



## **Why CBDT Instruction No 1 of 2023 on Search Assessments is Lacking in Merit? A Threadbare Analysis**

The 'Search' action is considered as one of the extreme measures of tax administration and its legislative mandate is given in section 132 of the Income Tax Act. If the competent income-tax authority, in consequence of any information in its possession, has reason to believe that any person is having any undisclosed income in the form of any unaccounted money, bullion, jewellery, or other similar valuable article or thing, or any accommodation entry in the books of accounts, then the authority has the power to issue an income-tax search warrant against such person, and enter and search such person's business or residential premises. During search, the Income-tax officials even have the power to break open the lock of any door, locker, safe, vault, almirah, or any similar structure in the searched premises, and impound or seize the valuables, found therein.

Uptill financial year 2021, the assessments pursuant to search were governed by separate provisions of sections 153A and 153C of the Act. From financial year 2022 onwards, search related assessments have been subsumed in the new reassessment regime under sections 147-151 of the Act, by the Finance Act 2021.

The appellate authorities on PAN India basis have recognised and held that after subjecting the taxpayer to the extreme invasion of privacy and trauma and hardship of a search action, the income-tax authorities are atleast expected to discover or unearth some incriminating material or evidence during the course of such search in order to reopen and tinker with the assessments of past years which had already got completed on the date of search and to justify the making of consequential additions in respect of alleged undisclosed income. If the authorities don't discover or unearth anything incriminating during the search action then they can't disturb the already completed/unabated assessments

This established legal position has been given the final stamp of approval by the hon'ble Supreme Court in a recent judgement in a batch of fifty appeals with the leading case of PCIT v. Abhisar Buildwell Pvt Ltd.

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 Apex Court has also observed in the last three sentences of this judgment, that such otherwise quashed assessment cases may be reopened by revenue authorities, under the reassessment sections 147-151, subject to the fulfilment of the specified conditions therein.

One of the prescribed compulsory conditions stipulated in section 149 of the Act is that the already completed assessments pursuant to searches conducted uptill 31.3.2021, can't be

reopened under the new reassessment regime of sections 147-151, on or after 1.4.2021, as per the legislative mandate of the Finance Act 2021. So, the legal luminaries and taxpayers were having a sigh of relief on the logical and final closure of such search related assessments by the hon'ble Apex Court in the Abhisar Buildwell judgement.

But then came one CBDT Instruction No. 1 of 2023, 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 purportedly contains the guidelines for the AOs to uniformly implement the judgement of the hon'ble Supreme Court in the case of Abhisar Buildwell. However, even a cursory reading of the said instruction makes it amply clear that this instruction deals only with one objective in mind, and that is directing the AOs to reopen the

leading as well as all the tagged otherwise quashed cases in this judgement, and also all other similar pending appeals in respect of search related assessment cases, which are now otherwise to be considered as null and void, in the absence of the discovery of incriminating material during the course of search.

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.

This CBDT Instruction has conceived an out of the box fictional concept of 'time-travel' in the Income Tax Act. It visualises a scenario, wherein the new reassessment provisions of sections 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 assessments made pursuant to searches conducted before 1.4.2021, which otherwise had been quashed by the Apex court. The CBDT Instruction suggests that this time travel is possible by virtue of one particular section 150 of the Act, which gives leeway to the revenue authorities to disregard the time barring limitation period, for reopening of already completed assessments, specified in section 149 of the Act, in order to give effect to the finding of any Court, in any appeal proceedings. The CBDT Instruction has directed the assessing authorities that in order to give effect to the finding of the apex court in Abhisar Buildwell judgement that such otherwise quashed assessments may be reopened, under sections 147-148, the above stated limitation conditions can be bypassed and undermined.

Thus, this CBDT instruction very conveniently tries to use the very same apex court judgement of Abhisar Buildwell, which was infact perceived as a final death blow to the subject assessment cases, as a lifeline, to give a new lease of life to such otherwise dead and quashed assessments, and as a back door 'jugaad' to provide the AOs, with a new window of opportunity of reopening such assessments.

## **Why the CBDT Instruction No. 1 of 2023 may not hold its Ground on Merits before appellate authorities?**

The impending reassessments which will be made by the AO's pursuant to the said CBDT Instruction No. 1 of 2023 and the directions contained therein are amenable to be challenged and litigated before the appropriate appellate forums, and may not hold their ground on merits. There are plain, basic and simple lawful reasons for the same.

**Firstly**, the basic difference between the Ashish Agarwal judgement and the judgement in Abhisar Buildwell is that in the Ashish Agarwal judgement, the hon'ble Supreme Court has invoked Article 142 of the Constitution of India, and it is this invocation of the Article 142 which has enabled the hon'ble Supreme Court to override the substantive legal sanctity of the Finance Act 2021 and that too only to the extent of deeming the old reassessment notices as valid preliminary Reassessment Notices u/s 148A(b) of the Act, as per the new reassessment regime, inserted by the Finance Act 2021. However, in the Abhisar Buildwell judgement, nowhere in the entire judgement, the hon'ble Supreme Court has even mentioned leave aside pronounced that the reopening sections of 147 and 148 of the new reassessment regime applicable only w.e.f. 1.4.2021 and that too only in respect of searches which are conducted on or after 1.4.2021, can be issued to reopen the subject old search related assessment cases which clearly had been conducted prior to the stipulated cut-off date of 1.4.2021. This wishful inference has been drawn in the said CBDT Instruction on its own without any legal and factual backing and support of the Legislative Sections, or the hon'ble Supreme Court.

**Secondly**, 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 and embedded stipulation and condition that such reopening has to be subject to the fulfilment of the conditions specified in such sections. One of the prescribed compulsory conditions stipulated in the second proviso to section 149 of the Act is that the already completed assessments pursuant to searches conducted uptill 31.3.2021, can't be reopened under the new reassessment regime of sections 147-151, on or after 1.4.2021, as per the legislative mandate of the Finance Act 2021.

Thus, the sacrosanct, legislative and binding cut-off date of 31.03.2021, for the applicability of the new reassessment regime provisions of sections 147-151 of the act, only to the new search actions conducted on or after 01.04.2021, as stipulated by the second proviso to section 149 and as inserted by the Finance Act 2021, can't be given a flimsy and superficial go-by under the garb of section 150(1) of the Act, as it is the inherent and inbuilt condition of 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.

In simple words, it is not possible for or open to the CBDT or the revenue authorities that they give only partial effect to the observation/finding of the hon'ble Apex Court of the possibility of reopening of such quashed assessments u/s 147-148, selectively, without giving effect to the pre-condition of the fulfilment of the specified conditions therein, attached to this possibility. It is incumbent upon them to give effect to the inherent and embedded condition of reopening only subject to the fulfilment of the specified conditions therein, which include the cut-off date applicability of 31.03.2021 for the applicability of the new reassessment regime provisions of sections 147-151 of the act, only to the new search actions conducted on or after 01.04.2021, and not to the old search cases, which infact are the subject matter of the Abhisar Buildwell judgement of the Apex Court, as stipulated by the second proviso to section 149 and as inserted by the Finance Act 2021.

**Thirdly**, 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.

**Fourthly**, 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 applicability dates of the new reassessment regime to the searches conducted prior to 31.3.2021, can't be override by any self-serving interpretation.

**Fifthly**, the Revenue Authorities have even filed their Miscellaneous Application (MA) before the hon'ble Apex Court, seeking clarification for initiating reopening proceedings u/s 148, in respect of the subject tagged cases, within a period of sixty days. In response to the same, the hon'ble SC has declined to entertain this MA and has relegated the Revenue to file appropriate review petition for the relief sought in the MA. The hon'ble SC have observed that relief sought by the Revenue in the MA can be sought only in the review petition as it requires detailed consideration at length looking into the importance of the matter. While disposing of Revenue's MA, the hon'ble Apex Court has abstained from entering into its merits. As per the currently available domain information, the Revenue has not filed any review petition in this regard, before the hon'ble apex court, but instead has come up with this CBDT Instruction No. 1 of 2023 on 23.8.2023, without the backing and support of the hon'ble Supreme Court.

### **Concluding Remarks**

In current 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 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 provide a more stable, certain and conclusive taxation regime to the taxpayers, in order to ensure that the assessments reach finality and conclusiveness and are not left open inconclusive, infinitely. However, contrary to this legislative intent, a Tsunami of litigations is foreseeable and expected after this adventurous CBDT Instruction.

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