (2012) 343 ITR 188 (Bom.)**
- **Reopening under S. 147 pursuant to an audit objection will be valid**-The intimation which the Income-tax Officer received from the audit department would constitute "information" within the meaning of section 147(b) - **R.K. Malhotra ITO Vs Kasturbhai Lalbhai - [1977] 109 ITR 537 (SC)**; **CIT Vs P.V.S. Beedies (P.) Ltd. [1999] 103 Taxman 294 (SC)/[1999] 237 ITR 13 (SC)/[1999] 155 CTR 538 (SC)**

# Approval of CIT under Section 151 of the Act

- Approval by the PCIT is required in certain cases to reopen assessments – Section 151 of the Act provides that no notice can be issued after the expiry of 4 years from the end of the relevant Ay unless the Commissioner is satisfied, on the reasons recorded by the AO, that it is a fit case for the issuance of such notice. Disputes have arisen over whether the Commissioner has applied his mind to the reasons or not and has often been raised as a ground for invalidating a notice under Section 148. Recently, the Division Bench of the Hon'ble High Court of Delhi in the judgment of **Principal Commissioner of Income Tax vs Meenakshi Overseas Pvt. Ltd.**, ITA 651 of 2015 vide judgment dated 11.1.2016 is pleased to hold as under:
- *"16. Having carefully examined the aforesaid decisions, the Court finds that they are distinguishable in their application to the facts of the present case. It is not as if the Additional CIT here has merely appended his signature without specifically noting his approval. This is also not a case where a "Yes" rubber stamp has been used as was in the case of Central India Electric Supply Co. (Supra). For the purpose of Section 151(1) of the Act, what the Court should be satisfied about is that the Additional CIT has recorded his satisfaction "on the reasons recorded by the Assessing Officer that it is a fit case for the issue of such notice". In the present case, the Court is satisfied that by recording in his own writing the words: "Yes, I am satisfied", the mandate of Section 151(1) of the Act as far as the approval of the Additional CIT was concerned, stood fulfilled. Additionally, by his letter dated 22<sup>nd</sup> March, 2011 the Additional CIT confirmed and reiterated his approval already granted on the Form ITNS-10."*

# Approval under S 151

- Au contraire, the same High Court in the case of Pr. CIT vs. N.C. Cables Ltd. in ITA 335/2015 order dated 11.01.2017 has held that ***Section 151 stipulates that CIT, who was competent authority to authorize reassessment notice, had to apply his mind and form opinion-Mere appending of expression 'approved' says nothing-It was not as if CIT had to record elaborate reasons for agreeing with noting put up-At same time, satisfaction had to be recorded of given case which could be reflected in briefest possible manner-In present case, exercise appears to have been ritualistic and formal rather than meaningful, which was rationale for safeguard of approval by higher ranking officer.***
- Therefore, there is no straight jacket formula on deciding whether a CIT has applied his mind or not and depends on the facts and circumstances of the case.



# Service of notice

- **Notice issued on the last day of the prescribed period of limitation by registered post received by the assessee after expiry of that period, held to be within limitation - R.K. Upadhyaya v. Shanabhai P. Patel, (1987) 3 SCC 96**
- **There is no requirement that the reasons recorded should also accompany the notice issued under S. 148 or that it should be served on the assessee before the period of limitation- A.G. Holdings Pvt. Ltd. v. Income Tax Officer, (2013) 352 ITR 364**

# Order disposing objections must be passed before passing the re-assessment order

- The Supreme Court in the case of **GKN Driveshafts (India) Ltd. v. ITO, (2003) 259 ITR 19 (SC)** has held that the Assessing Officer is bound to furnish reasons for issuance of notice u/s 148 within a reasonable time. The noticee is entitled to file objections to issuance of notice u/s 148, which shall be disposed by way of a speaking order.
- Ordinarily a writ petition is not entertained if the assessee has not filed objections against a notice for reassessment since an alternative efficacious remedy is available.

# Scope of Judicial Review against reopening under S 147

- The High Court would not substitute its own "reasons to believe" in place of "reasons to believe" recorded by the Assessing Officer.
- The recording of "reasons to believe" by the Assessing Officer is required to be only tentative and *prima facie* and it is not only not necessary but it is desirable that the Assessing Officer does not record any conclusive opinion.
- The High Court, in exercise of its writ jurisdiction would not go into either "sufficiency of reasons" or "correctness of reasons" or "adequacy of reasons". So long as there are reasons recorded based upon tangible material, the High Court would not interdict the proceedings at the stage of section 147.
- Nevertheless the Courts insist that the reasons should display application of mind by the AO and the tangible material must have a live link with the escapement of income.
- If on examination of "reasons to believe" as recorded by the Assessing Officer, the High Court finds that a second view is also possible, the High Court would refrain from interfering at the stage of issuance of notice under Section 147 merely because a second view – other than the view recorded by the AO – is possible.

# Scope of Judicial Review against reopening under S 147

- The expression “reason to believe” cannot be read to mean that the assessing officer should have finally ascertained the fact by legal evidence or conclusion. [*CIT v. Rajesh Jhaveri Stock Brokers (P) Ltd.*, (2008) 14 SCC 208 at page 217]
- In other words, at the initiation stage, what is required is “reason to believe”, but not the established fact of escapement of income. (*Rajesh Jhaveri (supra) at Page 217*)
- Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the assessing officer is within the realm of subjective satisfaction. [see *ITO v. Selected Dalurband Coal Co. (P) Ltd.* [(1997) 10 SCC 68 : (1997) 217 ITR 597]; *Raymond Woollen Mills Ltd. v. ITO* [(2008) 14 SCC 218 : (1999) 236 ITR 34].
- Even “*the sufficiency or correctness of the material is not a thing to be considered at this stage.*” See *Raymond Woollen Mills Ltd. Vs. Income Tax Officer and Ors*, [1999] 236 ITR 34 (SC), (2008) 14 SCC 218.
- Hon’ble High Court of Delhi in *Acorus Unitech Wireless Pvt. Ltd. v. ACIT* (2014) 362 ITR 417 has held as under: “*it is important to restate an accepted, but often neglected principle, that in its writ jurisdiction, the scope of proceedings before the Court while considering a notice under Section 147/148 is limited. The Court cannot enter into the merits of the subjective satisfaction of the AO, or judge the sufficiency of the reasons recorded, but rather, determine whether such opinion is based on tangible, concrete and new information that is capable of supporting such a conclusion*”.