KPMG

Tax Flash News

14 September 2023

The reassessment notice and the order issued beyond a period of 3 years from the end of the assessment year without the approval of specified authorities are invalid

Executive summary

Based on the Supreme Court's decision in the case of Ashish Agarwal[1] and CBDT instruction dated 11 May 2022[2], the tax department in several cases, claimed that the reassessment notices under the old regime issued before 30 June 2021 were within the time extended under the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (TOLA). The proceedings were valid under the new regime as per the Supreme Court's directions. Therefore, such proceedings were not time-barred. In some of the cases, the tax department has been arguing that since notices were not issued beyond the period of three years, there was no need to obtain any approval from specified authorities[3]. Further, in several cases, the notices were issued merely on the basis of a change of opinion.

Recently, the Bombay High Court in the case of Siemens Financial Services Pvt Ltd[4] (the taxpayer) held that the reassessment notice and order passed under the new reassessment regime were invalid and must be quashed and set aside. Such notice and order were issued beyond the period of 3 years from the end of the assessment year without the approval of specified authorities. Further, such reassessment notice was based on a mere change of opinion and therefore not permissible.

Facts of the case

- The taxpayer, a Non-Banking Finance Company (NBFC), filed its tax return for Assessment Year 2016-17. The AO passed an assessment order on 23 December 2018 without making any adjustments to the total income as reported by the taxpayer. Subsequently, on 25 June 2021, the taxpayer received a reassessment notice[5].
- The taxpayer contended that the notice was issued as per the old provisions of Sections 147 to 151. The AO should assume jurisdiction post 1 April 2021 in terms of the amended provisions. Accordingly, the reassessment notice issued on 25 June 2021 was bad in law.
- Relying on the Supreme Court's decision in the case of Ashish Agarwal, the AO rejected the contentions of the taxpayer and treated the reassessment notice as show cause notice in terms of Section 148A(b) of new reassessment provisions. The AO held that the income chargeable to tax had escaped assessment. Consequently, on 31 July 2022, the AO passed an order under Section 148A(d).
- The taxpayer filed a writ petition before the Bombay High Court against the reassessment notice and order issued under the new regime.

[1] UOI & Others v. Ashish Agarwal [2022] 138 taxmann.com 64 (SC)

[2] CBDT Instruction No. 1/2022, dated 11 May 2022

[3] As mentioned in Section 151(ii) of the Income-tax Act, 1961 - Sanction for issue of notice - Specified authority for the purposes of Section 148 and Section 148A shall be Principal Chief Commissioner or Principal Director General or Chief Commissioner or Director General if more than three years have elapsed from the end of the relevant assessment year

[4] Siemens Financial Services Pvt Ltd v. DCIT (Writ Petition No. 4888 of 2022) – Taxsutra.com

[5] Under Section 148 of the Act

Taxpayer's contentions

- The taxpayer contended that the reassessment notice and the order were issued beyond the limitation period, signed by the wrong specified authority, with a lack of 'information' as required under Section 148, resulting from a change of opinion and was in violation of Section 151.

High Court's decision

Applicability of TOLA

- TOLA only extends the period of limitation and does not affect the scope of Section 151.

- The AO cannot rely on the provisions of TOLA and the notifications issued thereunder as Section 151 was amended by the Finance Act, 2021 and the provisions of the amended Section would have to be complied with by the AO, with effect from 1 April 2021.

- Hence, the AO cannot seek to take the shelter of TOLA as a subordinate legislation cannot override any statute enacted by the Parliament.

- The sanction of the specified authority has to be obtained in accordance with the law existing when the sanction was required to be obtained.

Whether approval of specified authority was taken

- As per the Explanation below Section 148A read with Section 151, the specified authority for approving the issue of the reassessment notice beyond 3 years from the end of the relevant assessment year, are Principal Chief Commissioner (PCC) or Principal Director General (PDG) or Chief Commissioner (CC) or Director General (DG).

- The present case was related to the AY 2016-17 and the assessment notice was issued beyond the period of three years which was elapsed on 31 March 2020. Thus, the approval as contemplated in Section 151(ii) would have to be obtained from the above authorities. However, the approval/sanction under Section 148A(d) was granted by the Principal Commissioner of Income-tax (PCIT) and not the PCC. Therefore, the approval was not valid.

- Hence, the reassessment order passed under Section 148A(d) read with the notice issued under Section 148 was not valid and has to be quashed and set aside.

CBDT Instruction Interpretation

- The interpretation in the CBDT Instruction[6] was not acceptable. The extended reassessment notices cannot travel back in time to the original date when such notices were to be issued. This is contrary to the decision of the Bombay High Court in Tata Communications[7] where it was held that TOLA does not envisage traveling back of any notice.

- Even assuming that these notices travel back to the date of the original notice issued on 25 June 2021, even then the approval of the PCCIT should be obtained in terms of Section 151(ii) as a period of 3 years from the end of the relevant assessment year ended on 31 March 2020 for AY 2016-17.

- CBDT Instruction has wrongly stated that the notices issued under Section 148 for AY 2016-17 are to be considered as having been issued within a period of 3 years from the end of the relevant assessment year and, on that basis, has wrongly mentioned that the approval of the specified authority under Section 151(i) [and not under Section 151(ii)] should be taken.

Various Courts decisions

- TOLA does not provide that any notice issued under Section 148, after 31 March 2021 will relate back to the original date or the clock is stopped on 31 March 2021 such that the provision as existing on such date will be applicable to notices issued relying on the provision of TOLA. Reference was made to the decision of the Bombay High Court in the case of Tata Communications.

- Even the decision of the Supreme Court in the case of Ashish Agarwal does not anywhere indicate the notices that could be issued for eternity like in this case, on 31 July 2022, would be sanctioned by the authority other than the sanctioning authority defined under the Act.

Change of Opinion

- In view of the decision in the case of Dr. Mathew Cheria[8], whether under an old or a new regime of reassessment, it is a settled position that the issues decided categorically should not be revisited in the guise of reassessment.

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[6] CBDT Instruction No. 1 / 2022, dated 11 May 2022
[7] Tata Communications v. CIT [2022] 443 ITR 49 (Bom)
[8] Dr. Mathew Cheria v. ACIT [2010] 320 ITR 561 (SC)

- The AO has only the power to reassess not to review the order. The AO does not have any power to review his own assessment when during the original assessment the taxpayer provided all the relevant information that was considered by him before passing the assessment order under Section 143(3).

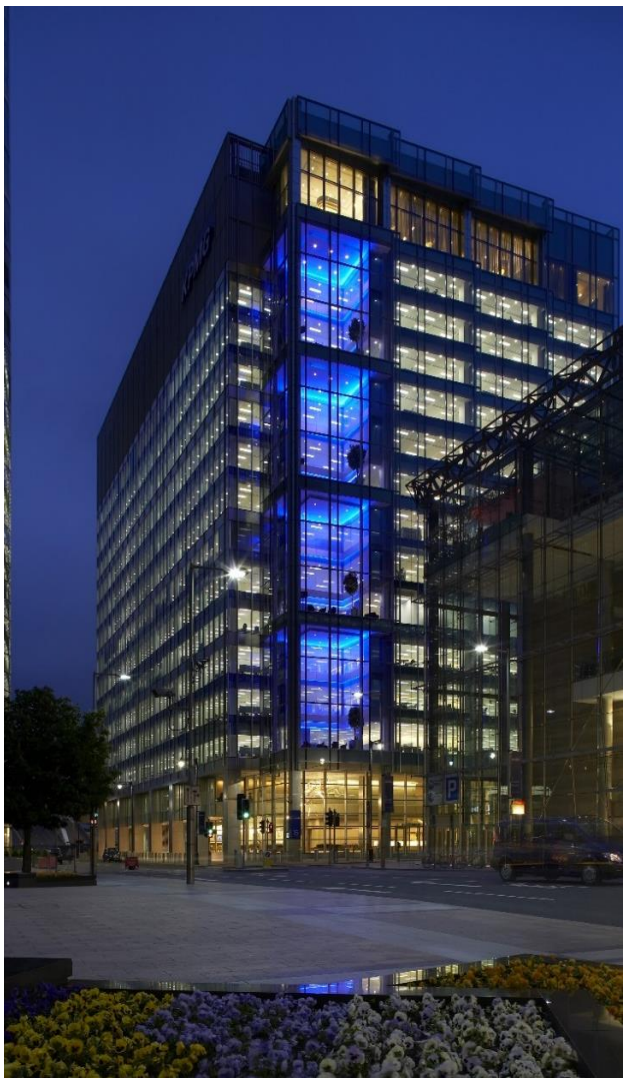
- The AO cannot initiate reassessment proceedings to have a relook at the documents that were filed and considered by him in the original assessment proceedings.

- In the taxpayer's case, the AO having allowed the amount of software consumables as a revenue expenditure now seeks to treat the same as capital expenditure which was a clear change of opinion.

- Various judicial precedents[9] have held that reassessment proceedings initiated based on a mere change of opinion were invalid and without jurisdiction.

- The Supreme Court in the case of Kelvinator of India Ltd.[10] held that the AO has no power to review but has only the power to reassess. The concept of 'change of opinion' must be treated as an in-built test to check abuse of power by the AO.

- Accordingly, the High Court held that the notice was issued based on the change of opinion which was not permissible.



Our comments

This is an important decision of the Bombay High Court dealing with the issue of the validity of reassessment notice issued beyond a period of 3 years from the end of the assessment year without the approval of specified authorities. This decision will impact the reassessment cases opened by the tax department under the old law by relying on the provisions of TOLA and the Supreme Court decision in the case of Ashish Agarwal. From taxpayers' perspective, it would be important to check whether their case is complying with Section 151, which requires approval of specified authorities for reopening of cases.

Further, the Bombay High Court gave an important observation with respect to the 'change of opinion' aspect of reassessment proceedings i.e. whether under the old or new regime of reassessment, it is a settled position that the issues decided categorically should not be revisited in the guise of reassessment. In the instant case, the notice was issued based on the change of opinion which was not permissible.

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[9] Dr. Mathew Cheria v. ACIT [2010] 320 ITR 561 (SC), Aroni Commercials v. DCIT [2014] 44 taxmann.com 304 (Bom)
[10] CIT v. Kelvinator of India Ltd. [2023] 151 taxmann.com 154 (Mad)

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