

Tax Alert

**Bombay High Court quashes reassessment notices as null and void. States that explanations to Taxation and Other Laws (TOLA) notifications are ultra vires**



# Bombay High Court quashes reassessment notices as null and void. States that explanations to Taxation and Other Laws (TOLA) notifications are ultra vires

The provisions for reopening the assessment contained in the Act have undergone a huge change. As per this newly introduced provision, before issuing a notice for reassessment, the assessing officer (AO) must conduct an inquiry with respect to the information which suggests that income chargeable to tax has escaped assessment. The AO is also required to allow the taxpayer to be heard while conducting such an inquiry. Basis material available on record, including the reply of the assessee, the AO is required to decide whether or not the case is fit for issuance of notice for reassessment.

The old procedure of conducting reassessment is given a complete go-by and the power of the AO to reopen the matters only when the AO had the reason to believe that the income has escaped the assessment is now history. The said new procedure is made applicable from 1 April 2021. However, the Central Board of Direct Taxes (CBDT) issued notifications under TOLA (Relaxation and Amendment of Certain Provisions) Act, 2020, extending the time for issuance of notice for reassessment.

In several cases, based on notifications issued by the CBDT under TOLA, the tax authorities issued notices for reassessment. However, the taxpayers believed that no escape clause allowed the AO to carry out the reassessment under the old regime even after 1 April 2021. Being aggrieved by the same, several Writ Petitions were filed in various courts, including the Bombay High Court (HC).

In writ proceedings, the Hon'ble Bombay HC has quashed all the reassessment notices issued post 31 March 2021, which were not in accordance with the mandatory procedure laid down u/s 148A of the Income Tax Act, 1961 (the Act) as inserted by the Finance Act, 2021 w.e.f. 1 April 2021. HC states that it fully agrees with the views taken by the Delhi HC, Allahabad HC, Rajasthan HC, Calcutta HC, and Madras HC and holds the impugned explanations to the notifications under TOLA as ultra vires, therefore, bad in law and null and void. However, the HC has held that the concerned AO can initiate fresh reassessment proceedings after strictly complying with the provisions of the Act.

The key arguments of both the parties and the verdict of the Hon'ble Bombay HC are captured hereunder:

## Facts of Case

- In the case under consideration, reassessment notices have been issued after 1 April 2021 under the old regime, under the grab of various notifications. The said notice was issued without following the newly laid down procedure, effective from 1 April 2021.
- Against such notices issued, the taxpayer filed a writ petition before the Hon'ble Bombay HC with a plea to nullify the said notice.

## Contentions of the Appellant

- Upon enactment of the Finance Act, 2021, the provisions contained in the Act pertaining to reassessment of income stood substituted by a new set of provisions and upon such substitution, the old provisions ceased to exist. There is no indication that the legislature desired to retain the old provisions for the past period in express terms or implied.
- Any action of issuance of notice for reassessment taken after 1 April 2021 must be in accordance with the amended provisions. Insertion of new provisions and substitution of the old would have the effect of repealing the old provisions, which would cease to have any applicability thereafter.
- The Relaxation Act merely authorized the government to extend the time limits contained in the specified Act. It did not include doing away with the laid down procedure or power to issue any explanation or clarification contrary to any other enacted law.
- The explanations contained in the various notifications are thus ultra vires the powers of the subordinate legislation and, therefore, unconstitutional. Under the taxing statutes, there is no scope for intendment. If two views are possible, one favoring the assessee should be taken.
- It was pointed out that the Division Bench of Allahabad, Rajasthan, Delhi, Madras, and one Judge from Calcutta HC have already decided on the said issue in favor of the taxpayer. Being Pan-India legislation in taxation, the Court should strive to achieve consistency. This Court should follow the view adopted by these Courts.

## Contentions of the Revenue

- The substitution of old provisions for the reopening of assessment would not obliterate the previous set of statutory provisions. They would continue affect the past period, i.e., for assessment years upto 31 March 2021. If the notice for reopening assessment were issued for any period prior to 1 April 2021, the provisions as they stood at the relevant time would apply. There was no requirement of following the newly laid down procedure before issuing notice for reassessment in such a case.
- The current situation is unprecedented that has arisen because of COVID-19 and requires extraordinary measures. The taxpayers cannot take advantage of the unusual circumstances. TOLA was therefore framed for giving an extension of time limits for taking actions and adhering to compliances. These extensions were for the benefit of both - actions that had to be taken by the Revenue and compliances that had to be made by the taxpayers.
- Therefore, the CBDT, in the exercise of powers conferred under TOLA, has issued a necessary explanation that merely clarifies which statutory provisions. This explanation makes explicit what is otherwise implicit under the Act. The same is well within the power of the government.
- All reopening notices challenged have been issued in accordance with/under the unamended provisions of the Act, as the provisions of TOLA empowered the AOs to do so. The case of the Revenue is not that the old provisions apply after 1 April 2021, but that TOLA empowers the AO to issue notices under the old law.
- TOLA is a beneficial legislation that relaxes requirements in specified Acts for both assesseees and Revenue alike, which must be given a purposive interpretation.

## Questions posed before the Hon'ble Bombay HC

- Would the old provisions survive after introducing new provisions for reassessment with effect from 1 April 2021, and could it be used for issuing notices for reassessment for the past period?
- Are the explanations in the CBDT Circulars/Notifications are legal and valid?

## Verdict from the HC

After considering the arguments of both parties, the HC quashed all the reassessment notices and made the following observations:

- It is well settled that the validity of notice for reassessment is to be judged based on the law existing on the date of such notice. CBDT, in one of its Circulars<sup>1</sup>, explaining the relevant provisions, specifically sets out that any notices issued by Revenue after the amendment made by the Finance Act, 1989 must comply with the amended provision of the law. Therefore, in the case under consideration, notice issued after 1 April 2021 must comply with the amended provisions of the Act.
- This new amended reassessment procedure, in a way, codifies the procedure prescribed in the well-known case of the Supreme Court in GKN Driveshafts (India) Ltd. V/s. Income Tax Officer.

- Furthermore, to uphold the arguments of the Revenue, either a savings clause, or a specific legislative enactment deferring the applicability of the amended provisions would be required. No such savings clause or enactment is available.
- Even though TOLA was in existence when the Finance Act, 2021 was passed, the parliament has specifically made the amended provisions of reassessment applicable with effect from 1 April 2021. Therefore, the legislature's intention is clear that substituted provisions must apply to notices issued with effect from 1 April 2021.
- A plain reading of the explanations in CBDT's Notifications<sup>2</sup> proposing that the extended timelines for issuance of notices for reassessment are justified, which ultra vires the TOLA.

1. Circular No.549 of 1989

2. Nos. 20 of 2021 and 38 of 2021

## Our Comments



There was a lot of discomfort in the industry when the CBDT issued notifications under the TOLA stating that the reassessment notices could be issued even post 1 April 2021 without following the new procedure enacted by the parliament. All the discomfort is now put to rest as the HCs accept that subordinate legislation (i.e. TOLA) has a restricted scope limited to the Parent Act only (i.e. the IT Act). By way of explanation, the subordinate legislature cannot revive the statutory provisions which had already lapsed.

While this decision would be welcomed with open arms by the taxpayers, it is important to note that the decision of Allahabad HC has been challenged before the Apex court. It would be interesting to see how the Apex court would deal with such notices. As the last word on the reassessment controversy is yet to be said, there would be another series of arguments that we would witness from both sides while arguing the matter before the Apex court.

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