



# #19

12/21



SBS

## UPDATES COVERED:

Re-Opening of Assessment  
- Challenge before Delhi High Court

**FEMA**

**INCOME  
TAX**



**SBS AND COMPANY LLP**  
CHARTERED ACCOUNTANTS

# As the legislature has permitted re-assessment to be made only in accordance with the substituted provisions, it can only be done in this manner, or not at all - Delhi High Court.

## Background:

During the outbreak of COVID-19 pandemic, in order to provide sufficient time to comply with various provisions under the Income Tax Act, 1961 ('ITA') and other laws, Central Government ('CG') has enacted Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 ('TOLA, 20')

Section 3 of TOLA, 20 states that where the time for completion of proceedings, issue of notice, letter, intimation.....etc. falls between 20.03.2020 to 31.12.2020, such date is extended to 31.03.2021.

Further, section 3 of TOLA, 20 has delegated power to CG to specify any other date for extending the time limit specified above.

Subsequently, though the Finance Act, 2021 ('FA 21'), the concept of reassessment proceedings under Section 147 has been reformed by substituting the new provisions for the existing provisions. Substituted Section 149 of ITA states that assessment cannot be reopened after the expiry of 3 years from the end of relevant Assessment Year ('AY') and these provisions are made effective from 01.04.2021.

On the other hand, by utilising the powers conferred under section 3 of TOLA, CG has issued a Notification which states that where the time limit for issue of notice under Section 149 expires on 31.03.2021, such date is extended to 30.04.2021 (the date further extended to 30.06.2021). Further, the said notification contains an Explanation which states that.

"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 said Notification tends to extend the time limit for issue notice under erstwhile Section 148 for reopening the assessment post 31.03.2021.

## Issue Involved:

The issue involved is 'as the old provisions for reassessment has been substituted by Finance Act, 2021 and such old provisions are not applicable on or after 01.04.2021, whether the central government with the delegated power is empowered to issue such Notification extending the time limit for issue of notice even on or after 01.04.2021 under the old provisions?'

In this regard, many assesseees have filed instant writ petitions before various High Courts.

The Hon'ble Chhattisgarh High Court has upheld the issue of notice under Section 148 whereas Allahabad High Court and Rajasthan High Court have quashed the reassessment notice under Section 148.

The Hon'ble Delhi High Court has given its judgment in the batch of over 1300 writ petitions.

### Contention of the Assessee(s):

- As the provisions of reassessment has been substituted by the FA, 21, same would be result in repeal of earlier provisions and, therefore, the earlier provisions could not be relied upon.
- Under the new provisions of reassessment, notice under Section 148 can be issued within 3 years from the end of relevant AY unless the case is covered under exceptional case where the time period is 10 years. Under the new provisions, only reassessment from the AY 2018-19 onwards could be reopened on or after 01.04.2021 and prior periods were barred.
- Once the Parliament had exercised its power of legislation then any action, such an issue of Notification dated 31.03.2021 contrary to the said legislation, taken by the any other agency or wing of government was bad in law as the same fell foul of the doctrine of 'Occupied Field'.
- Notification dated 31.03.2021 were 'ultra vires' the ITA as amended by FA 21 and in excess of the enabling powers conferred under section 3 of TOLA, 20.
- The impugned Explanation in the said Notification has attempted to revive and keep in existence two schemes governing the initiation of reassessment proceedings, which were substantially different from each other and thus could not co-exist at the same time.
- Notice issued after the 31.03.21 has been issued in violation of the mandatory procedure prescribed under Section 148A of the ITA as amended by FA 21.
- Alternatively, Sections 147 to 151 are procedural in nature, inasmuch as, they primarily amended limitation period and therefore applied retrospectively. Hence, for issue of notice in respect of past assessment years, procedure under amended provisions are to be followed.

- The decision of Chhattisgarh High Court cannot be considered as the High Court has stated that impugned Notification issue under TOLA, 20 has deferred the operation of newly incorporated Section 148A of the ITA which not the intention of the FA, 21.
- The Allahabad High Court has allowed the submission of the assessee for issue of notice post 31.03.2021 and quashed the notice issued under section 148.
- Further, section 3 of TOLA and Notifications issued thereunder only extended the time limits for issue of notice however, they did not affect the mandatory provisions which are applicable for completion of reassessment.

### Contention of the Revenue:

- Arguments advanced by the assessee were in complete ignorance of the background of one-in-hundred years emergency called Global Covid-19 pandemic with severe intensity by second wave at the time when the impugned notice was issued.
- Even Supreme Court has issued orders for extension of limitation (for filing appeal) and CG has enacted TOLA, 20 to extend dates for compliance and issue of notice. The management of COVID-19 is akin to war time emergency and construed more liberally.
- Section 3 of TOLA, 20 is not a delegated legislation and it is a conditional legislation. And such conditional legislation shall be treated in par with plenary legislation.
- Section 3 of TOLA creates a legal fiction by virtue of which CG is empowered with revenue was entitled to invoke section 148 of ITA, as it existed before 31.03.2021, after 01.04.2021.

- The two expressions vital for the purpose of understanding the legal fiction at play were 'such action' and 'extended'.
- 'Such action' which was due for completion or compliance between 20.03.2020 and 30.03.2021 as the CG may specify which in the present case is 31.03.2021 stood 'extended' to a date beyond 31.03.2021.
- CG is empowered to fix two terminal dates under section 3 of TOLA, 20 – the last date by which compliance is required to be made which could not be made and extended date by which such compliance could be made.
- The jural co-relative of power is liability. Where there is a power, it follows that there is a liability on the person against to whom the power exists.
- There was no conflict between TOLA, 20 and FA, 21 due to their text, context, scheme and object.
- Principles of harmonious construction and ut res magis valeat quam pereat can lead to inexorable conclusion that if there was some conflict, alleged or real, between two provisions of law.
- Alternatively, if there was a conflict between two legislations, provisions of TOLA, 20 would override the FA, 21 not just because of special provisions but also the provisions of Section 3 of TOLA, 20 contains non-obstante clause.
- Amended provisions of Section 147 to 151 are not just procedural in nature. Right to assess under Section 147 is substantive right and others are machinery provisions. As FA, 21 has amended entire scheme of reassessment making both substantive and procedural amendments and therefore cannot be applied retrospectively.

- If assessee's arguments are accepted, it would lead to unreasonable classification between two assesses who could not be issued notice only because of pandemic.
- Alternatively, Section 3 of TOLA, 20 is 'stop the clock' provision somewhat similar to the U.S. doctrine known as 'Tolling' which allows for the pausing or delaying of the running of the time set forth by the statute.
- Finally, even under General Clauses Act, revenue is empowered to issue notice under section erstwhile Section 148.
- The decision of Allahabad High Court cannot be considered as High Court has held that section 3 of TOLA was meant to protect the pending proceedings or they have time barred between 20.03.20 and 30.06.21.

#### High Court Ruling:

##### ● Amendments by FA, 21:

By virtue of Section 1 (2) (a) of the FA 21, the substituted provisions of Section 147-151 of ITA pertaining to reopening of the assessment came into effect from 01.04.21. There is no power with the executive to defer the implementation of the substituted provisions of reassessment. It is settled law that the law prevailing on the date of issue of notice under Section 148 has to be applied.

If the intention of the legislature to keep the erstwhile provisions alive, it would have introduced the new provisions with effective from 01.07.2021 which has not been done.

Notices issued under Section 148 on or after 01.04.2021 have to comply with provisions as specifically substituted by the FA 21. The Legislature has permitted re-assessment to be made in this manner only, it can be done in this manner, or not at all.



### ● TOLA, 20:

Section 3 of TOLA is just to extend the time limits and it does not give any power to the CG to postpone the applicability of any provision which has been made effective from a particular date.

Impugned Explanation in the Notification is beyond the powers delegated to the CG as the TOLA, 20 does not give power to extend the erstwhile provisions and defer the newly substituted provisions. Hence, provisions of Section 148A are to be complied with before the issue of notice under Section 148 on or after 01.04.2021.

Impugned Explanation in the Notification is ultra vires the parent law i.e., TOLA 20 and it is in conflict with the provisions of ITA which had specifically made the new reassessment provisions applicable from 01.04.2021.

The distinction between conditional and delegated legislation is irrelevant to the controversy in hand, as the person to whom the power is entrusted in either situation can do nothing beyond the limits which circumscribe the power.

### ● Power of Re-assessment:

It is not disputed that jural correlative of power is liability. However, with the commencement of substituted provisions from 01.04.2021, there has been no curtailing the power of revenue.

FA 21, merely changed the procedure for issue of notice under Section 148. Consequently, the power of reassessment that existed before 31.03.2021 continue to exist even after 01.04.2021.

### ● Retrospective Applicability:

It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly made to have retrospective operation. 'nova constitutio futuris formam imponere debet non praeteritis', i.e., 'a new law ought to regulate what is to follow, not the past'.

However, statutes dealing with merely matters of procedure are presumed to be retrospective unless such a construction is textually inadmissible.

Relied on the A.G. v. Vernazza, (1960) 3 All ER 97 where in it has held that if the new Act affects matters of procedure only, then, prima facie, 'it applies to all actions pending as well as future'.

Procedural laws have retrospective applicability because a procedural change is expected to improve matters for everyone concerned (or at least to improve matters for some, without inflicting detriment on anyone else who uses ordinary care, vigilance and promptness).

In order to determine whether the amendment is a procedural or a substantive law one will have to examine the intent, purpose and scope of such amendment.

The Finance Minister ('FM') in her budget speech clearly stated that the object behind the amendment to the ITA was 'to simplify the tax administration, ease compliance, and reduce litigation'. Based on the substituted provisions as well as the speech of FM and memorandum, it is apparent that the intention of the legislature is to reduce the time limit in ordinary cases and increase threshold amount for income escaping assessment to INR 50 lakhs.

The FA 21 has introduced new provisions regarding the procedure to be complied with in respect of the re-opening of an income tax assessment hence, these provisions are applicable to past assessment years.

Further, CBDT Circular 549 of 1989 explaining amended provisions of Section 147-151 in 1989 states that said provisions are procedural in nature and would have retrospective applicability.

- **Operations of two provisions:**

If the argument of the Revenue that the explanation in Notification No. 20 dated 31st March, 2021 extended the applicability of old procedure of reassessment beyond 31st March, 2021 is accepted, the same shall lead to manifest arbitrariness and conflict.

- **COVID-19 Pandemic:**

When the FM moved the bill in the parliament and same has been enacted, COVID-19 was widely prevalent, and parliament was fully aware of such situation. Hence, reliance on COVID-19 for contending that new provisions are effective from 01.07.2021 cannot be accepted.

- **Non-Obstante Clause:**

Non obstante clause has to be interpreted strictly and cannot be interpreted to in way which defeats or extends the object and purpose of the enactment.

Section 3 of TOLA contains non obstante clause as specified act provided time limits for completion of such action. Hence, in order to override such time limits, section 3 has been provided with non obstante clause. Such non obstante clause cannot be applied to contend that provisions of TOLA overrides the provisions of ITA/FA 21.

- **Stop the Clock Provisions:**

Section 3 of TOLA is not stop the clock provision as it extends only time limit. The essential ingredient of the stop the clock provision is that time during such clock is stopped, such period has to be excluded which is not in the present case.

- **General Provisions vs Special Provisions:**

It is equally well-settled law that a special Act overrides a general Act. But this principle has no application whatsoever in the present case because TOLA and the FA operate in their distinct and separate spheres. Consequently, the question whether one prevails over and supersedes the other does not arise at all.

- **Unreasonable Classification:**

The argument of the revenue is that it would lead to unreasonable classification as notice could not be issued to those assessee. This argument cannot be accepted as any amendment in the procedural law will create inequality since procedural law will be applicable for all pending assessments as on that date.

- **General Clauses Act:**

The submission of the Revenue that Section 6 of the General Clauses Act saves notices issued under Section 148 of ITA is untenable in law, as in the present case, the repeal is followed by a fresh legislation on the same subject and the new Act manifests an intention to destroy the old procedure.

- **Our Comments:**

The decision given by the Hon'ble Delhi High Court provides big relief to the many assessee(s) who have received notice after 01.04.21 under section 148 under erstwhile provisions.

Unlike other High Courts which have dealt with the issue of notice under section 148, Delhi High Court has given enormous analysis to come up with such decision.

The Delhi High Court has dealt with many interpretational issues which may provide guidance on understanding various provisions /amendments viz. retrospective applicability, general vs special provisions, non obstante clause, General Clauses Act and many other. Further, the detailed analysis by the Delhi High Court would stand scrutiny before the Honourable Supreme Court and in all probabilities this judgment may be upheld in the later forum.