

CBDT Instruction for Search Assessments - A Litigation Deja Vu

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“History repeats itself, first as tragedy, second as farce.”- Karl Marx

Friends, a year ago, the CBDT Instruction No. 1 of 2022, issued on 11.5.2022, pursuant to the hon'ble Supreme Court judgement, in the leading case of 'Union of India vs. Ashish Agarwal' [\[TS-339-SC-2022\]](#), had invented an altogether new, innovative and revolutionary concept of 'time-travel' in the Income Tax Act, by visualising a scenario, wherein the otherwise time barred reassessment notices, under the old reassessment regime provisions, issued on or after 1.4.2021, were deemed to have the super power of travelling back in time to their original time barring limitation issuance dates, so as to provide them a new lease of life.

A year after, the history has repeated itself, in the form of the [CBDT Instruction No. 1 of 2023](#) issued on the historic day of 23.8.2023, when almost every Indian was busy celebrating the success of the 'Chandrayan 3 Lunar Mission'. This CBDT Instruction has once again visualised a scenario, wherein the newly substituted reassessment provisions of section 147-151, as per the Finance Act 2021, have been assumed to travel back in time to the pre-Finance Act, 2021 era, and are made applicable for reopening the old completed/unabated assessments pursuant to search and requisition action carried before 1.4.2021, which otherwise had been quashed by virtue of the hon'ble Supreme Court judgement in the leading case of 'PCIT (Central) 3 v. Abhisar Buildwell Pvt Ltd & Ors. [\[TS-202-SC-2023\]](#), and other similar judgements.

In the said Abhisar Buildwell judgement, the hon'ble Apex Court have upheld the well settled and established legal position that in respect of the assessments being done u/s 153A/153C, pursuant to search under section 132 or requisition under Section 132A of the Act, 1961, no addition can be made by the revenue, in respect of completed/unabated assessments on the date of search/requisition, in the absence of unearthing of any incriminating material, during the course of such search/requisition.

However, the hon'ble Apex Court have also observed that such completed/unabated assessments can be re-opened by the AO in exercise of powers under sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under such sections of the Act and those powers are saved.

For ready reference, the concluding para of the said SC judgement is being reproduced below:

“14. In view of the above and for the reasons stated above, it is concluded as under:

iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under [Section 132](#) or requisition under [Section 132A](#) of the Act, 1961. **However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved.**”

Interestingly, the CBDT Instruction No 1 of 2023, doesn't talk about the comprehensive fourteen paras of the SC judgement of Abhisar Buildwell, adjudicating on the main issue of non-sustainability of additions in completed/unabated assessments in the absence of unearthing of any incriminating material during search, but refers and focusses only on the last three sentences (highlighted in Bold, supra), of para no. 14(iv) of the judgement, in order to enable the revenue authorities to reopen all such otherwise quashed assessments, under the provisions of sections 147/148 read with section 150 of the Income Tax Act.

Friends, at this juncture, if I ask You a simple question that, "Can the provisions of newly substituted sections 147 - 151 of the Income Tax Act, pertaining to the new reassessment regime, as inserted by the Finance Act 2021, be made applicable to reopen completed assessments pursuant to searches conducted prior to 1.4.2021", what will be Your answer?

Well, your precise answer would be a clear 'NO', in view of the specific and categorical mandate of the second proviso to section 149 of the Income Tax Act, which reads as under:

"Provided further that the provisions of this sub-section shall not apply in a case, where a notice under section 153A, or section 153C read with section 153A, is required to be issued in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before the 31st day of March, 2021"

However, in present times, it seems that the legislative sanctity of the cut-off applicability dates of various sections, as enshrined in the Finance Acts, laid out and approved by the Parliament, is getting blurred and undermined day by day, in so much so that the newly substituted legislative sections in the Income Tax Act by a subsequent Finance Act, are routinely being made applicable to the assessments, governed by the legislative provisions of the previous Finance Act, by way of issuing Instructions and Notifications, containing self-serving guidelines, directions and instructions for the AOs.

The CBDT Instruction No. 1 of 2023 dated 23.8.2023, has tried to use the provisions of section 150 of the Act, as a 'life-saver' for saving the otherwise quashed/dead completed/unabated search assessments, in the SC Abhisar Buildwell judgement and even further in all similar pending appeal matters.

The subsection (1) of section 150 of the Income Tax Act carves out an exception to the stipulated limitation period for reopening contained in section 149 and reads as under:

"150. (1) Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law."

The CBDT Instruction has interpreted and treated the last three sentences contained in para no. 14(iv) of the SC judgement viz,

"However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved."

as the qualifying criteria/ the finding of the hon'ble Supreme Court, in Abhisar Buildwell judgement, to be given effect to, as per subsection (1) of section 150 of the Income Tax Act, in respect of all the tagged cases along with the lead case, and as such an opportunity to reopen all such completed/unabated assessments u/s 147/148, irrespective of the time barring limitation period as stipulated in section 149 and the second proviso to section 149 of the Act.

In para 7.2.1 of the CBDT Instruction, it has been directed that in respect of completed/unabated assessments tagged in the Abhisar Buildwell SC judgement, along with the lead case, necessary action need to be taken in the situation stated by the Court (SC) in para 14(iv) of the said order in view of section 150 of the Act. The AO will be required to reopen the cases following the procedure prescribed under section 148A of the Act as inserted by Finance Act 2021 in accordance with the law laid down by Hon'ble Supreme Court by its order dated 04.05.2022 in Union of India v. Ashish Agarwal case (2022 SSC

Online SC 543). in view of the specific provisions of section 153(6) of the Act, all the cases reopened u/s 147/148 of the Act will be required to be completed by 30th April 2024.

The CBDT Instruction even goes further to direct the AOs to reopen the other already completed/unabated assessment cases pursuant to search action also, where searches had been conducted prior to 1.4.2021 and where no incriminating material had been unearthed during such searches, and which were not even the subject matter or tagged along with the SC Abhisar Buildwell judgement.

In such cases, where appeal is pending (either filed by the assessee or by the Department) before any appellate forum, it has been directed that the said SC Abhisar Buildwell judgement is to be brought to the notice of the respective appellate forum [CIT(Appeals)/ITAT/High Court], by the Departmental Representative. As and when such appeals are disposed of the respective appellate authorities, the AOs have been directed to consider reopening such cases u/s 147/148 read with section 150 of the Act.

Post SC Abhisar Buildwell judgement, in the other cases also where the respective appellate authorities have quashed the completed assessments in the absence of any incriminating material being unearthed during search, but the option for reopening the cases u/s 147/148 has not been given to the revenue authorities, by such appellate authorities, the AOs have been directed to file the Miscellaneous Application (MA) before the respective appellate authorities, with the condonation of delay if any, and quote Article 141 of the Constitution of India, to contend that the ratio decidendi of the SC Abhisar Buildwell judgement, needs to followed by such appellate authorities.

It is interesting to note here that the ratio decidendi of the SC Abhisar Buildwell judgement, as interpreted by the CBDT Instruction, is not the unsustainability of additions made in the completed/unabated assessments, in the absence of any incriminating material being unearthed during search, but the observation that such cases may be reopened by AOs u/s 147/148 of the Act, on the fulfilment of the specified conditions.

Thus, the CBDT Instruction very conveniently tries to use the very same SC Abhisar Buildwell judgement, which has infact uphold the quashing of the subject completed/unabated search assessment cases, in the absence of any incriminating material being unearthed during search, as a life-saving jacket, to give a new lease of life to such dead and quashed assessments, under the garb of section 150 of the Act, and as a back door 'jugaad' to provide the AOs, with a new window of opportunity of reopening such already completed assessments, and that too, by bypassing and undermining the sacrosanct limitation period stipulated u/s 149 of the Act, and more particularly by disregarding the compulsory condition as stipulated in second proviso to section 149, that the assessments pursuant to searches and requisitions conducted prior to 1.4.2021, can't be reopened under the newly substituted sections 147-151 of the new reassessment regime, as inserted by the Finance Act 2021.

Way Forward:

The legislative intent of substitution of the old reassessment regime and subsuming of the search related assessments in the new reassessment regime by the Finance Act 2021, was to facilitate and provide the stable, more certain and conclusive taxation and assessment regime to the taxpayers, in order to ensure that the assessments reach finality and conclusiveness and are not left open inconclusive, infinitely. This is really unfortunate that a Tsunami of litigations is foreseeable and expected after this CBDT Instruction, just like the situation after the CBDT Instruction No. 1 of 2022 dated 11/5/2022 after the SC judgement in Ashish Aggarwal.

Friends, before parting, I would like to share some practical handy hints and tips to effectively handle such proposed reassessment notices u/s 148/147, post this CBDT Instruction 1 of 2023 dated 23.8.2023.

Firstly, the observation in the judgement of the hon'ble Supreme Court in the case of Abhisar Buildwell Pvt Ltd that the AOs may reopen such otherwise quashed completed assessments u/s 147/148 of the Act, has been made by the hon'ble Apex Court with a very crucial and significant rider that such reopening has to be subject to the fulfilment of the conditions specified in such sections.

Thus, the second proviso to section 149 clearly stipulating that the provisions of newly substituted

sections 147 - 151 of the Income Tax Act, pertaining to the new reassessment regime, as inserted by the Finance Act 2021, can't be made applicable to reopen the concluded/completed assessments pursuant to searches conducted prior to 1.4.2021, can't be given a flimsy and superficial go-by under the garb of section 150(1) of the Act, as it is inherent and inbuilt in the very same observation/finding of the hon'ble Supreme Court, which the CBDT Instruction is trying to give effect to, under section 150(1) to bypass the limitation period stipulated u/s 149 of the Act.

Secondly, along with sub section (1) of section 150, there is another subsection, i.e., subsection (2) of section 150 of the Income Tax Act, which categorically stipulates that the relaxation in respect of non adherence to the time barring limitation period as stipulated in section 149 of the Act, by the AOs in reopening the already completed assessments, as given in subsection (1) of section 150, is only applicable if the subject appeal order, for which the effect of the finding is to be given, has also been passed within the stipulated limitation period as per other sections limiting the time period.

In the present cases, clearly the limitation period as stipulated in section 149 and 153 of the applicable pre-amended reassessment regime, before the enactment of the Finance Act 2021, for reopening u/s 147/148, would have already elapsed by the date of pronouncement of the said SC judgement in the case of Abhisar Buildwell Pvt Ltd on 24.4.2023, so immunity under sub section (1) of section 150 of the Act, from the applicability of time barring limitation period is clearly not available in such cases.

Thirdly, the observation in the judgement of the hon'ble Supreme Court in the case of Abhisar Buildwell Pvt Ltd that the AOs may reopen such otherwise quashed completed assessments u/s 147/148 of the Act, can't be made binding and universally applicable across board on all pending appeals on similar cases, which were not even the subject matter or tagged along with the said SC judgement, as unlike the judgement of the hon'ble Supreme Court in the case of 'Ashish Agarwal', the Article 142 of the Constitution of India, has not been invoked by the hon'ble Apex Court in the Abhisar Buildwell judgement, and as such the substantive legislative sanctity of the cut-off date of the applicability of new reassessment regime to the searches conducted prior to 31.3.2021, can't be override by any self-serving interpretation.

Summing up the above otherwise serious and critical discussion in a lighter and poetic manner:

[CBDT Instruction No 1 of 2023:](#)

New Reassessment Notices Travelling Back in Time,

Triggering Litigation Bells to Chime

SC in Abhisar Buildwell, upholds quashing of completed search assessments,

If unearthing of incriminating material in search is absent.

Observes Such Cases u/s 148, May be Reopened

But subject to the Specified Conditions therein Not Forgotten.

On 23.8.2023, CBDT issues an Instruction,

Containing Guidelines for SC-Abhisar Buildwell Judgement Implementation.

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Directing Instructions to be adopted in a Uniform Manner,

CBDT Instruction tries to serve as an Explainer.

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*However, on some aspects, Instruction appears to be Self-serving,
Making the Assessee, again Nerving.*

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First Time it was a Bonafide Mistake,

Second Time it's a Deliberate Take.

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Quashed Completed Search Assessments to be Reopened

2nd Proviso to Section 149, completely Forgotten.

Instruction says, Re-opening of these assessments u/s 148 will Survive,

SC finding to Reopen read with section 150 to Override.

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New Reassessment Regime Will Travel Back in Time,

Triggering More Litigation Bells to Chime.

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To Reduce Litigations, SC Abhisar Buildwell judgement was Strived,

Ironically, increased Litigations, are now to be Contrived.