

## **Legal status of notices issued under Section 148 for assessment/re-assessment for Assessment year 2013-14 and subsequent years after the prescribed time elapsed**

### **Background:**

The Finance Act 2021 has substituted by introducing new provisions with respect to re-opening of assessment under the Income Tax Act, 1961 contained in **section 147, 148, 149 & 151** of the Income Tax Act, 1961. The new provisions are effective from 1-4-2021, hence old provisions are existed till 31-03-2021. Besides, a new **Section 148A** which prescribes the procedure to be followed has also been incorporated by the Finance Act 2021.

As per the old provisions, notice under section 148 for the assessment year 2013-14 and 2014-15 could have been issued on or before 31-03-2020 and 31-03-2021 respectively. Because, the old provisions were existed till 31-03-2021 and accordingly assessment could be reopened under section 148 within six years from the end of the relevant assessment year, where income escaping assessment being more than Rs. One Lac and not beyond.

From 01-04-2021, new provisions became operational under which assessments up to 10 years, where income escaping assessment being more than 50 lakhs, could be re-opened. Under the new provisions, all notices under section 148 were to be issued after following the procedure laid down therein.

Further due to Covid pandemic, notices could not be issued under the old provisions to re-open assessment/re-assessment for the assessment year 2013-14, 2014-15 and subsequent years till 31-03-2020.

Therefore, The Government passed **Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (TOLA)** whereby the date of limitation for completion of any proceeding or issue of notice falling between **20-3-2020 to 31-3-2021** was extended to **30-6-2021**.

There are numbers of notices issued under section 148 between from 01-04-2021 to 30-06-2021 for assessment year 2013-14 and subsequent years under the old provisions. These notices were issued without adopting the procedure laid down under the new section inserted 148A of the Act.

Since the new provisions related to reopening of assessment has already been introduced and came in to operation on 01-04-2021, therefore the notices issued under section 148 on or after 01-04-2021 should had followed the procedure laid down under the new provisions and not under old provision which no longer existed after 31-3-2021.

### **Judicial pronouncements:**

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These notices issued under section 148 have been challenged by the many assessee in writ petitions before High Courts. All High Courts except Chattisgarh High Court, quashed the notices as unlawful on the ground that by substituting the provisions of the Act by means of the Finance Act, 2021 with effect from 1-4-2021, the old provisions were omitted from the statute book and replaced by fresh provisions with effect from 1-4-2021. In absence of any saving clause in either the Ordinance or the Enabling Act (TOLA) or the Finance Act 2021, there existed no presumption in favour of the old provision continuing to operate for any purpose, beyond 31-3-2021. Accordingly, any notice under old section 148 issued after 31-3-2021 was unlawful and void.

The Calcutta High Court in the case of **Bagaria Properties and Investment (P.) Ltd. v. Union of India, W.P.O. NOS. 244, 253 TO 256 OF 2021 & OTHS JANUARY 17, 2022** also declared the Explanation A(a) to the Notification No. 20 [S.O. 1432 (E) dated 31st March, 2021 issued under section 3(1) of the TOLA as ultra vires to the parent legislation. The said explanation which provided for issue of notice under the old provision of 148 beyond 31-3-2021, is reproduced below for reference.

**Explanation—** For the removal of doubts, it is hereby clarified that for the purposes of issuance of notice under section 148 as per time-limit specified in section 149 or sanction under section 151 of the Income-tax Act, under this sub-clause, the provisions of section 148, section 149 and section 151 of the Income-tax Act, as the case may be, as they stood as on the 31st day of March 2021, before the commencement of the Finance Act, 2021, shall apply.

The High Court decisions were challenged by the Government by SLPs before the Supreme Court of India. The Supreme Court of India decided all cases pending in courts or where this issue was involved, by a combined order using special powers under article 142 of the constitution of India.

In this order in the case of **Union of India vs Ashish Agarwal (2022 SCC Online SC 543), dated 04.05.2022** the hon'ble Supreme Court of India has decided as under:

We propose to modify the judgments and orders passed by the respective High Courts as under:

- i. The respective impugned section 148 notices issued to the respective assessee shall be deemed to have been issued under section 148A of the IT Act as substituted by the Finance Act, 2021 and treated to be show cause notices in terms of section 148A(b). The respective assessing officers shall **within thirty days from today** provide to the assessee the information and material relied upon by the Revenue so that the assessee can reply to the notices within two weeks thereafter;
- ii. The requirement of conducting any enquiry with the prior approval of the specified authority under section 148A(a) be dispensed with as a onetime measure vis-à-vis those notices which have been issued under Section 148 of the

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- unamended Act from 01.04.2021 till date, including those which have been quashed by the High Courts;
- iii. The assessing officers shall thereafter pass an order in terms of section 148A(d) after following the due procedure as required under section 148A(b) in respect of each of the concerned assessees;
  - iv. All the defences which may be available to the assessee under section 149 and/or which may be available under the Finance Act, 2021 and in law and whatever rights are available to the Assessing Officer under the Finance Act, 2021 are kept open and/or shall continue to be available and;
  - v. The present order shall substitute/modify respective judgments and orders passed by the respective High Courts quashing the similar notices issued under unamended section 148 of the IT Act irrespective of whether they have been assailed before this Court or not.

With the above judgement of Hon'ble Supreme Court of India, all the notices quashed by High Courts have been revived by converting the notices issued under old provision/section 148 to notice under section 148A of the new provisions **with a direction to continue the proceedings after following the procedure laid down under the new provisions.**

### **CBDT Instructions No.-1/2022 dated 11.05.2022**

Thereafter, CBDT has issued **Instruction No. 01/2022, dated 11.5.2022**, containing guidelines for implementation of the above mentioned Supreme Court judgment. The CBDT instruction gave under mentioned guideline.

### **AY 2013-14, AY 2014-15 and AY 2015-16:**

Fresh Notice u/s 148 can be issued in these cases, with the approval of the specified authority, only if the assessing officer has in his possession books of accounts or other documents or evidence which reveal that the income chargeable to tax, represented in the form of an asset, which has escaped assessment, amounts to or is likely to amount to fifty lakh rupees or more, for that year.

### **AY 2016-17, AY 2017-18:**

Fresh Notice u/s 148 can be issued in these cases, with the approval of the specified authority, since they are within a period of three years from the end of the relevant assessment years.

The Calcutta High Court in the case of **Bagaria Properties and Investment (P.) Ltd. v. Union of India**, W.P.O. NOS. 244, 253 TO 256 OF 2021 & OTHS **January 17, 2022** has only declared the **Explanation A(a) of the Notification No. 20 [S.O. 1432 (E) dated 31st March, 2021 issued under sec 3(1) of the TOLA as ultra vires to the parent legislation.**

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### Author's view

A analysis of the Supreme Court judgement, Calcutta High Court judgement, the new provisions of reopening read with the provisions of TOLA that:

- a) TOLA still subsists and has not been struck down.
- b) The parent Act, TOLA is still valid and is very much in operation. **It is applicable to the provisions of old section 148 till 30-3-2021 & from 1-4-2021 it is applicable to the new provisions.**
- c) After 31-3-2021, the old provisions ceased to exist and all notices issued on or after 1-4-2021 ought to be under the new provision.
- d) As per the new provision, the AO can go back as far as ten years if income escaping assessment is more than 50 lakhs.
- e) Thus, for cases having income escaping assessment of 50 lakhs or more, AY 2013-14 & 2014-15 are well within the range of reopening.
- f) From the above it is clear that if AY 2013-14 & 2014-15 could not be reopened under the old 149 (1) (b) on 31-3-2021; it can't be opened even now under the new provision.
- g) As per old 149(1)(b) the time limit prescribed was 6 years and therefore, AY 2013-14 could be reopened only up to 31-3-2020 and AY 2014-15 up to 31-3-2021. Therefore, prima facie it appears that in terms of restriction placed by the first proviso to section 149(1) these two AYs can't be reopened now (between 1-4-2021 to 30-6-2021).

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