

EY Tax Alert

Gujarat and Allahabad HCs hold reassessment notices for TYs 2012-13 and 2013-14 issued during April to June 2021 and revived earlier by SC, barred by limitation

Executive summary

EY 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 recent rulings of the Gujarat High Court (HC), dated 7 February 2023, in a batch of cases with the lead case being Keenara Industries P. Ltd.¹ and the Allahabad HC, dated 22 February 2023, in a batch of cases with the lead case being Rajeiv Bansal². Common issue for consideration before the HCs in the instant cases was whether the reassessment notices, revived by virtue of the Supreme Court ruling in the case of Ashish Agarwal³ for tax years (TYs) 2013-14 and 2014-15, were barred by limitation.

Vide the promulgation of The Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020 (Relaxation Act) read with Notifications issued thereunder during the onset of the COVID-19 pandemic, the period of reassessment notices under old regime falling due on 31 March 2020 and 31 March 2021 for past year/s, was extended from time to time till 30 June 2021.

The new reassessment regime which substituted the old reassessment regime, with effect from 1 April 2021, provides for a curtailed time limit of four 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. However, where reassessment involved is for TYs 2020-21 and earlier years, the extended time limit of 11 years is curtailed to the extent of time allowed under the old reassessment regime (viz. seven years).

¹ [TS-45-HC-2023(GUJ)]

² [TS-74-HC-2023(ALL)]

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"

The SC, in Ashish Agarwal's case, by exercising its extraordinary powers under Article 142 of the Constitution of India, upheld the validity of notices issued between 1 April 2021 and 30 June 2021 (extended period) following the old regime by converting these notices to show cause notices under new reassessment regime enacted with effect from 1 April 2021 but subject to defenses available to the taxpayers including on account of limitation period, if applicable.

The HCs held that reassessment notices so revived pursuant to SC ruling in Ashish Agarwal's case for the given TYs being issued beyond the limitation period of seven years are barred by limitation. The HCs also held that the Central Board of Direct Taxes' (CBDT) Instruction to the extent it provided guidance to tax authority to consider the time limit under new reassessment regime after taking into consideration the extension provided under Relaxation Act is not consistent with the correct interpretation of law and the SC ruling in Ashish Agarwal's case.

Background

► **Old regime of reassessment:** The tax authority could reopen the past assessments if there existed a 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. ITO*⁴ 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 five years or seven years or 17 years from the end of the TY, as the case may be. These provisions were applicable till 31 March 2021.

► **Relaxation Act:** Vide the promulgation of The Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020 (Relaxation Act) during the onset of the COVID-19 pandemic, various due dates for compliance by taxpayers as also by tax authority were relaxed and further time was provided. In respect of the period of reassessment notices falling due on 31 March 2020 and 31 March 2021 for past year/s, the CBDT, pursuant to the powers conferred under the Relaxation Act through Notification No. 20/2021 dated 31 March 2021 (March Notification) and Notification No. 38/2021 dated 27 April 2021 (April

Notification) with their Explanations⁵ extended dates from time to time till 30 June 2021.

► **New regime of reassessment:** Finance Act (FA) 2021 substituted provisions for conducting reassessment proceedings under the Income Tax laws (ITL⁶) (new reassessment regime). The new reassessment regime 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 reassessment regime, 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 an obligation on the tax authority to obtain approval from higher authorities at multiple stages under the new reassessment regime. The new reassessment regime provides for curtailed time limit of four 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 INR 5mn and certain additional conditions are fulfilled. However, where reassessment involved is for TYs 2020-21 and earlier years, the extended time limit of 11 years is curtailed to the extent of time allowed under the old reassessment regime (viz. seven years) (Grandfathering Provision).

► First round of litigation:

- In the earlier round of litigation, issue arose on the validity of notices issued between April 2021 and June 2021 under the old reassessment regime pursuant to the time extended under the Relaxation Act, despite the introduction of the new reassessment regime with effect from 1 April 2021.
- Most HCs in response to taxpayers' writ petitions challenging the notices ruled in favor of the taxpayers and quashed the reassessment notices as being invalid. Some of these cases travelled to the SC.
- **Supreme Court in case of Ashish Agarwal⁷:** The SC, while disposing off a bundle of appeals by the tax authority, at the outset upheld the view of various HCs that any notice issued on or after 1 April

⁴ [2003] 259 ITR 19

⁵ 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

⁶ Income Tax Act 1961 read with Income Tax Rules 1962

⁷ 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"

2021 post enactment of the new regime had to be issued only under the new regime and same could not have been issued under 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 reassessment regime for conducting pre-notice inquiry. However, the SC expressly held that all defenses under the new reassessment regime including the defense of limitation period 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 tax authority proposes to issue reassessment notice.

The SC ruling thus revived all the 90,000 cases where notices for reassessment were issued during April to June 2021.

- ▶ CBDT Instruction 1/2022 dated 11 May 2022⁹ (CBDT Instruction)
 - Taking cognizance of the SC ruling, the CBDT released Instruction explaining therein its understanding of the SC ruling and the way forward for implementation of the SC’s directions.
 - CBDT Instruction suggested that the SC ruling, read together with time extensions provided under Relaxation Act, will permit issuance of extended reassessment notices to travel back in time to their original date and new reassessment regime limitation period (4, 7 or 11 years) to apply at that point in time. Accordingly, CBDT Instruction provided the following directions to deal with extended reassessment notices:
 - With respect to the TY 2012-13, 2013-14 and 2014-15, fresh notices as per new regime of reassessment can be issued only if the case falls under the extended time limit of 7 or 11 years from the end of the TY as per new reassessment regime.

- With respect to the TY 2015-16 and 2016-17, fresh notice as per new reassessment regime can be issued considering the four years’ time limit from the end of the tax year under the new regime to be read together with time extension granted under Relaxation Act.

Illustratively, for the TY 2015-16 and 2016-17, the time limit under new regime of 4 years from end of TY would stand expired on 31 March 2020 and 31 March 2021 respectively. However, in light of Relaxation Act, the same stands extended upto 30 June 2021 and thus notice issued during April to June 2021 falls within threshold of four years category under new reassessment regime

▶ Second round of litigation:

- In the second round, issues primarily arose on validity of notices being time barred for TYs 2012-13 and 2013-14 and validity of CBDT Instruction to the extent it directed the tax authority to consider cases of TYs 2015-16 and 2016-17 as being covered by category of four years period from end of TY under New reassessment regime. First of the controversy came up before Delhi HC in the case of Touchstone Holdings Pvt. Ltd¹⁰, followed by Gujarat and Allahabad HC rulings in a batch of writ petitions filed by taxpayers, which are the subject matter of the present alert.
- **Delhi HC in case of Touchstone Holdings Pvt. Ltd¹¹.**
 - 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*).
 - In terms of SC ruling in the case of Ashish Agarwal (*supra*), tax authority had issued SCN under the new reassessment regime calling for taxpayer’s objections against reassessment. Tax authority vide its order rejected taxpayer’s contention that proceedings are time barred and

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 Refer EY Tax Alert, “CBDT issues instructions to tax authority for implementing Supreme Court directions and to conduct reassessment

proceedings for cases where notices were issued between April and June 2021”

¹⁰ WPC 13102/2022, [TS-726-HC-2022(DEL)] dated 9 September 2022

¹¹ 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”

issued reassessment notice which was challenged before Delhi HC in a writ.

- Disposing of the writ, Delhi HC held that 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. Consequently, the Taxpayer's challenge to CBDT circular to that extent was held also not maintainable.

► **Gujarat¹² & Allahabad¹³ HC rulings in second round of litigation**

Common issue in both HCs ruling is whether revised reassessment notices issued for TYs 2012-13 or 2013-14 consequent to the decision of SC in the case of Ashish Agarwal (*supra*) are beyond the limitation period and hence are invalid. Additionally, Allahabad HC also dealt with reassessment notices issued for TYs 2014-15, 2015-16 and 2016-17. Further issue raised was whether CBDT Instruction to the extent it provided guidance to tax authority to consider time limit under new reassessment regime after taking into consideration extension provided under Relaxation Act is valid in law.

For ease of reference, alert captures facts involved in Gujarat HC ruling as representative case while contentions of the taxpayers and tax authority, and conclusion remain largely same/similar in both HC rulings.

○ **Facts of the case**

- In the facts before Gujarat HC, tax authority had originally issued reassessment notice between 1 April 2021 and 30 June 2021 under old reassessment regime for TY 2013-14 pursuant to time extended granted under Relaxation Act. This notice was set aside by HC in the first round of litigation and the proceedings were revived pursuant to SC decision in the case of Ashish Agarwal (*supra*).
- In the second round, consequent to the decision of SC in the case of Ashish Agarwal (*supra*), the Taxpayer was issued a SCN on 28 May 2022 along with relevant material on the basis of which there was an allegation that income exceeding INR 5mn had escaped assessment. The Taxpayer filed a detailed response on 9 June 2022, and apart from merits of matter, also challenged the reopening of assessment as being beyond seven

years from TY of applicable limitation period.

- The tax authority, however, passed an order rejecting taxpayer's objections and issued a reassessment notice under on 26 July 2022 under new assessment regime.
- Taxpayer filed writ petition before the HC challenging the reassessment notice and the order disposing of the taxpayer's objections as being barred by limitation.

○ **Taxpayer's contentions**

- Reassessment notice issued under new reassessment regime could be issued on or after 1 April 2021 only if it was not barred by limitation under the old reassessment regime. For TY 2012-13, notice under old regime could have been issued only upto 31 March 2021. Notice issued on 26 July 2022 in the instant case was thus time barred.
- The extension granted by Relaxation Act upto 30 June 2021 was applicable to notices issued under the old reassessment regime. On introduction of new assessment regime w.e.f. 1 April 2021, the old reassessment regime stood obliterated. In absence of the old reassessment regime, Relaxation Act could not operate in vacuum.
- Relaxation Act cannot be applied to new reassessment regime which was introduced with effect from 1 April 2021.
- CBDT Instruction stating that Relaxation Act would allow the extended reassessment notices to travel back in time to the original date of notice is invalid.

○ **Tax authority's contentions**

- The reopening was on the basis and directions of the SC ruling in the case of Ashish Agarwal (*supra*), and thus, the question of it being barred by limitation did not arise.
- Tax authority relied on the Delhi HC decision in the case of Touchstone Holidays Pvt. Ltd. (*supra*). In that case, HC upheld the validity of notice issued under extended period between 1 April 2021 to 30 June

¹² Lead matter - Keenara Industries P. Ltd

¹³ Lead Matter - Rajeev Bansal

2021 pursuant to Relaxation Act for TY 2012-13 with escaped income being more than INR 5mn which was converted into SCN pursuant to SC ruling in Ashish Agarwal (*supra*).

○ **HCs' rulings:**

HCs held that reassessment notices so revived pursuant to SC ruling in Ashish Agarwal's case for given TYs being issued beyond limitation period of seven years are barred by limitation. Benefit of extension as granted by the Relaxation Act does not apply to new reassessment regime. Following are the key observations of the HCs:

▪ **Taxpayer can challenge notice which was issued post revival of proceedings pursuant to SC ruling in Ashish Agarwal:**

- HC observed that the SC ruling in Ashish Agarwal (*supra*) while reviving notices issued under old reassessment regime and converting them into SCN, had kept all the defenses including those related to limitation period available to the Taxpayer alive. SC was conscious that its ruling should not prejudice rights of the parties and hence, kept all contentions open. Thus, right to challenge the notice on the ground of limitation is available to the Taxpayer in view of the SC's observations. Tax authority's contention to the contrary is thus not valid.

▪ **Notice is barred by limitation**

- HC noted SC ruling in Ashish Agarwal to the effect that new reassessment regime being remedial and benevolent in nature and substituted with a specific aim and object to protect rights and interest of the taxpayers and same being in public interest, respective HCs have rightly held that the benefit of new regime shall be made available even in respect of the proceedings relating to past tax years where reassessment notice has been issued on or after 1 April 2021.
- HC referred to SC ruling in Ashish Agarwal wherein it was held that post 1 April 2021, extension of Notification of Relaxation Act to old reassessment regime by the tax

authority, was a bonafide mistake. Basis such mistake of law committed by the tax authority, the SC permitted the application of new reassessment regime to all notices issued on or after 1 April 2021, for balancing the interest of tax authority. It supports that issuance of notices on or after 1 April 2021 can be only under new reassessment regime.

- Further, HC observed that time limit for issuance of reassessment notice under the new regime is reduced to four years from the end of TY in general, and extended upto 11 years from end of TY where income chargeable to tax escaped assessment is more than INR 5 Mn. However, in respect of TY 2020-21 and earlier year to which Grandfathering provision to apply, tax authority is prevented from issuance of reassessment notice by taking a recourse of larger period of limitation prescribed under new reassessment regime if same has turned time barred (beyond seven years period) under the old reassessment regime on date of issue of notice.
- Basis above, all reassessment notices issued between 1 April 2021 and 30 June 2021 are to pass the test of new reassessment regime including on limitation test of seven years applied in respect of TY 2020-21 and earlier year.
- For TY 2012-13 and 2013-14, limitation period for issuance of notice under old reassessment regime expired before 1 April 2021 and hence, no notice under new reassessment regime can be issued for these TYs beyond 1 April 2021.
- Further, Relaxation Act does not extend limitation period prescribed under old reassessment regime which remained at seven years from end of TY. Also, new reassessment regime while enacting provisions with effect from 1 April 2021 makes reference to time limit prescribed under old reassessment regime being

seven years from end of relevant TY. This time limit is not altered by Relaxation Act. Thus, while applying new reassessment regime to notice issued on or after 1 April 2021, limitation to reopen TYs upto 2020-21 of seven years alone is relevant.

▪ **Relaxation Act and extension granted thereunder do not apply to new reassessment regime:**

- Notifications issued under the Relaxation Act were applicable to the old reassessment regime and once the old regime is substituted by FA 2021 with effect from 1 April 2021, the notifications could not extend limitation period of old reassessment regime. In Ashish Agarwal's case, the SC had not disturbed the findings of various HCs on the Notifications in so far as it extends time limit beyond 31 March 2021 being ultra vires.
- Under new reassessment regime, there is no saving provision for tax proceedings under old reassessment regime. Legislature which was aware of Relaxation Act as also Notifications issued thereunder did not provide for any saving clause. There is thus legislative intent to bring an end to possibility of any fresh proceedings being initiated under old reassessment regime post 1 April 2021.
- HCs also observed that the Relaxation Act was a subsidiary legislation, whereas the reassessment provisions under ITL was the principal legislation. Since the entire reassessment provisions were substituted by virtue of amendment by FA 2021, the Relaxation Act and Notifications issued thereunder could not have any effect after such amendment. The relegated power cannot be exercised to nullify the commencement of new reassessment regime. Also, scope of Relaxation Act

does not extend to revive old reassessment regime which stood repealed with effect from 1 April 2021.

- New reassessment provisions were not on statute book when Relaxation Act was introduced. Thus, Relaxation Act cannot be read into new reassessment regime which has come into force from 1 April 2021.
- HCs referred to SC ruling in the case of State of Madhya Pradesh v Cadia Leather and Liquor Ltd¹⁴ for the proposition that repeal of old provision is inferred by necessary implication and in case of conflict, later provision would prevail.

▪ **Validity of CBDT Instruction**

- HCs noted the CBDT Instruction wherein it was clarified that in view of the SC ruling in Ashish Agarwal's (*supra*) and the extension under the Relaxation Act, reassessment notices could travel back in time to their original date and then the time limit under new reassessment regime would apply.
- HCs while noticing that the travel back theory being repugnant to other provisions of new reassessment regime, held that effect of such view is to make the new law applicable retrospectively to reassessment notices from such original date. Since the amendment substituting the reassessment provisions was prospective and not retrospective, the travel back theory would not be permissible.
- HCs further held that the CBDT Instruction could not override the reassessment provisions under ITL or the SC ruling. Even though, the new reassessment regime was in force at the time of issuance

¹⁴ 2003 (7) SCC 389

of notice, if the tax authority was still allowed to choose and apply the repealed and substituted provisions, the objective of the legislature introducing new reassessment regime would be defeated.

- CBDT in its Instruction has applied the SC decision in piecemeal without giving complete effect to the directions as laid down by SC itself and thus provided a distorted picture. HC also remarked that CBDT has made surreptitious attempt to circumvent the decision of SC.
 - CBDT instruction which permits tax authority to act beyond the jurisdiction prescribed under the statute is ultra vires the provisions of new reassessment regime.
 - CBDT Instruction, based on erroneous interpretation of and is contrary to SC ruling, is not binding.
- **Delhi HC ruling in the case of Touchstone Holdings is incorrect:**
- Delhi HC proceeded on the erroneous basis that notice issued during April to June 2021 was issued within the permissible extended time by virtue of Relaxation Act and Notifications issued thereunder and was legal, valid and within time frame and hence, HC respectfully disagreed with view taken by Delhi HC ruling.

Comments

The overlap of the extension granted for issue of reassessment notices under old regime during 1 April 2021 to 30 June 2021 pursuant to the Relaxation Act, and the new reassessment regime introduced w.e.f. 1 April 2021 had given rise to a long-drawn litigation.

In the first round of litigation, most of the HCs unanimously quashed the reassessment notices issued during the extended period under the old reassessment regime, despite the new reassessment regime being already in force. The SC, in its unique ruling in the case of Ashish Agarwal (*supra*) revived the reassessment notices in approximately 90,000 cases by invoking its extraordinary power under Article 142 of the Constitution of India in larger public interest, subject to the applicable limitation period prescribed under the new reassessment regime.

The controversy in the first round of litigation was put to rest by the SC. However, as was expected, the SC ruling has opened up further litigation. CBDT Instruction, which clarified its understanding of the applicability of Relaxation Act to the new reassessment regime, has further added to the controversy.

In the second round of litigation, Gujarat and Allahabad HCs have held reassessment notices for TYs 2012-13 and 2013-14 to be beyond the limitation period of seven years and thus barred by limitation. Thus, the fresh lease of life given to the reassessment notices by virtue of the SC ruling is short-lived, now on the ground of limitation.

Further, the Gujarat and Allahabad HCs disagree with the contrary view of the Delhi HC in Touchstone Holdings Pvt. Ltd.'s case (*supra*).

Additionally, the CBDT Instruction to the extent it provides guidance to the tax authority to consider time limit under a new reassessment regime after taking into consideration the extension provided under the Relaxation Act was found to be inconsistent with the SC ruling.

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