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Direct Tax Alert

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Bombay High Court quashes reassessment proceedings for AY 2015-16 on various grounds

Recently, the Bombay High Court has pronounced a landmark decision[1] dealing with the new re-assessment regime. The High Court has clarified on multiple aspects such as re-assessment on the basis of change of opinion, limitation of period, issuance of notice by Jurisdictional Assessing Officer ('JAO'), etc.

Background

- The re-assessment provisions were replaced with a new regime being introduced with effect from April 1, 2021. The new regime was introduced to make it simpler and less cumbersome for tax-payers.
- A host of issues have cropped up in terms of interpreting the provisions of the new reassessment regime including the time impact due to covid disruption.
- The Bombay High Court has in this landmark decision addressed a host of important issues like:
  - Time-barring under new regime for AY 2015-16.
  - Whether new reassessment needs to be under faceless scheme
  - Circumstances for reassessment beyond 3 years
  - Whether change of opinion theory still applies to reassessment
  - Whether a deduction consistently allowed can be subject to reassessment
  - Whether DIN is mandatory under new regime.

[1] *Hexaware Technologies Ltd.* v. *ACIT* (Writ Petition No.1778 of 2023) [2024] 162 taxmann.com 225 (Bom.) – This decision deals with various issues. However, only key issues have been summarized in this alert.

Facts of the case

- The taxpayer, a company engaged in the business of information technology, claimed deductions under section 80JJAA and 10AA of the Income-tax Act, 1961 ('the Act'), in its return for AY 2015-16.
- The case was selected for scrutiny where the Assessing Officer ('AO') inquired about various deductions. After taking into consideration the submissions furnished by the taxpayer, the AO passed an order accepting the return of income filed by the taxpayer.
- The taxpayer was served a re-assessment notice under section 148 on April 8, 2021. The taxpayer filed a writ petition challenging the validity of notice on the ground that it was issued based on old re-assessment provisions applicable up to March 31, 2021. The Bombay High Court allowed the petition.
- The department took the matter to the Supreme Court. The Supreme Court by virtue of a common order, in the case of *Union of India* v. *Ashish Agarwal*[2], allowed the revenue to continue the re-assessment proceedings treating such notices as notice issued under section 148A(b). The Supreme Court also clarified that all the defences available under the provisions of the Act would be available to the taxpayer.
- After taking into consideration the reply of the taxpayer, the AO passed order under section 148A(d) and issued notice under section 148 on August 27, 2022, for initiation of re-assessment proceedings on the ground of ineligible claim of deduction under section 80JJAA. The said notice was not bearing Document Identification Number ('DIN').
- The taxpayer filed a writ before the Bombay High Court challenging validity of the notice issued under section 148 and re-assessment proceedings.

Issue 1 – When would the notice issued under section 148 be time-barred with respect to grand fathering provisions for years covered by old regime

Petitioner's contentions

- As per the first proviso to section 149(1), if time limit to issue notice under section 148 has expired under the unamended provisions, no re-assessment notice can be issued even under the amended provisions.
- Since the time limit for issue of the notice for AY 2015-16 under erstwhile provisions had expired on March 31, 2022, the notice issued on August 27, 2022, is time-barred and bad in law.

Revenue's contentions

- The original notice under section 148 was issued on April 8, 2021, i.e. within the limitation period of six years. Hence, the re-assessment proceeding is not time-barred.
- The expression 'at that time' used in the first proviso to section 149(1) would mean April 1, 2021, and not the date of the notice under section 148. Hence, if the time limit for issuance of notice as on April 1, 2021, has expired, then the notice cannot be issued within the revised time limit under the amended provisions. In effect, the first proviso to section 149(1) applies only to the assessment years 2013-14 and 2014-15, and not to assessment years 2015-16 and onwards.
- Reliance was placed on the CBDT instruction no.1 of 2022[3] to hold that the notices issued after April 1, 2021, up to

[2] [2022] 138 taxmann.com 64 (SC)

[3] Dated May 11, 2022

June 30, 2021, were valid and hence, the tax department can proceed with the re-assessment proceedings. The Revenue also relied upon the Delhi High Court decision in the case of Touchstone Holdings Pvt. Ltd[4]., wherein validity of the CBDT instruction was upheld.

High Court Ruling

- The High Court upheld the contentions of the taxpayer. A plain reading of the first proviso to section 149(1) suggests that if on the date of issue of notice under section 148, the time limit to issue notice as per the unamended provisions had expired, then notice cannot be issued under the new provisions as well.
- The expression 'at that time' in the first proviso refers to the date on which notice under section 148 is actually issued. On the said date, if a notice could not have been issued under the erstwhile provision of section 149(1)(b) of the Act (due to the grand fathering provisions), for any assessment year beginning on or before April 1, 2021, the notice cannot be issued even under the new provisions.
- The purpose of the first proviso to section 149(1) is consistent with the stated object of the government to make prospective amendments in the Act.
- The revenue's contention that the first proviso to section 149(1) will be applicable only for AYs 2013-2014 and 2014-2015 is not sustainable.
- Once the notice dated April 8, 2021, has been treated as notice issued under section 148A(b), the said notice cannot be considered as notice under section 148 and is no longer relevant for the purpose of determining the period of limitation.
- Accordingly, the period of limitation as prescribed in the erstwhile provisions of section 149(1)(b) would be applicable up to assessment Year 2021-2022 (period before the amendment), and only from assessment year 2022-2023, the period of ten years as provided in Section 149(1)(b), would be applicable.

Dhruva Comments

- This is a welcome ruling of the High Court clarifying that the extended period of limitation i.e. 10 years would apply for AY 2022-23 onwards. This is in line with government's commitment to avoid retrospective amendments.

Issue 2 - Whether the notice issued under section 148 can be struck down if it is issued by JAO instead of Faceless Assessing Officer ('FAO')

Revenue's contentions

- JAO and FAO both have concurrent jurisdiction for the issuance of re-assessment notice.
- Relying upon certain guidelines and documents[5], it was argued that the JAO is required to issue the re-assessment notice and not the FAO as the format required the designation and physical signing of the AO along with office address.
- No prejudice is caused to the petitioner when the notice is issued by the JAO as the reassessment will be done by FAO.

High Court ruling

- Based on the Faceless Assessment Scheme introduced by the CBDT[6], FAO is required to issue the notice under section 148 and not the JAO.

[4] [2022] 142 taxmann.com 336 (Del)
[5] Central Board of Direct Taxes ('CBDT') guidelines dated August 1, 2022, and Income Tax Business Application ('ITBA') step-by-step document no. 2 and Office memorandum dated February 20, 2023
[6] in exercise of its powers under section 151A of the Act

- The internal guideline relied upon by the revenue cannot supersede the scheme which has been laid before the Parliament.
- The said guidelines are also not binding on the AO as they are contrary to the provisions of the Act and the scheme framed under section 151A.
- The argument of JAO and FAO having concurrent jurisdiction was rejected. If the argument of revenue is to be accepted, then even when notices are issued by the FAO, it would be open to a taxpayer to make submission before the JAO and vice versa, which is clearly not contemplated in the Act.
- The scheme framed by the CBDT covers both the aspects i.e. (i) assessment, reassessment or recomputation under section 147 (ii) issuance of notice under section 148.
- When the authority proposes to take action against a taxpayer without following the due process of law, the said action itself results in a prejudice to the taxpayer.
- The High Court followed the Telangana High Court decision in the case of *Kankanala Ravindra Reddy*[7] where the notices issued by the JAOs were held to be invalid and bad in law based on similar grounds.

Dhruva Comments

- In practise, it has been observed that the JAO passes the order under section 148A(d) and issues the notice under section 148, whereas the subsequent proceedings are undertaken by the FAO. In all such matters, this decision is likely to have impact on the validity of the proceedings. The matter is likely to reach up to the Supreme Court considering huge number of cases involved.

Issue 3 - Whether the proposed disallowance of deduction under section 80JJAA is an escapement of income as per section 149(1)(b)

Petitioner's contentions

- The extended time limit of 10 years applies if the income chargeable to tax as represented in the form of an asset, or expenditure in respect of transaction or in relation to an event or occasion or entry in the books of accounts, exceeds fifty lakh rupees.
- Proposed disallowance under section 80JJA cannot be regarded as 'asset' or 'expenditure in respect of a transaction or in relation to an event or occasion' or 'entry in the books'. Hence, the extended time limit of 10 years cannot be invoked in the instant case.

High Court ruling

- The High Court upheld the contentions of the taxpayer and held that the proposed addition under section 80JJAA does not fit into requirement of section 149(1)(b). Accordingly, the notice was held invalid.

Dhruva Comments

- The extended time limit of 10 years is introduced to target serious tax evasions. Tax liability arising pursuant to possibility of two interpretations should not be exposed to extended time limit for re-assessment proceedings. In such cases, the taxpayer can rely upon the observations of the High Court to avoid hardships of re-assessment proceedings.

[7] [2023] 156 taxmann.com 178 (Telangana)

Issue 4 - Whether re-assessment proceedings can be initiated based on change of opinion

High Court ruling

- The claim of deduction under Section 80JJAA was disclosed in the Tax audit report of the taxpayer. After considering all submissions, the deduction was allowed in the original assessment order. Hence, it is an attempt to reassess income based on change of opinion.
- The AO cannot be allowed to review orders under the garb of re-assessment proceedings.

Dhruva Comments

- The High Court has reaffirmed that the in-built test of 'change of opinion' is equally valid under the new reassessment regime. The observations are in line with its earlier decision in the case of *Siemens Financial Services (P.) Ltd.* v. *DCIT*[8].

Issue 5 - When deduction under section 80JJAA has been consistently allowed by the AO/ Appellate Authorities in the earlier years, can the AO have a belief that there is an escapement of income

High Court ruling

- Since deduction under section 80JJAA has been allowed to the taxpayer consistently since AY 2013–14, the AO cannot allege that income chargeable to tax has escaped assessment in AY 2015-16.

Issue 6 - Whether the provisions of Taxation and Other Laws (Relaxation and Amendment of certain provisions) Act, 2020 ('TOLA') are applicable to AYs 2015-16 and onwards

High Court ruling

- TOLA provisions are applicable only to the AYs for which the time limit for issue of notice under section 148 was expiring on or before March 31, 2021. Since the time limit for issuing notice for AY 2015-16 was expiring on March 31, 2022, the provisions of TOLA are not applicable to AY 2015-16. The decisions in the case Siemens Financial Services (P.) Ltd (supra) and *Tata Communications Transformation Services Ltd* v. *ACIT*[9] have been relied upon.
- The High Court referred to its earlier decision in the case of *New India Assurance* v. *ACIT*[10] and held that the 'travel back' theory as propounded by CBDT instruction is erroneous.

Issue 7 - Whether the notice issued without mentioning DIN is valid. Whether separate intimation letter issued subsequently can rectify the mistake

High Court ruling

- As per the CBDT circular no. 19 of 2019, every communication from the department has to mention DIN. If DIN is not mentioned in the communication, the department has to follow prescribed procedure to cure the mistake.
- A separate intimation letter mentioning the DIN cannot validate the notice as the procedure prescribed in circular was not complied with.

Dhruva Comments

- Various High Courts have held that the notices issued without DIN are invalid[11].

[8] [2023] 154 taxmann.com 159 (Bombay)
[9] [2021] 128 taxmann.com 247 (Bom)
[10] [2024] 158 taxmann.com 367 (Bom)
[11] CIT (International Taxation) v. Brandix Mauritius Holdings Ltd. [2023] 456 ITR 34 (De), PCIT (E) v. Tata Medical Centre Trust [2023] 459 ITR 155 (Cal), Kamlesh Kumar Jha v. PCIT [2024] 296 Taxman 511 (Del), Ashok Commercial Enterprises v. ACIT [2023] 459 ITR 100 (Bom)

While the Supreme Court has stayed implementation of Delhi High Court order[12], it would be interesting to see whether the Supreme Court will uphold the notices on the ground of mere technical glitch, or it will consider it as substantive violation of law to quash the notices.

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[12] CIT (International Taxation) v. Brandix Mauritius Holdings Ltd. (supra)

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