

# Practical Aspects of Reassessment u/s 147 & Recent Pronouncements on Penny Stocks

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# What is Reopening of Assessment and Why

- Reassessment is one of the distinguishing weapon with the Assessing Officer to assess, reassess or re-compute the income which has escaped assessment.
- There are certain limitations with the department in assessment u/s. 143(3) viz. Time and Strength
- So, in reassessment, the AO possessing information regarding the escaped income can reassess the income of the assessee.

- You can run but can't hide: Modi's long arm reaches out for tax evaders



# Reopening of Assessment u/s 147

- Preconditions for reopening assessment u/s 147:
  - Record the reasons u/s 148(2) for taking the actions u/s 147.
  - Reason to believe that income chargeable to tax has escaped assessment.
- Recorded reasons must have a live link with the formation of the belief.

# Law laid down in GKN Driveshaft

- GKN Driveshaft (India) Ltd. vs ITO 259 ITR 19
  - After notice u/s 148 is issued
    - Assessee to file a return in response to notice u/s 148
    - Seek reasons for issuing notice u/ s 148
    - AO bound to furnish reasons within a reasonable time
    - Assessee to file his objections against issuance of notice u/s 148
    - Assessing Officer bound to dispose of the objection by passing a speaking order.

# Procedure to be Followed

- The AO must have reasons. Existence of reasons is mandatory.
- AO must form a belief that income has escaped assessment.
- AO must record the reasons in writing
- AO must obtain the sanction from the authority as prescribed u/s 151.
- AO must issue the notice u/s 148 within the prescribed time limit.

# Procedure to be Followed

- AO must serve notice upon the assessee
- Assessee shall submit his return within the prescribed time limit or communicate about considering earlier return as in response to notice u/s 148.
- Issue notice u/s 143(2)
- Assessee can demand the reasons for reopening the assessment and AO bound to provide the same
- If no reasons are demanded, AO can proceed to complete the assessment
- Assessee can raise his objections on reopening.

# Procedure to be Followed

- AO to reject the objections by passing a speaking order.
- Assessee can file writ before the High Court if aggrieved by the objection and re-assessment proceedings
- File details and advance all the arguements
- Assessment to be completed by passing a order within the prescribed time limit



# Assessing Officer must have reasons to believe

- Reopening cannot be done merely on the basis of suspicion.
- Reopening cannot be done on the basis of borrowed satisfaction.
- Proceeding u/s 148 cannot be initiated to review the earlier opinion.
- No reassessment to make an enquiry or verification
- Reopening merely on the basis of information provided by other person or other officer is bad-in-law, if no application of mind by the AO.
  - CIT vs Smt. Laxmi Mehrotra [2014] 41 taxmann.com 427 (All. HC)
- Proceeding u/s 148 cannot be initiated
  - On audit objections.
  - To review the earlier opinion

# Order to be passed within the prescribed time limit

- Section 153 – Time Limit for Reassessment
  - 9 months from the end of the FY in which notice u/s 148 has been served
  - If a reference to TPO has been made the time limit will be 21 months from the end of the FY in which notice u/s 148 has been served.

# Assessing Officer to mention the failure (proviso to s. 147)

- Where already 143(3) or 147 done and more than 4 years from end of A.Y.
- Reasons should
  - clearly indicate the failure on the part of the assessee.
  - explain what the material was that was not disclosed by the assessee.
- Mere reproduction of the language of the provision will not suffice.
- Supplying reasons
  - while disposing the objections or
  - providing them in counter-affidavit will not suffice.

# Assessing Officer to mention the failure (proviso to s. 147)

- Supporting Decisions:
  - Hindustan Lever Ltd vs R.B. Wadkar [2004] 268 ITR 339 (Bom)
  - HCL TECHNOLOGIES LTD. vs DCIT 397 ITR 469(Del)
  - ORACLE INDIA PRIVATE LIMITED vs ACIT 397 ITR 480 (Del)

# AO must form a belief

- AO should have tangible material to reopen
- AO should have reason to believe that income has escaped assessment
- Mere 'change of opinion' cannot per se be reason to reopen
  - CIT vs. Kelvinator of India Ltd. 320 ITR 561 (SC)

# AO must obtain sanction from prescribed authority u/s 151

- Section 151  sanction for issue of notice u/s 148 to be taken from

Situation	Permission to be taken from
If notice to be issued after the expiry of a period of four years	Pr.CCIT/CCIT/Pr.CIT/CIT
In any other case	ITO/ACIT/DCIT requires permission of Joint Commissioner

# AO must obtain sanction from prescribed authority u/s 151

- Sanction issued by Pr. CCIT/CCIT/Pt.CIT/CIT instead of JCIT.
- Can satisfaction by one authority be substituted by the other?
  - Held no.
  - Authority designated to record his / her satisfaction alone should record the same.
  - Power to be exercised by an officer cannot be exercised by a superior officer.

# AO must obtain sanction from prescribed authority u/s 151

- Supporting Decisions
  - GHANSHYAM K. KHABRANI vs ACIT 346 ITR 443 (Bom)
  - CIT vs SPLs SIDDHARTHA LTD. 345 ITR 223 (Del)



# Manner of recording the sanction

- Manner of recording the sanction
  - Sanctioning authority merely cannot affix the 'yes' stamp and sign
  - It suggests that the decision was taken in a mechanical manner
  - Not a sufficient compliance u/s 151
    - Chhugamal Rajpal vs S. P. Chaliha & Ors 1971 AIR 730 (SC)
    - Central India Electric Supply Co. Ltd. v. ITO (2011) 51 DTR 51 (Del.)(H C)

# Time limit for issuing notice u/s 148

- S. 149 – Time limit for issuing notice u/s 148

Amount of escaped income	Time limit within which notice u/s 148 can be issued
Less than Rs 1,00,000	4 years from the end of the relevant AY
Rs 1,00,000 or more	6 years from the end of the relevant AY
Income related to assets located outside India	16 years from the end of the relevant AY

# Assessee to file his return within the prescribed time period.

- In response to notice u/s 148 the assessee may:
  - File a return electronically u/s 148 or
  - File a letter stating

*‘The assessee has filed the original return of income for the AY \_\_\_ dated \_\_\_. The original return filed on \_\_\_ should be considered as a return filed in response to notice u/s 148.*

*We further request your good self to kindly provide us the reason recorded for re-opening the assessment which would enable us to file proper objections / details.’*

# AO to issue notice u/s 143(2)

- Notice u/s 148 issued
- Assessee filed his return u/s 148
- Assessing Officer bound to issue notice u/s 143(2)
- Sub-section (1) provides '*all the provisions under the Act as if it was a return furnished u/s 139*'

# AO to issue notice u/s 143(2)

- Omission on the part of the assessing authority to issue notice u/s 143(2) cannot be a procedural irregularity.
- The same is not curable.
- Requirement of notice u/s 143(2) cannot be dispensed with.
  - Hotel Blue Moon 321 ITR 362 (SC)

# S.143(2) vs S.292BB

- Can S.292BB cure the defect of non-issuance of notice u/s 143(2)?
  - Issue of notice u/s 143(2) is mandatory
  - Failure to do so renders the reassessment void.
  - Jurisdiction error cannot be cured by Section 292BB.

# Assessee to demand reasons

- Notice u/s 148 issued
- Assessee has the right to demand reasons recorded u/s 148(2) for reopening the assessment u/s 147.
- AO to provide the reasons within a reasonable period of time.

# Assessee to raise his objections

- Reasons recorded u/s 148(2) provided to the assessee.
- Assessee has the right to object on the reasons recorded by the AO
- Assessee to submit his objections within a reasonable period of time.



# Disposal of objection by a speaking order.

- AO must dispose of the objection by passing a speaking order.
- Disposal of the objection to be linked with recorded reasons.
- AO cannot deal with the objection while passing the assessment order.

# Disposal of objection by a speaking order.

- Time within which AO cannot proceed with the matter
  - Asian Paints Ltd. vs DCIT 296 ITR 90 (Bom)
    - AO not to proceed with the matter within a period of four weeks from the date of receipt of objection filed by the assessee.
    - Assessee to be given a reasonable time to challenge the order of rejection.
  - Similar view taken in:
    - Bharat Jayantilal Patel v. UOI (2015) 378 ITR 596 (Bom.)(HC)

# Assessment of any other Income

- Explanation 3 to S. 147 permits the AO to assess or reassess income which has escaped assessment even if the recorded reasons have not been recorded in respect of such income,
- However, it is essential that the main issue in respect of which the reasons has been recorded are assessed.
- If no addition on the main issue, it means there was no 'reasons to believe that income has escaped assessment'
- Therefore, no jurisdiction to assess any other income.

# Remedies Available to the Assessee

- GOA STATE CO-OPERATIVE BANK LTD. vs. ACIT [2017] 395 ITR 642 (Bom.)
  - Facts:
    - Assessee's case reopened, sought copy of reasons recorded and reasons provided
    - Assessee raised its objections.
    - Assessment order passed without disposing the objections.
    - Assessee filed a writ before High Court.

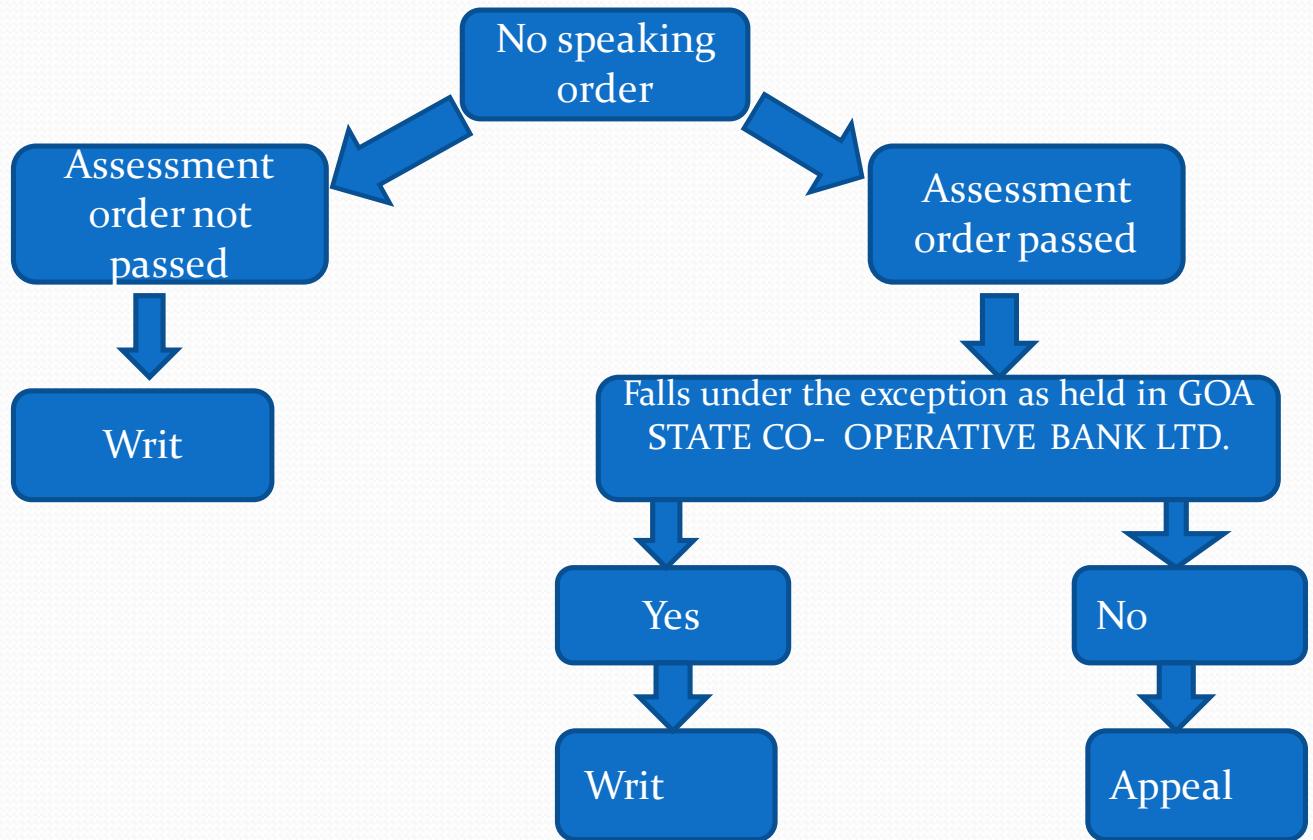
# Remedies Available to the Assessee

- Contention of the Revenue
  - Assessee has alternate remedy to challenge the order
  - Relied on CIT and others vs Chabbil Agrawal (2013) 357 ITR 357 (SC)
- Held
  - Refusal to entertain a writ is a self-imposed restriction, which has certain exceptions viz;
    - remedy available is ineffective
    - statutory authority:
      - did not act in accordance with the provisions of the enactment

# Remedies Available to the Assessee

- acted in defiance of fundamental principles of judicial procedure
  - resorted to invoke the provisions that are not available
  - acted in total violation of the principles of natural justice.
- Assessment order quashed and set aside

# Remedies Available to the Assessee





# **RECENT JUDGEMENTS ON PENNY STOCKS**



# RECENT JUDGEMENTS ON PENNY STOCKS

- Pr. CIT, Ludhiana vs Prem Pal Gandhi ITA-95-2017 (O&M) (P&H)
  - Facts
    - Assessee purchased shares of a company at Rs 11/ share in AY 2006-07 & sold in AY 2008-09 at Rs 400/ share
    - Assessing Officer added the said appreciation to the total income of the assessee
    - Alleged it to be
      - fictitious transaction and
      - income from undisclosed sources

# RECENT JUDGEMENTS ON PENNY STOCKS

- Held
  - Appeal dismissed on the ground that:
    - Shares were traded on the NSE
    - Payments and receipts were routed through the bank
    - No evidence to indicate that it was a closely held company
    - Trading was not manipulated at the NSE.

# RECENT JUDGEMENTS ON PENNY STOCKS

- SANJAY BIMALCHAND JAIN L/H SHANTIDEVI BIMALCHAND JAIN vs Pr. CIT ITA No. 18/2017 (Bom)
  - Facts
    - Assessee purchased shares of two Kolkata based companies
    - Address of both the companies were same
    - Authorized signatory of both companies were also same
    - Acquisition of shares made by cash

# RECENT JUDGEMENTS ON PENNY STOCKS

- Address of broker same as that of the company
- Assessee sold the shares at nearly 97 times its cost
- Claimed exemption u/s 10(38)
- Held
  - The transaction did not qualify as an investment.
  - Assessee did not have any inkling as to what was going on in the whole transaction except paying the purchase price.
  - Rather it was an adventure in the nature of trade.
  - No justification for the appreciation in share price
  - Motive was to derive profit and not income.
  - Profit chargeable to tax under business income.

# RECENT JUDGEMENTS ON PENNY STOCKS

- Meenu Goel vs ITO ITA No. 6235/Del/2017
  - Facts
    - Assessee purchased 45,000 shares of a company in physical form
    - AO made additions u/s 68 based on the report of the Investigation Wing
  - Held
    - Assessee proved the genuineness of the transaction on the basis of the following:
      - Transaction were through A/c payee cheques

# RECENT JUDGEMENTS ON PENNY STOCKS

- Copy of purchase bill
- Copy of share transfer form
- Bank statement highlighting the payments made and received
- Transaction statement of the stock broker
- AO could not substantiate how assessee availed the accommodation entries.
- AO merely stated the modus operandi
- Source, identity and genuineness have been established.
- There cannot be an additions u/s 68

# RECENT JUDGEMENTS ON PENNY STOCKS

ITO vs Arvind Kumar Jain HUF ITA No. 4862/Mum/2014  
*'If the DMAT account and contract note show details of the share transactions and the AO has not proved the transactions to be bogus, the capital gains earned on the said transactions cannot be treated as unaccounted income u/s 68. The fact that the broker was tainted and violated SEBI regulations would not make assessee's transactions bogus'*

# RECENT JUDGEMENTS ON PENNY STOCKS

Kamla Devi S Doshi vs ITO ITA No. 1957/Mum/2015

*'The statement u/s 131 implicating the assessee is not sufficient to draw an adverse inference against the assessee when the documentary evidence in the form of contract notes, bank statements, STT payments etc prove genuine purchase and sale of the penny stock. Failure to provide cross-examination is a fatal error'*



# RECENT JUDGEMENTS ON PENNY STOCKS

CIT vs Bhavik Bharatbhai Padia [2017] 78 tasmann.com 133 (Ahd. – Trib)

*'Where assessee had shown capital gain in share transaction and AO concluded that purchases of shares by assessee was bogus and , accordingly, treated capital gain as cash credit u/s 68, since sale of shares had been confirmed by BSE, raising of doubt as to purchase of shares did not arise and addition was not justified.'*

# RECENT JUDGEMENTS ON PENNY STOCKS – Related to Search

Smt. Anjali Pandit vs ACIT [2016] 52 ITR 404 (Mum)

*‘Where all transactions of purchase and sales of shares were evidenced and supported with bills and vouchers of brokers and confirmations from brokers, acknowledgement of payments and receiving sale proceeds by account payee cheques and fact that department could not bring any evidence to rebut evidence on record, long- term capital gain shown on such transaction could not be treated as cash credit u/s 68’*

# RECENT JUDGEMENTS ON PENNY STOCKS – Related to Survey

Charanjit Singh vs ITO [2016] 52 ITR (Trib)337 (Chd.)

*‘Statement recorded on oath at the time of survey u/s 133A has no evidentiary value and no addition u/s 68 should be made on that basis.’*

*Thank  
you*



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