

EY Tax Alert

Delhi HC validates reassessment notice issued before 30 June 2021 for tax year 2012-13 in accordance with CBDT Instruction No. 1/2011 post SC ruling in Ashish Agarwal's case

Executive summary

Tax Alerts cover significant tax news, developments and changes in legislation that affect Indian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor.

This Tax Alert summarizes a recent Delhi High Court (HC) ruling in the case of Touchstone Holdings Pvt. Ltd.¹ (Taxpayer) wherein with respect to the issue of time barring of reassessment notice and order, the HC has upheld the validity of the reassessment notice and order dated 20 July 2022 for tax year (TY)² 2012-13 issued by the tax authority in accordance with the Supreme Court ruling in the case of Ashish Agrawal³ (SC ruling) and Central Board of Direct Taxes (CBDT⁴) Instruction 1/2022 (CBDT Instruction).

In the earlier round of litigation, reassessment notice, issued for TY 2012-13 on 29 June 2021 within the extension granted under the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act 2020 (Relaxation Act) but following the old regime of reassessment despite the enactment of new regime with effect from 1 April 2021, was set aside by HC as invalid. However, post the SC ruling in Ashish Agarwal's case, all these notices were revived and the tax authority was permitted to proceed with reassessment proceedings under the new regime.

¹ WPC 13102/2022, [TS-726-HC-2022(DEL)] dated 9 September 2022

² Period commencing from 1 April of one calendar year and ending on 31 March of the immediately subsequent calendar year

³ Union of India & Others v. Ashish Agarwal - Civil Appeal No. 3005/2022, Refer EY alert dated 5 May 2022 "SC validates reassessment notices issued between April and June 2021 following old procedure"

⁴ Apex body for administration of direct taxes in India

In the present case, being second round of reassessment proceedings so revived, the Taxpayer contended that as per the new scheme of reassessment which is effective from 1 April 2021 a notice cannot be issued for reassessment of given TY on or after 1 April 2021 if the time period for issuance of notice under the old regime of reassessment has already expired on the date of issuance of such notice (Grandfathering Provision). The tax authority, however, rejected the Taxpayer's contention citing the CBDT Instruction 1/2022 which was issued in the matter of implementation of said SC ruling in Ashish Agarwal's case and passed an order together with notice of reassessment dated 20 July 2022 which was challenged by the Taxpayer before HC in Writ.

The HC held that since the reassessment proceedings were initiated during the time extended by the Relaxation Act and were undisputedly within time, the Grandfathering Provision is not attracted in the facts of this case. According to the HC, the SC in Ashish Agarwal's case had declared the said reassessment notice as a notice issued under the new reassessment regime and permitted the tax authority to complete the reassessment proceedings. Therefore, the Taxpayer's challenge to the reassessment notice and order and the CBDT Instruction 1/2022 was not maintainable.

Background

- ▶ Finance Act (FA) 2021 had brought reformative changes for conducting reassessment proceedings under the Income Tax laws (ITL⁵) (new regime of reassessment) by substituting the old regime. The new regime of reassessment was effective from 1 April 2021.
 - ▶ **Old regime of reassessment:** The tax authority could reopen the past assessments if there existed reason to believe that income has escaped assessment. Though there was no requirement in the statute to supply reasons recorded to the taxpayer, the SC in the case of GKN Driveshafts v. ITO⁶ provided certain guidelines (e.g., to supply reasons to taxpayer if sought so, objections to be raised by taxpayer, if any, disposal of objections by speaking order, etc.) for conduct of reassessment proceedings under the old regime of reassessment. Such reopening was permissible within 5 years or 7 years or 17 years from the end of the TY, as the case may be. These provisions were applicable till 31 March 2021. However, in respect of period of reassessment notices falling due on 31 March 2020 and 31 March 2021 for past year/s, the date stand extended till 30

June 2021 by the CBDT, pursuant to powers conferred under the Relaxation Act promulgated during the onset of the COVID-19 pandemic and also Notification No. 20/2021 dated 31 March 2021 (March Notification) and Notification No. 38/2021 dated 27 April 2021 (April Notification) with their Explanations⁷.

- ▶ **New regime of reassessment:** Amongst other changes, the new regime of reassessment with effect from 1 April 2021 provides a separate mechanism to be followed by tax authority before issuing the notice for reopening assessments and is materially different than the procedure laid down under the old regime of reassessment applicable till 31 March 2021. Under the new regime of reassessment, tax authority is required to follow a pre-notice issuance procedure (a) conduct pre-notice inquiry on the basis of information in tax authority's possession which suggest that income has escaped assessment (b) provide an opportunity to taxpayer to support why reassessment should not be done and (c) pass an order if tax authority decides to proceed for issuing notice for reassessment. Additionally, there is obligation on tax authority to obtain approval from higher authorities at multiple stages under the new regime of reassessment. The new regime of reassessment provides for curtailed time limit of 4 years from the end of the TY in normal circumstances and extended time limit of 11 years from the end of the TY if escaped income exceeds INR5m and certain additional conditions are fulfilled. Separately, the extended time limit of 11 years is further curtailed to the extent of time allowed under the old reassessment regime (viz. generally 7 years) in case of TYs 2020-21 and earlier years (Grandfathering Provision).
- ▶ **Controversy in the first round of reassessment notices issued under old regime during April to June 2021 for past years:**
 - ▶ In the first round of litigation, the validity of notices issued between April and June 2021 under the erstwhile reassessment regime pursuant to the time extended under the Relaxation Act, despite the introduction of the new regime with effect from 1 April 2021, was questioned before various HCs. Most HCs ruled in favor of the taxpayers and quashed the reassessment notices, issued during the period from April to June 2021 for past TYs which were being issued following the old procedure of reassessment that was

⁵ Income Tax Act 1961 read with Income Tax Rules 1962

⁶ [2003] 259 ITR 19

⁷ Refer EY Tax Alert, "Delhi HC quashes reassessment notices issued between April to June 2021 following old regime of

reassessment" dated 17 December 2021 for a detailed explanation of the March and April Notification along with their Explanations

already substituted vide FA 2021 w.e.f. 1 April 2021.

- ▶ However, the matter travelled to the SC where the SC, in the case of **Ashish Agarwal** (*supra*), at the outset upheld the view of various HCs that any notice issued on or after 1 April 2021 post enactment of the new regime had to be issued only under the new regime and same could not have been issued in the old regime. However, considering that such view may impact the public exchequer⁸, the SC invoked the extraordinary power under Article 142 of the Constitution of India in order to render “complete justice” and upheld the validity of notices issued under the old regime by deeming the impugned reassessment notices as show-cause notices (SCN) under the new regime of reassessment for conducting pre-notice inquiry. However, the SC expressly held that all defences under the new reassessment regime including defence of limitation period and applicability of Grandfathering Provision to contest jurisdiction of the tax authority to take up reassessment would be available to taxpayers. The SC also provided directions to the tax authority to provide opportunity to the taxpayer by furnishing all material basis which assessment was reopened and passing a speaking order post considering the taxpayer’s objections as to why the taxpayer proposes to issue reassessment notice.
- ▶ The SC ruling had thus revived all the 90,000 cases where notices for reassessment were issued during April to June 2021.
- ▶ Taking cognizance of the SC ruling, the CBDT released Instruction 1/2022 explaining therein its understanding of the SC ruling and the way forward for implementation of the SC’s directions. The CBDT Instruction reiterated the way forward laid down by the SC ruling with respect to reassessment for different TYs involved in the controversy.
- ▶ With respect to the TY 2012-13 and 2013-14, CBDT Instruction 1/2022 stated that fresh notices as per new regime of reassessment can be issued for these cases with the approval of the specified authority, only if the case falls under the extended time limit of 11 years from the end of the TY as per new regime of reassessment. Accordingly, cases involving escaped income less than INR5m (small taxpayers) for these TYs were excluded from reassessment proceedings.

Litigation in second round: Present case

Facts of the case

- ▶ In this case, tax authority issued notice for reassessment for the given TY on the allegation that the Taxpayer and its group concerns were engaged in providing accommodation entries and the Taxpayer had received bogus premium and capital. Allegations were pursuant to certain findings revealed in search action being taken on Taxpayer’s other group entities and survey action on the Taxpayer. The Taxpayer however, disputed the allegations⁹.
- ▶ Tax authority originally had issued notice to the Taxpayer for reassessment of TY 2012-13 under old reassessment regime on 29 June 2021 (which was beyond the original due date of 31 March 2020) under the extension granted under the Relaxation Act, which, as aforesaid, stood revived in terms of SC ruling in Ashish Agarwal (*supra*).
- ▶ Post revival, tax authority proceeded with the proceedings further by calling for the Taxpayer’s objections to reassessment after furnishing the Taxpayer material available with the tax authority. It was case of the tax authority that since the escaped income exceeded INR5m, in terms of CBDT Instruction 1/2022, the said notice was treated as a notice issued under the extended limitation period of 11 years under the new reassessment regime and thereby directed the Taxpayer to show cause why reassessment should not be carried on in the case of the Taxpayer.
- ▶ Taxpayer’s contention that reassessment proceedings turned time barred under new regime due to operation of Grandfathering Provision was rejected by the tax authority in an order passed on 20 July 2022 disposing of the objections.
- ▶ Subsequently, notice for reassessment under the new reassessment regime was issued to the Taxpayer on 20 July 2022.

⁸ The SC noticed that more than 90,000 reassessment notices were issued following the old regime and invalidating these notices would have a detrimental impact on the public exchequer.

⁹ Taxpayer challenged the reassessment notice on factual finding also before HC which was also rejected by HC. However, the same is not covered in the present alert.

Issue before the HC

- ▶ The controversy can be understood having regard to different limitation period under old and new regime tabulated below as applicable to TY 2012-13 which has given rise to present controversy.

Limitation period under old regime		Limitation under new regime for cases involving escaped income >0.5m	
Particular	Date	Particular	Date
Time barring date for given year as per unamended old law	31 March 2020	Time barring date for general limitation period as applicable (11 Years)	31 March 2024
Extended time as per Relaxation Act as applicable to old regime	30 June 2021	Time barring date as per Grandfathering Provision as applicable to relevant TY (7 years)	31 March 2020
Date of issuance of reassessment notice in first round of litigation	29 June 2021	Date of deemed SCN/ reassessment notice	29 June 2021/ 20 July 2022
Whether notice is issued in time as per the old regime in time?	Yes	Is any of the notice issued in time?	Taxpayer claimed it being time barred having regard to Grandfathering Provision.

Taxpayer's contention

- ▶ The Taxpayer contended that notice issued (dated 29 June 2021) is time barred having regard to Grandfathering Provision wherein notice for reassessment cannot be issued beyond the period of 7 years (31 March 2020).

Tax authority's contention

- ▶ Tax authority contended that the reassessment notices issued on 29 June 2021 within time extended under Relaxation Act under old regime was in time and the proceedings which were taken in continuation as per the SC directions under new regime, therefore, are not time barred.

HC ruling

The HC held that the Taxpayer's challenge on notice being time barred as also on validity of the CBDT Instruction was not maintainable and accordingly ruled in favor of validity of the reassessment proceedings on the basis of the following:

- ▶ The initial notice in the present proceedings was issued under old regime on 29 June 2021 which was within time extended by Relaxation

Act and there was no dispute that it was not time barred.

- ▶ Original notice issued on 29 June 2021 was quashed by Delhi HC in the present case in the first round of litigation on the ground that notice issued under old regime post enactment of new regime with effect from 1 April 2021 is not valid. However, the said notice stood revived due to SC ruling in Ashish Agarwal's case.
- ▶ The SC in Ashish Agarwal's case had declared that the said reassessment notice be deemed as a notice issued under the new reassessment regime and permitted the tax authority to complete the reassessment proceedings.
- ▶ According to HC, since the time period for issuance of reassessment notice for TY 2012-13 under the old regime itself stood extended until 30 June 2021, the Grandfathering Provision is not attracted in the facts of this case.
- ▶ Consequently, the Taxpayer's challenge to CBDT circular to that extent is also not maintainable.

Comments

The present ruling is the first in line post the SC ruling in the case of Ashish Agarwal dealing with applicability of limitation period as also validity of the CBDT Instruction with respect to issuance of reassessment notice for TY 2012-13. The said issue is also presently pending before the Punjab and Haryana HC and Calcutta HC.

The SC ruling itself was exceptional wherein the SC had invoked its extra ordinary powers under Article 142 of the Constitution to rescue the bundle of reassessment notices which were under challenge to protect the interest of revenue. It was expected that when the SC ruling is applied to individual taxpayer, it is likely to give rise to further litigation on a number of issues. To an extent, the CBDT circular clarifying its understanding about SC ruling also added to the areas of probable controversies. Present issue before HC is one of such issues.

The HC ruling appears to give impression that the it has proceeded on the basis that the proceedings post revival of the reassessment notices by the SC in Ashish Agarwal's case represent continuation of the proceedings initiated under the old regime. Basis such an understanding of law, the HC held that reassessment notice issued under extended period of Relaxation Act under old regime may override Grandfathering Provision enacted under new regime which prohibited the tax authority to reopen case for TY up to 2020-21 beyond the period of 7 years.

It may be for consideration whether certain other factors narrated in the SC ruling in Ashish Agarwal's case will have any bearing on the conclusion of HC in the present case. For instance, firstly, the SC ruling affirms that any notice for reopening the past year issued on or after 1 April 2021 can be issued only under new regime of reassessment and it cannot be issued under old regime of reassessment. Implied therein, therefore, are instructions of the SC that the validity of notice, as also applicability of limitation period, need to be examined completely under the new regime of reassessment on a standalone basis. Secondly, the SC had upheld various HCs' decision to the effect that notices issued under old regime of reassessment were bad in law but expressed a concern that judgements of HCs would result in no reassessment proceedings at all "even if the same are permissible under the Finance Act 2021 and as per substituted sections of 147 to 151 of the IT Act". The SC ruling reviving the notices is to be read in this context. Thirdly, the SC in Ashish Agarwal's case has categorically preserved the taxpayer's right to challenge the proceedings under new regime on the issue of time barring despite reviving the old notices. These observations appear to suggest that the SC kept open the issue of limitation period including applicability of Grandfathering Provision as per new regime in appropriate cases. Combined reading of all above appears to suggest that fresh life to notices issued is permissible only where notices are otherwise not time barred under new regime of reassessment. Unfortunately, the present HC ruling does not notice or deal with any of these aspects at all.

The HC ruling is first in line. Being a ruling against the taxpayer, it may pose additional challenge for other taxpayers which are similarly placed and whose matters are pending before the different HCs.

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