I. REVAMPED REASSESSMENT PROCEDURE: AN EXAMINATION OF THE EXTENT OF CHANGE AND AREAS OF CONCERN

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ABSTRACT

The Finance Act, 2021 claims to have introduced a completely new regime for reassessments. A first look at the amended provisions makes it evident that in addition to the changes introduced in the limitation for issuance of notice and the reassessment procedure, changes have also been made in the language of the jurisdictional pre-conditions. The Memorandum indicated that the objective of the Bill is to result in less litigation and would provide ease of doing business to taxpayers as there is a reduction in time limit by which a notice for assessment or reassessment or re-computation can be issued. The legal framework governing reassessment has always been a highly litigated area of the tax laws. It has been frequently amended in the past, including changes in its jurisdictional pre-conditions. However, despite several amendments, Courts have time and again reaffirmed certain basic principles surrounding the concept of reassessment which are integral to it and any attempt to interpret the legal provision otherwise will amount to misuse of the power to reasseess. This article is an attempt to understand the scope of the new regime, examine how should the assessees expect the department to proceed under the amended provisions and figure out the trigger points that an assessee should keep in mind to immediately litigate and protect themselves against any illegal reassessment proceeding under the new regime.

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I. INTRODUCTION

The Finance Act, 2021 has introduced a new regime for law relating to reopening of assessments under the Income Tax Act, 1961 (**"Act"**). The Explanatory Memorandum to the Finance Bill 2021 (**"Memorandum"**) indicated that the Bill proposes a completely new procedure of assessment, reassessment or re-computation of income escaping assessment. The Memorandum indicated that the objective of the Bill is to result in less litigation and would provide ease of doing business to taxpayers as there is a reduction in time limit by which a notice for assessment or reassessment or re-computation can be issued. The Budget Speech also highlighted that "it is proposed to completely remove discretion in re-opening and henceforth re-

opening shall be made only in cases flagged by system on the basis of data analytics, objection of C&AG and in search/survey cases."[1]

The legal framework governing reassessment has always been a highly litigated area of the tax laws. It has been frequently amended in the past, including changes in its jurisdictional pre-conditions. However, despite several amendments, Courts have time and again reaffirmed certain basic principles surrounding the concept of reassessment which are integral to it and any attempt to interpret the legal provision otherwise would amount to misuse of the power to reassess.

The Finance Act, 2021 claims to have introduced a completely new regime for reassessments. A first look at the amended provisions makes it evident that in addition to the changes introduced in the limitation for issuance of notice and the reassessment procedure, changes have also been made in the language of the jurisdictional pre-conditions. This article is an attempt to understand the scope of the new regime, examine how should the assessees expect the department to proceed under the amended provisions and figure out the trigger points that an assessee should keep in mind to immediately litigate and protect themselves against any illegal reassessment proceeding under the new regime.

[1] Nirmala Sitharaman, Minister of Finance, Address at the Budget Announcement (Feb. 1, 2021), *in* Speech of Nirmala Sitharaman, Budget 2021-2022, Annex B at 28-33.

II. JURISDICTIONAL PRE-CONDITIONS FOR REASSESSMENT

A. Reassessment Regime prior to the Finance Act, 2021

To examine the changes introduced in the jurisdictional pre-conditions by the new regime, it is important to broadly understand the earlier regime of reassessment. As per Section 147 of the Act, as it existed prior to the amendments introduced by the Finance Act, 2021, the jurisdictional pre-condition for reassessment was that the Assessing Officer (**"AO"**) shall have a reason to believe that income chargeable to tax has escaped assessment. The key phrase here is 'reason to believe'. Prior to the substitution of Section 147 of the Act by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1-4-1989, the jurisdictional pre-condition for reassessment was that in consequence of information in his possession, the AO shall have reason to believe that income chargeable to tax has escaped assessment.[2] The key phrases here are 'information in his possession' and 'reason to believe'.

These phrases underwent judicial scrutiny from time to time and broadly, the settled law as on date is as follows:

'Information':

i. Information is an indispensable ingredient which must exist before the section can be availed of;[3]
ii. Information shall mean not only facts or factual material but also includes information as to the true and correct state of the law;[4]

[2] Income Tax Act, 1961, § 147 *(Prior to Direct Tax Laws (Amendment) Act, 1987),* No. 43, Acts of Parliament, 1961.
[3] Indian & Eastern Newspaper Society v. CIT, (1979) 2 Taxman 197 (SC).
[4] Maharaj Kumar Kamal Singh v. CIT, (1959) 35 ITR 1 (SC).

iii. When 'information' as to law is referred to, what is contemplated is information as to the law created by a formal source;[5]

iv. Reason to believe shall be based on a fresh tangible material (information) which came to the knowledge of the AO subsequent to the initial assessment;[6]

v. Information is an instruction or knowledge derived from an external source concerning facts or particulars, or as to law, relating to a matter bearing on the assessment".[7]

'Reason to Believe':

i. AO must have a reason to believe that income chargeable to tax has escaped assessment;

ii. The reason to believe shall not be based on a change of opinion;[8] The AO cannot review or rectify its order under the guise of reassessment.[9]

iii. When a regular order of assessment is passed in terms of the said sub-section (3) of Section 143, a presumption can be raised that such an order has been passed on application of mind. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the AO to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising quasi-judicial function to take benefit of its own wrong.[10]

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[5] Indian & Eastern Newspaper Society v. CIT, (1979) 2 Taxman 197 (SC).
[6] CIT v. Kelvinator of India Ltd., (2002) 123 Taxman 433 (Del).
[7] CIT v. A. Raman & Co., (1968) 67 ITR 11 (SC).
[8] CIT v. Kelvinator of India Ltd., (2010) 187 Taxman 312 (SC).
[9] CIT v. Kelvinator of India Ltd., (2002) 123 Taxman 433 (Del).
[10] CIT v. Kelvinator of India Ltd., (2002) 123 Taxman 433 (Del).

iv. AO must record reasons for proposing to initiate reassessment proceedings;

v. The reasons recorded by the AO must demonstrate a live link between the fresh tangible material (information) and escapement of income;[11] and

vi. The satisfaction to be recorded for reopening shall not be a borrowed satisfaction. The satisfaction shall be of the AO itself.

It is evident that despite dropping the word 'information' from Section 147 of the Act post 01.04.1989, the above judicial principles have continued to apply with equal force. Fresh tangible material/information continues to be the primary basis which must exist for assuming jurisdiction for reassessment. However, the jurisdiction is not obtained by merely having the information. The jurisdiction to reassess is obtained only when the AO uses such information/material and forms a reason to believe that income chargeable to tax has escaped assessment. Therefore, while existence of a 'fresh tangible material/information' is an objective step to obtain jurisdiction, 'reason to believe' is the subjective and equally important step of obtaining jurisdiction to reassess.

B. New Reassessment Regime as introduced by the Finance Act, 2021

The statutory provision laying down the jurisdictional pre-conditions for reassessment in Section 148 reads as hereunder:

> 148. Before making the assessment, reassessment or recomputation under section 147, and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order

[11] CIT v. Kelvinator of India Ltd., (2010) 187 Taxman 312 (SC).

> passed, if required, under clause (d) of Section l48A, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed, and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139:
>
> Provided that no notice under this Section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice.

Further, an exhaustive meaning has been given defining as to what information with the AO means which suggests that income chargeable to tax has escaped assessment and the same is reproduced hereunder:

> Explanation 1. For the purposes of this Section and Section l48A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means, -
>
> any information flagged in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time,
>
> any final objection raised by the Comptroller and Auditor-General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act.

C. Areas of Concern in New Reassessment Regime with respect to Jurisdictional Pre-conditions

In the new regime, the Finance Act, 2021 proposes to completely remove discretion in re-opening by allowing reopening only in cases flagged by the system on the basis of data analytics and on the basis of objection of the Comptroller & Auditor General (**"CAG"**) and in search/survey cases.

In order to understand what to expect from the new provisions, it is important to examine the phrases used in the new provisions and understand as to what extent has the discretion been removed.

I. Scope of Information forming basis for Reassessment

The jurisdictional pre-condition requires that the AO should have information which suggests that income chargeable to tax has escaped assessment. The re-introduction of the word 'information' in itself is not of much significance as even in its absence in the statute between 1989 and 2021, the existence of a fresh tangible information/material was still a mandatory pre-requisite which served as the basis for the AO to form its 'reason to believe'.

Further, the information will still continue to be either information as to facts or information as to the correct position of law (as created or interpreted by a formal source) as the new regime doesn't restrict the definition of information to either of the above.

Which information can be considered for the purpose of reassessment? Earlier, the statute did not answer this question and it was left to the discretion of the AO. The Finance Act, 2021 takes away this discretion from the AO who

will now consider reopening of the assessment only on such information as is flagged in the case of an assessee in accordance with the Risk Management Strategy (**"RMS"**) determined by the Central Board of Direct Taxes (**"CBDT"**) or on the basis of the final objection raised by the CAG.

From Clause (i) of the Explanation 1 to the proviso to Section 148 of the Act, it is evident that the discretion to choose information has been transferred to the final report of the CAG and also to a computer-based system which will flag information every year in accordance with the RMS of the CBDT. Therefore, the scope of information to be considered for reassessment is majorly in the hands of the CBDT which may, from time to time, amend the factors in its RMS.

II. Applicability of Concepts of 'Fresh Tangible Material' & 'Change of Opinion'

Whether the AO will be allowed under the new regime to use such information, as flagged by the system or as pointed out by the CAG report, which was already available with the AO and was examined by it in the initial assessment proceedings? Whether the concepts of 'fresh tangible material' and 'change of opinion' continue to apply under the new regime as well?

These two concerns relate to the settled principle of law that the AO does not have the power to review under the garb of reassessment proceedings. The Hon'ble Supreme Court has time and again interpreted the word 'reassess' and has distinguished the same with 'review'. The Apex Court has throughout maintained its stand that if the AO is allowed to re-appraise and change its opinion on the same information which existed with the AO at the time of the initial assessment or which had in fact been examined by the AO in the initial

assessment proceedings, it will amount to review of the assessment and the AO has the power to reassess and not the power to review. The Apex Court has held as follows:[12]

> We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989, 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.

It is evident from the above findings of the Apex Court that its findings go to the core of the concept of reassessment. It is not based upon the interpretation of the phrase 'reason to believe' or 'information', etc. Therefore, this well settled principle of law governing reassessment shall still apply with full force under the new regime as well. The concept of 'change of opinion' will have to be treated as an in-built test under amended provisions as well.

III. Requirement to demonstrate live link between information and escapement of Income?

The realisation that income has escaped assessment used to be covered by the phrase 'reason to believe' (now replaced with the phrase 'which suggests' in the new regime), and such realisation follows from the

[12] CIT v. Kelvinator of India Ltd., (2010) 187 Taxman 312 (SC).

"information" received by the AO. The information is not the realisation of escapement of income, the information merely gives birth to such realisation.[13]

Therefore, the phrase 'which suggests' in the new regime signifies that merely having the information will not suffice. A live link or a causal connection will still have to be demonstrated between such information and escapement of income. The requirement in law relating to reassessments is very simple and logical – that, in the reasons for reopening, the AO cannot simply record a factual position. The AO must record how such facts have led to the escapement of income. The law does not require a final finding on escapement of income from the AO at this stage. But at the same time, the minimum requirement is that the AO must record how the facts recorded by the AO have any connection or causal nexus or live link with the escapement of income.[14]

The Income Tax Department may come up with an interpretation that Explanation 1 to the proviso to Section 148 of the Act does not merely define 'information' but it defines the entire phrase 'information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment'. Applying this interpretation, the Department can argue that the information flagged by the system as per the RMS formed by the CBDT and the final objection from the CAG report are by themselves information that suggest that income has escaped assessment and hence, no further exercise has to be undertaken by the AO on such information except for taking an approval from the specified authority to initiate proceedings u/s 148A of the Act. This

[13] Indian & Eastern Newspaper Society v. CIT, (1979) 2 Taxman 197 (SC).
[14] G.S. Engineering & Construction Corporation v. DDIT, Circle 1(2), International Taxation, New Delhi & Ors, (2013) 357 ITR 335.

interpretation also finds support to some extent by the following paras from the Memorandum to the Finance Bill, 2021:

> (iv) It is proposed to provide that any information which has been flagged in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board shall be considered as information which suggests that the income chargeable to tax has escaped assessment. The flagging would largely be done by the computer based system.
>
> (v) Further, a final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been in accordance with the provisions of the Act shall also be considered as information which suggests that the income chargeable to tax has escaped assessment.

Therefore, if this interpretation is considered, it will imply that even the requirement to demonstrate the live link between information and escapement of income has been shifted from the AO to the computer-based system and the final report of CAG.

However, it is not understood how the information obtained from a computer-based system or from the final report of CAG will deal with the concepts of 'change of opinion' or requirement of a 'fresh tangible material'. These concepts have been fundamental to the power of reassessment as they have been crucial to check the abuse of power by the AO in order to ensure that an unbridled power of review is not resorted to by the AOs. These concepts do not lose their importance even today when a computer based system is being introduced to remove subjectivity from a human exercise. A certain level of subjective exercise by the AO upon the objective factors of 'change of opinion' and 'fresh tangible material' will still be imperative to

ensure that the AO does not assume a power of review which has never been the intention of the legislature.

The alternative interpretation is that Explanation 1 to the proviso to Section 148 of the Act merely defines 'information' that can be used to reopen assessments. It merely fulfils the requirement of information in the jurisdictional pre-condition that the AO should have information which suggests that income chargeable to tax has escaped assessment. Therefore, in the alternative view, it will be the AO who will apply such 'information' on the facts of an assessee's case and determine whether such information provided by the system or by the final objection from the CAG report 'suggests' that income has escaped assessment.

These possible alternative interpretations will be prone to litigation and the assessees must file appropriate objections in following cases, *inter alia*:

1. Where the AO merely mentions the information flagged by the computer-based system and does not demonstrate how such information suggests that income has escaped assessment in assessee's case;
2. Where the information flagged by the system or the information in the form of the final objection in the CAG report is with respect to an issue which has already been examined by the AO in the initial assessment proceedings.

D. Additional Conditions in case of Reopening beyond 3 years but before 10 years

The earlier regime allowed reopening of assessment upto 4 years from the end of the relevant assessment years if the AO had reason to believe that income escaped assessment. However, if the income escaping assessment was above INR 1 lac and there was a failure on behalf of the assessee to disclose fully and truly all material facts, the AO was allowed to reopen assessments upto 6 years from the end of the relevant assessment year. There was an additional limitation of upto 16 years for escapement of income in relation to foreign assets which is now governed by the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.

The new regime has revised the timelines for reopening of assessment as follows – (i) within 3 years from the end of the relevant assessment year and (ii) beyond 3 years but within 10 years from the end of the relevant assessment year. The jurisdictional pre-conditions for reassessment upto 3 years have already been discussed hereinabove in this article. Section 149(1)(b) of the Act prescribing additional conditions for the 3-10 years' timeline for initiating reassessment proceedings reads as hereunder:

> 149. (1) No notice under Section 148 shall be issued for the relevant assessment year,
>
> if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b),
>
> if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which

> has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year:
>
> …
>
> Explanation - For the purposes of clause (b) of this sub-section, "asset" shall include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account.

In addition to the conditions already discussed in this article above for reassessment, the amended provisions have prescribed following additional jurisdictional conditions for initiating reassessment proceedings beyond 3 years:

i. The AO must have in his possession either books of accounts or other documents or evidence which reveals that income chargeable to tax has escaped assessment;
ii. Income escaping assessment shall be represented in the form of an asset; and
iii. Income escaping assessment shall be or likely be INR 50 lacs or more for that year.

It is evident from a mere reading of Section 149(1)(b) of the Act that the above 3 additional conditions must co-exist. And looking at the nature of these conditions imposed by the legislature, it is very likely that these conditions will be prone to litigation. Therefore, it is very important for the assessees to understand each condition in detail because the non-existence of any one of the conditions takes away the jurisdiction from the AO to reopen assessment beyond a period of 3 years.

I. AO must have books of accounts or documents or evidence which reveal escapement of income

'Books of account' has been defined under the Act under Section 2(12A) as follows: **"**(12A) "books or books of account" includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device;**"**

Document has been defined under the Act under Section 2(22AA) as follows: **"**(22AA) "document" includes an electronic record as defined in clause (t) of sub-section (1) of Section 2 of the Information Technology Act, 2000 (21 of 2000);**"**

Evidence is not defined under the Income Tax Act but the same has been defined under the Indian Evidence Act, 1872 as follows:

> Evidence means and includes —
>
> 1. all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
>
> 2. all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

Therefore, for reopening assessment beyond 3 years, merely having information which suggests that income has escaped assessment is not sufficient. The law requires that the AO shall have in his possession either books of accounts or documents (which include electronic documents) or evidence (which includes oral as well as documentary evidence) which shall reveal that income has escaped assessment. The use of the word 'reveal' for

reopening assessment beyond 3 years instead of the word 'suggests' by itself indicates that the law requires the AO to have a higher amount of certainty of escapement of income and such revelation should either come from the books of accounts or some document or evidence.

As per the Cambridge Dictionary, the word 'reveal' means 'to make known or show something that is surprising or that was previously secret' or 'to allow something to be seen that, until then, had been hidden' Therefore, the use of the word 'reveal' also indicates that such books of accounts or the document or the evidence that now reveals escapement of income was not disclosed by the assessee to the AO in the initial assessment proceedings. This is an additional safeguard for the assessee which can be used to object to the reassessment in case the AO seeks to reopen on the basis of any document, evidence or books of accounts which was specifically disclosed by the Assessee during the initial assessment and was examined by the AO or can be presumed to have been examined on the basis of any specific questionnaire.

II. Income escaping assessment shall be represented in the form of an asset

For reopening assessment beyond 3 years under the new regime, it is mandatory that the income which has allegedly escaped assessment shall be represented in the form of an asset. The phrase 'represented in the form of an asset' indicates that the assessee has held or used to hold such income escaping assessment in the form of an asset.

While the provision provides that the income escaping assessment must be or must have been held by the assessee in the form of an asset but it does not require that at the time of the initiating reassessment proceedings, the

assessee should still be holding such asset. If the books or documents or evidence reveal that any asset, which was once held by the assessee, and has now been converted or transferred, represents any income that has escaped assessment, this condition will be satisfied.

III. PROCEDURE FOR INITIATING REASSESSMENT PROCEEDINGS

A. Procedure under the Reassessment Regime prior to Finance Act, 2021

In the reassessment regime prior to the Finance Act 2021, the legislature provided the following steps for initiating reassessment proceedings:

> Step 1: AO shall have a reason to believe that income has escaped assessment.
>
> Step 2: AO to take approval of the specified authority under Section 151 of the Act on the reasons for reopening.
>
> Step 3: AO issues notice for reassessment requiring the assessee to file return for reassessment.
>
> Step 4: AO to issue notice under Section 143(2) and pass reassessment order.

Between Step 3 and Step 4**,** the following procedure was introduced by the Hon'ble Supreme Court to be followed mandatorily by the assessee and

the Department in cases the assessee wishes to know the reasons for reopening: 15

> Step 3.1: On receipt of notice, assessee files the return of income and seek reasons for reopening.
>
> Step 3.2: AO to present reasons for reopening to the assessee within a reasonable time
>
> Step 3.3: Assessee to file objections with the AO, if any.
>
> Step 3.4: AO to dispose off the objections by way of a speaking order before proceeding with the reassessment.

Under this regime, following principles were laid down by the Courts time and again with respect to the procedure for initiating reassessment proceedings in order to prevent the abuse of the process by the Department:

i. The reasons for reopening must be recorded prior to taking the approval of the specified authority and prior to issuance of the notice.[16] Reasons for reopening, as approved by the specified authority, is the pre-requisite for issuance of a notice for reassessment. The reasons to be presented to the assessee during the reassessment proceedings must be reasons already recorded by the assessee before initiating such proceedings.

[15] GKN Driveshafts (India) Ltd. v. ITO, (2003) 259 ITR 19 (SC).
[16] Rajoo Engineers Ltd. v. DCIT, (2008) 218 CTR 53; CIT v. S.R. Constructions, (2002) 257 ITR 502 (MP).

ii. The approval of the specified authority for reassessment does not mean paper approval. The approval must indicate due application of mind.[17]

iii. Approval of the specified authority is a mandatory pre-condition for issuance of a notice for reassessment and in absence of such approval, the AO will lose jurisdiction for reassessment.[18]

B. Procedure under the New Reassessment Regime introduced by the Finance Act, 2021

In the new reassessment regime introduced by the Finance Act, 2021, in principle, the procedure introduced by the Supreme Court in *GKN Driveshafts*[19] has been made part of the legislative scheme under Section 148A of the Act with higher safeguards requiring approval of the specified authority at every stage in order to reduce litigation and improve ease of doing business. The procedure now gives the option of a pre-notice enquiry to the AO. The procedure also encompasses a mandatory show cause notice and option to object to the reasons and requirement to pass a reasoned order disposing off such objections even before issuance of a notice for reassessment. The procedure is as follows:

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[17] German Remedies Ltd v. Dy. CIT, (2006) 287 ITR 494 (Bom); CIT v. Suman Waman Chaudhary, (2010) 321 ITR 495 (Bom); CIT v. S. Goyanka Lines & Chemical Ltd., (2016) 237 Taxman 378 (SC); My Car (Pune) (P.) Ltd. v. ITO, (2019) 263 Taxman 626; United Electrical Company (P) Ltd v. CIT & Ors, (2002) 258 ITR 317 (Del); Asiatic Oxygen Ltd. v. Dy. CIT, (2015) 372 ITR 421 (Cal.); Maruti Clean Coal And Power Ltd. v. ACIT, (2018) 400 ITR 397 (Chhattisgarh); Central India Electric Supply Co. Ltd. v. ITO, (2011) 51 DTR 51 (Del).

[18] Anil Jaggi. v. CIT, (2018) 168 ITD 599 (Mum) (Trib.); ITO v. Ashok Jain, 2018 SCC OnLine ITAT 2201.

[19] GKN Driveshafts (India) Ltd. v. ITO, (2003) 259 ITR 19 (SC).

Step 1: AO shall have information which suggests income has escaped assessment. Additional conditions to be met in case of reassessment beyond 3 years.

Step 2: AO has the option to conduct an enquiry, if required, but with prior approval of the specified authority under Section 151 of the Act. This is an optional step.

Step 3: AO to issue a show cause notice to the assessee as to why a notice for reassessment shall not be issued on the basis of the information which suggests income has escaped assessment and on the basis of the results of the enquiry conducted, if any. A period of minimum 7 days and up to 30 days (extendable on request) to be provided to the assessee to reply. Such show cause notice shall also be issued only with prior approval of the specified authority.

Step 4: AO to consider the reply of the assessee furnished, if any, in response to the show cause notice.

Step 5: On the basis of the material available on record including the reply of the assessee, AO to decide and pass an order within one month from the end of month in which reply is received and in case of no reply, within one month from the end of the month in which the period to file response expired. Order to be passed with prior approval of the specified authority.

Step 6: If the objections of the assessee have been rejected, AO to issue notice for reassessment after taking approval from the specified authority requiring the assessee to file return of income.

Step 7: AO to issue notice under Section 143(2) and pass reassessment order.

C. Areas of Concern under the New Reassessment Regime with respect to Procedure

I. When should the AO satisfy the jurisdictional pre-condition of having information which suggests income has escaped assessment?

With the addition of the procedure for a pre-notice enquiry by the AO, the first area of concern is as to when should the AO satisfy the jurisdictional pre-condition of having 'information which suggests that income chargeable to tax has escaped assessment'. Can the AO take recourse to the provision for pre-notice enquiry under Section 148A(a) for obtaining information which suggests that income has escaped assessment?

Having information which suggests that income has escaped assessment is a mandatory pre-requisite to initiating the entire reassessment proceedings. Therefore, the requirement of having such information shall be satisfied by the AO at the very outset. The AO cannot take recourse to the provision for pre-notice enquiry under Section 148A(a) of the Act for obtaining such information for the following reasons:

i. The requirement to have information which suggests that income has escaped assessment is a mandatory jurisdictional pre-requirement for initiating reassessment proceedings while the pre-notice enquiry is an optional exercise that the AO may opt to undertake. The law will not provide an optional enquiry procedure to satisfy a mandatory jurisdictional pre-condition;

ii. The option of pre-notice enquiry envisaged under Section148A(a) is for carrying out an enquiry **'**with respect to the information which suggests that the income chargeable to tax has escaped assessment'. When the enquiry itself is about the information which suggests that income has escaped assessment, then it is obvious that such information should exist prior to making the decision to undertake such enquiry or not.

iii. The use of the phrase 'if required' under Section 148A(a) also makes it evident that such information shall exist prior to the AO exercising the option to make such enquiry or else there will be no other way for the AO to determine whether the enquiry is required or not.

iv. Further, Section 148A(a) requires the AO to take prior approval of the specified authority to undertake enquiry. If an approval has to be taken for undertaking an enquiry, there must be some subject matter for such enquiry. The approval from the specified authority cannot be made for a fishing and roving enquiry. Hence, even the requirement for approval suggests that the information suggesting escapement of income must exist prior to exercising the option to undertake a pre-notice enquiry.

It is evident from the above that the AO cannot use the provisions for pre-notice enquiry as a tool to obtain information which suggests income escaping assessment. Initiating an enquiry without having any information suggesting income escaping assessment will clearly amount to undertaking fishing and roving enquiries where the AO may or may not find any information suggesting income escaping assessment. Once the AO has such information, the AO can resort to the enquiry in case he/she thinks it fit to obtain certain additional details with respect to such information.

Even in case of reassessment beyond 3 years, the AO must satisfy the additional pre-conditions laid down by Section 149(1)(b) of the Act at the very outset before taking the permission for undertaking a pre-notice enquiry. The AO cannot resort to a fishing and roving enquiry under Section 148A(a) to obtain the books of accounts or documents or evidence in order to reveal income escaping assessment. The AO cannot assume jurisdiction to initiate the reassessment proceedings, unless he is already in possession of such books of accounts or documents or evidence revealing income, represented in the form of asset, amounting to INR 50 lacs or more, escaping assessment.

From the discussion above, it is evident that Section 148A(a) has the highest potential to be misused by the Department for conducting fishing and roving enquiries. Therefore, the approval of the specified authority under Section 148A(a) becomes very crucial to determine whether the jurisdictional pre-conditions were satisfied prior to obtaining such approval and whether the approval has been granted by the specified authority on the basis of information with the AO which suggests income escaping assessment or books of accounts/documents/evidence revealing escapement of income, as the case may be. As a matter of litigation strategy, in cases where enquiry has been undertaken by the AO, the assessee should always formally seek a copy of the approval obtained for such enquiry or conduct a formal inspection of the record. If found that the AO conducted fishing and roving enquiries for satisfying jurisdictional pre-conditions, this goes to the root of the matter and invalidates the reassessment proceedings.

II. Order to be passed u/s 148A(d) of the Act

The amended provisions require the AO to consider the objections filed by the assessee in reply to the show cause notice and the material

available on record and decide the objections by passing an order with prior approval of the specified authority.

The use of the phrase 'consider the reply of assessee furnished' under Section148A(c) and use of the phrase 'decide, on the basis of the material available on record including the reply of the assessee' make it evident that the AO must pass a reasoned order after considering all the objections raised by the assessee and after considering the material available on record.

This part of the reassessment procedure will be highly prone to litigation. Therefore, the assessees must give great attention to such orders. If an order fails to consider and decide any objection which is crucial to the case of the assessee will be violative of Section 148A(c) and 148A(d) and will be in violation of the principles of natural justice. Such orders will be liable to be set aside. However, if the assessee's challenge to such order is limited to non-disposal of a certain objection, then, in a writ jurisdiction, the assessee should expect only an order of remand back to the AO to pass a reasoned order.

III. Approval of the Specified Authorities u/s 151 of the Act

The new regime requires approvals to be taken from even higher authorities than what the earlier regime required. For reassessment within 3 years, the amended Section 151 of the Act requires approval to be obtained from Principal Commissioner or Principal Director or Commissioner or Director. For reassessment beyond 3 years, approval has to be obtained from Principal Chief Commissioner or Principal Director General or Chief Commissioner or Director General.

The amended provisions require such approvals to be obtained at every stage obviously in order to ensure higher safeguards for the assessees. This by

itself indicates that such approvals should not be reduced to empty formalities or be mere paper approvals. The specified authorities must give approvals after duly applying their mind.

Further, it is a settled principle that if the law requires the approval to be obtained from a particular authority, the approval has to be obtained from the mentioned authority only. Approval either from superior or sub-ordinate authority does not amount to a valid approval.[20]

Approvals taken from specified authorities for issuance of notice for reassessment is a mandatory pre-requirement for obtaining jurisdiction to issue such notice. Therefore, this is another area of the reassessment procedure which the assessees should closely examine. Any irregularity in the approvals renders the entire reassessment proceedings invalid. Therefore, as a matter of litigation strategy, the assessee should always formally seek a copy of the approval obtained for such an enquiry or conduct a formal inspection of the record.

IV. CONCLUDING REMARKS

The new reassessment regime introduced by the Finance Act 2021 is a welcome step for the following reasons:

i. It has considerably reduced the limitation for reopening from 6 years to 3 years for normal cases;

[20] Ghanshyam K. Khabrani v. ACIT, (2012) 346 ITR 443 (Bom); DSJ Communication Ltd. v. DCIT, (2014) 222 Taxman 129 (Bom); Purse Holdings India P. Ltd. v. ADDIT(IT), (2016) 143 DTR 1 (Mum); Yum! Restaurants Asia Pte Ltd v. Dy. DIT, (2017) 397 ITR 639 (Del); CIT v. Aquatic Remedies Pvt. Ltd., (2018) 406 ITR 545 (Bom).

ii. Even for cases which are otherwise cases of non-disclosure and severe tax evasion but where the income escaping assessment is below INR 50 lacs, the limitation for reopening has been limited to 3 years;

iii. The cases covered by the 10 years limitation have been subjected to additional jurisdictional conditions and a monetary threshold of INR 50 lacs to focus only on cases of severe tax evasion and non-disclosures;

iv. Smaller individual taxpayers and businesses have been relieved from a longer period of uncertainty of assessment;

v. Despite the procedure laid down by the Supreme Court in *GKN Driveshafts*,[21] it was still not being followed by many AOs. Making such procedure a mandatory part of the legislative scheme ensures higher level of safeguards for the assessees;

vi. Further, approvals from very senior authorities have been made mandatory in the legislative scheme and that too at every stage of the reassessment procedure. This evidences the commitment of the legislature to ensure highest level of protection to the taxpayers against any illegal reopening of assessments or reassessments without any application of mind.

However, there are several areas of the amended provisions, as indicated at various places in the article, which are highly prone to litigation and which the assessees should closely examine while being subjected to reassessment proceedings. Despite being principally similar to the earlier regime, since there has been a major overhauling in the new reassessment regime, the assessees should expect major variations in Department's

[21] GKN Driveshafts (India) Ltd. v. ITO, (2003) 259 ITR 19 (SC).

interpretation of the amended provisions and hence, should be extra cautious during the entire reassessment proceedings, examine each stage closely and object to anything which appears in variance with the legislative scheme.