

Anatomy and Analysis of Section 148A- A new and different approach in reopening of tax assessment under income tax law

Paper Authored By Kapil Goel Adv Assisted by Sandeep Goel Adv
(9910272804) advocatekapilgoel@gmail.com

1. Preface and Overview

It is well settled that provisions dealing with reopening of tax assessment being interfering in the finality of closed assessment needs to be strictly interpreted though they are machinery provisions. Kanga, Palkhivala and Vyas on The Law and Practice of Income Tax, Volume-II, Ninth Edition, page 1826 explains the scope of the section 147 of the Act. Further it needs to be strictly interpreted as per sage and astute observations of Hon'ble Apex court in leading case of Parsuram Potteries 106 ITR 1 that "It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that state issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity." Even when recently epochal and milestone changes were made by legislature in the set of provisions of section 147 to 151 of the Act vide Finance Act 2021, notably same are based on three significant ideals, namely, that there is ease of doing business and that there is lesser number of cases being reopened and most importantly,

aiming at lesser litigation . These three pivotal aspects being basis of recently made changes in scheme of reopening of assessment have been noted , adumbrated and examined in detail by various high courts across country , in the recent decisions where interplay of old provisions vis a vis new provisions is adjudicated , some of the reported decisions are MonMohan Kohli case 441 ITR 207 (Decision of Delhi high court by Justice Manmohan) and Ashok Kumar Aggarwal 439 ITR 1 (Decision of Allahabd high court by Justice S.D.Singh) and also by Rajasthan high court in case of Sudesh Taneja vs ITO order dated 27.01.2022 by Justice Akil Kureshi (Para 31 very important).

By now it is well settled by Hon'ble Apex court in its litany of decisions that legislative intent (*for present purposes – explanatory memorandum to Finance Bill 2021*) is to be key prepollent and driving force for the interpretation to be placed on statutory provisions , reference may be made to two recent decisions of Hon'ble Apex court in Kerala State Beverages case 440 ITR 492 and Apex laboratories case decided on 22.02. by Justice S.Ravindra Bhatt (*paragraph 33 & 34 to be referred*). Even the Hon'ble Apex court leading decision in case of KP Varghese 131 ITR 597 is to the same effect on *overriding importance of statutory interpretation based on concept of legislative intent/purpose/mischief* which is further followed by Hon'ble Apex court in its various recent orders (refer *372 ITR 746, 424 ITR 704, 427 ITR 360, 436 ITR 582* etc).

Although section 147 etc in the income tax act (income tax law) have seen different phases, where one was the phase prior to 1989 and then from 1989 to 2021 (*reopening based primarily on reasons to believe – sec. 148(2)*) and now from 2021 onwards (now reopening is based on new jurisdictional norm of *information suggesting escapement of income* – expl. 1 to new sec. 148) , it has always witnessed lot of litigation due to revenue's apparent propensity to use the provision of

sec.147 as a tool of general scrutiny/tax assessment provision like sec. 143(2) of the Act. One of the significant change in new reopening regime is provision of sec. 148A, carrying head note as “ ***conducting Inquiry , providing opportunities before issue of notice u/s 148*** ” which as per settled principle of interpretation (refer 431 ITR 1 SC , 88 GSTR 228 SC) states the ***drift of the provision and is a unique /typical provision inducted in the income tax law which has very avowed objective (less litigation, lesser number of cases to be reopened, ease of doing business)***. In this background , for present paper , author has attempted to next cogitate on various practical issues arising from the recent notices issued in new provisions of sec. 148A which may or may not further give rise to initiation of proceedings under new section 148 of the Act depending on the *decision* taken by Jurisdictional Assessing Officer (JAO) in proceedings u/s 148A of the Act.

2. Before taking up the practical issues arising from Show cause notices (SCN) u/s 148A, it is fit to reproduce the text of the said provision, for sake of enhanced understanding :

Conducting inquiry, providing opportunity before issue of notice under [section 148](#).

148A. *The Assessing Officer shall, before issuing any notice under [section 148](#),—*

- (a) *conduct any enquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;*
- (b) *provide an opportunity of being heard to the assessee, with the prior approval of specified authority, by serving upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time,*

as may be extended by him on the basis of an application in this behalf, as to why a notice under [section 148](#) should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (a);

- (c) consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);*
- (d) decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under [section 148](#), by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (c) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (b) expires:*

Provided that the provisions of this section shall not apply in a case where,—

- (a) a search is initiated under [section 132](#) or books of account, other documents or any assets are requisitioned under [section 132A](#) in the case of the assessee on or after the 1st day of April, 2021; or*
- (b) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under [section 132](#) or requisitioned under [section 132A](#), in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or*
- (c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under [section 132](#) or requisitioned under [section 132A](#), in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee.*

Explanation.—For the purposes of this section, specified authority means the specified authority referred to in [section 151](#).]

Even correlated provisions of sec. 148 of the Act are reproduced below:

Issue of notice where income has escaped assessment.

148. *Before making the assessment, reassessment or recomputation under [section 147](#), and subject to the provisions of [section 148A](#), the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of [section 148A](#), requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under [section 139](#):*

Provided that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice.

Explanation 1.—*For the purposes of this section and [section 148A](#), the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,—*

- (i) *any information flagged in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;*
- (ii) *any final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act.*

Explanation 2.—*For the purposes of this section, where,—*

- (i) *a search is initiated under [section 132](#) or books of account, other documents or any assets are requisitioned under [section 132A](#), on or after the 1st day of April, 2021, in the case of the assessee; or*
- (ii) *a survey is conducted under [section 133A](#), other than under sub-section (2A) or sub-section (5) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or*

(iii) *the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under [section 132](#) or [section 132A](#) in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or*

(iv) *the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under [section 132](#) or [section 132A](#) in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee,*

the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the three assessment years immediately preceding the assessment year relevant to the previous year in which the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.

Explanation 3.—*For the purposes of this section, specified authority means the specified authority referred to in [section 151](#).]*

3. Now firstly taking section 148A of the Act, on plain and literal reading of the said provision, following striking features are worth noting:
 - i) It is for *conducting inquiry and providing opportunity* before issue of notice u/s 148 of the Act;
 - ii) It is imperative and mandatory on part of concerned jurisdictional Assessing officer (JAO-definition u/s 2(7A) of the Act –) to make this inquiry as evident from scheme of sec. 148 and sec. 148A of the Act , read along with legislative intent contained in explanatory memorandum to finance bill , which is so held by various high courts on the mandatory nature of the provision – 441 ITR 207 (MonMOhan Kohli case); 439 ITR 1 (Ashok kr Aggarwal case) etc. **Further on**

mandatory nature of said provision , reference may be made to recent Hon'ble Apex court decision in V Mohan case CIVIL APPEAL NOS. 85928593 OF 2010 December 14, 2021 (“59. G.P. Singh, in Principles of Statutory Interpretation, 14th Edition, at page 430, has laid down principles and rules for ascertaining the mandatory or directory nature of provisions, and has noted that this depends on the intent of the legislature and not necessarily on the language that the intent is clothed in. The nature and design of the statute, the effects which would follow from construing it one way or the other, and the severity or triviality of consequences that flow therefrom have to be considered. At times, the courts examine whether the statute provides for the contingency of non-compliance and whether noncompliance is visited with some penalty etc., but this is not a necessary or sufficient basis for determining whether the provision is mandatory or directory in nature. Lastly, if a provision is mandatory, it must be obeyed and followed. This is especially so in case of jurisdictional requirements, i.e., preconditions that have to be fulfilled before any action is taken”)

***Clearly as per this latest dictum** , given the clear/perspicacious legislative intent behind sec. 148A, mandatory language of the provision, and its (sec. 148A) inextricable connection with sec. 148 of the Act, the **inquiry u/s 148A** is mandatory and imperative and **jurisdictional in nature** .*

Ergo, if inquiry u/s 148A is not conducted at all or is conducted in unlawful and illegal manner, then same could not give rise to valid proceedings u/s 148 of the Act .

- iii) *The sole specified competent authority u/s 148A to make inquiry is Jurisdictional AO (JAO) as per opening language of the provision. That is it is not in faceless mode inquiry. Further only jurisdictional AO can conduct this mandatory/jurisdictional inquiry and no body else can conduct it. For concept of JAO reference may be further made to section 120 to sec. 127 of the Act.*
- iv) *Only in the excluded cases spelt out in first proviso to sec. 148A, the inquiry u/s 148A is dispensed with (broadly speaking search cases and other related matters) and in all other left out cases , inquiry u/s 148A is imperative and mandatory. In this manner, phrase/ word “if required” used in sec. 148A(a) and sec. 148 needs to be harmoniously interpreted.*
- v) *Four key aspects of sec. 148A are – a) Conducting of enquiry b) Provide an opportunity by valid SCN and c) considering reply of assessee and d) decision thereon by passing order*
- vi) *Since above key phrases are seminal and primordial for valid inquiry u/s 148A, we narrate the meaning ascribed to the same from authoritative black law dictionary, to facilitate the understating of operational/practical nuances of sec. 148A:*

a) *Inquiry and Enquiry word meaning :*

Refer Hon’ble Apex court decision in case case of Kathiroom Service Co-op Bank Ltd vs CIT (CIB) & others, reported in 360 ITR 243

“The Merriam-Webster Unabridged Dictionary states that the words “Inquiry or Enquiry” connote: “1: examination into facts or principles 2: a request for information 3: a systematic investigation often of a matter of public interest.”

The Cambridge Advanced Learner's Dictionary & Thesaurus defines inquiry or enquiry as “question” or “the process of asking a question.”

The Oxford Advanced Learner's Dictionary defines enquire as: “an official process to find out the cause of something or to find out information about something; a request for information about somebody/something; a question about somebody/something; the act of asking questions or collecting information about somebody/something”

16. *The Black’s Law Dictionary, 9th Ed., 2009, p. 864 defines “enquiry” as “a request for information, either procedural or substantive”.*

The expression inquiry under Encyclopedia Law Lexicon, Vol. 4, Ashoka Law House, 2008/09, p. 2356 and K.J. Aiyar’s Judicial Dictionary, Vol. 1, Lexis Nexis Butterworths Wadhwa, 15th Edition, 2011, p. 838 follows the explanation hereunder:

“According to the New Standards Dictionary, the word inquiry includes investigation into facts, causes effects and relations generally; “to inquire”, according to the same dictionary means to “exert oneself to discover something.” Chambers 20th Century Dictionary lays down that the meaning of the term “to inquire” is “to ask, to seek” and the meaning of the term “inquiry” is to give as: “in search for knowledge; investigation; a question” (Also Real Value Appliances Limited v. Canara Bank and others, (1998) 5 SCC 554)”

b) Opportunity of being heard (natural justice concept made expressly part of sec 148A(b)– also called as audi altrem partem – linked to article 14 of the indian constitution- refer Hon’ble Apex court decision in cases of AR Antulay vs RS Nayak 1988 2 SCC 602 and Union of India vs Tulsiram Patel 1985 3 SCC 398- the violation of principles of natural justice renders the act a nullity and the rule of audi altrem partem is comprehended within the guarantee of article 14 of the constitution and no prejudice be proved for violation of natural justice) : Word: Reference may be made to Hon’ble Apex court decision in case of

CASE NO.: Appeal (civil) 2809 of 1979 PETITIONER: Sohan Lal Gupta (Dead) Thr. L.Rs. & Ors. RESPONDENT: Vs. Smt. Asha Devi Gupta & Ors. DATE OF JUDGMENT: 01/09/2003

“For constituting a reasonable opportunity, the following conditions are required to be observed :

1. Each party must have notice that the hearing is to take place.
2. Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.
3. Each party must have the opportunity to be present throughout the hearing
4. Each party must have a reasonable opportunity to present evidence and argument in support of his own case.
5. Each party must have a reasonable opportunity to test his opponent’s case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.
6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument.”

Even Hon’ble Apex court 5 judge constitution bench decision in case of Khem Chand vs UOI 1958 SCR 1980 , in context of article 311 of constitution of india in relation to opportunity to be proved to govt servants is apposite:

“Held : To summarise: the reasonable opportunity envisaged by the provision under consideration includes-

(a) *An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;*

(b) *an opportunity to defend himself by crossexamining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally*

(c) *an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant. In short the substance of the protection provided by rules, like r. 55 referred to above, was bodily lifted out of the rules and together with an additional opportunity embodied in [s. 240](#) (3) of the Government of India Act, 1935 so as to give a statutory protection to the government servants and has now been incorporated in [Art. 311 \(2\)](#) so as to convert the protection into a constitutional safeguard”*

Even reference to following other /recent decisions of Hon’ble Apex court on opportunity of being heard may be referred:

a) ***Landmark decision in case of Radhakrishna industries vs State of Himachal Pradesh reported at 88 GSTR 228 by SC by Justice Dr DY Chandrachud***

b) ***Landmark decision by Hon’ble Supreme court in case of T.Takano vs SEBI Civil appeal no. 487-488 OF 2022 ORDER DATED 18.02.2022-PARA 22 to 53 important – BY Justice Dr DY Chandrachud)***

c) ***Three Judge bench Hon’ble Apex court decision in case of Sona Buiders vs UOI reported at 251 ITR 197***

c) *Show cause notice (SCN) concept in sec. 148A(b) :*

On requisite ingredients of valid SCN u/s 148A(b) reference may be made to leading Hon'ble Apex court in case of Oryx Fisheries Pvt Ltd vs UOI 2010 13 SCC 427 (para 24 to 27) and Hon'ble Apex court decision in Gorkha Security Services vs Govt of NCT of Delhi (2014 9 SCC 105 -PARA 21 & 22) and CBDT instruction no. 20/2015 (dated 29.12.2015)

d) *Word consider as used in sec. 148A(c) in relation to reply filed by assessee : As defined in black law dictionary :*

CONSIDER. To fix the mind on, with a view to careful examination; to examine; to inspect. Eastman Kodak Co. v. Richards, 204 N.Y.S. 246, 248, 123 Misc. 83. To deliberate about and ponder over. People v. Tru-Sport Pub. Co., 291 N.Y.S. 449, 457, 160 Misc. 628. To entertain or give heed to. Rodolf v. Board of Com'rs of Tulsa County, 122 Okl. 120, 251 P. 740, 741. See, also, Considered

e) *Word decide as used in sec. 148A(d): as defined in black law dictionary :*

DECIDE. To "decide" includes the power and right to deliberate, to weigh the reasons for and against, to see which preponderate, and to be governed by that preponderance. Darden v. Lines, 2 Fla. 571; In re Milford & M. R. Co., 68 N.H. 570, 36 A. 545.

f) *Word ORDER. From black law dictionary as referred in sec. 148A(d)*

"A mandate, precept; a command or direction authoritatively given; a rule or regulation. Brady v. Interstate Commerce Commission, D.C. W.Va., 43 F.2d 847, 850. The distinction between "order" and "requisition" is that the first is a mandatory act, the latter a request. Mills v. Martin, 19 Johns. (N.Y.) 7."

vii) Further sec. 148A can be invoked only with respect to information suggesting income escaping assessment as available in possession of concerned JAO.

Now on the legal and judicial connotation of the word information suggesting income escaping assessment reference needs to be made to text of explanation 1 to sec. 148 of the Act which prior to finance bill 2022 stated as : For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,— (i) any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time; (ii) any objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act (as amended by finance bill 2022) . By Finance bill 2022 following are further included here: ; or (iii) any information received under an agreement referred to in section 90 or section 90A of the Act; or (iv) any information made available to the Assessing Officer under the scheme notified under section 135A; or (v) any information which requires action in consequence of the order of a Tribunal or a Court.”

How word suggest needs to be interpreted , reference is made to meaning given to the same term in black law dictionary : SUGGEST. **To introduce indirectly to the thought; to propose with diffidence or modesty; to hint; to intimate.** Sims v. Ratcliff, 62 Ind.App. 184, 110 N. E. 122, 123

How word information needs to be interpreted , reference is made to meaning given to the same term by Hon'ble Apex court in its decision

in case of Larsen and Toubro vs State of Jharkhand in context of sec. 19 of Bihar Finance Act 1981 dealing with Turnover of registered dealer escaping assessment , has interpreted said word as “It is also pertinent to understand the meaning of the word ‘information’ in its true sense. According to the Oxford Dictionary, ‘information’ means facts told, heard or discovered about somebody/something. The Law Lexicon describes the term ‘information’ as the act or process of informing, communication or reception of knowledge. The expression ‘information’ means instruction or knowledge derived from an external source concerning facts or parties or as to law relating to and/or having a bearing on the assessment....”

Notably for present purposes of sec. 148A , information has to be understood and applied in the manner as stipulated vide expl. 1 to sec. 148 of the act and not beyond that as clear from conjoint reading of sec. 148A read with expl.1 to sec. 148 of the Act. Further in authors opinion assessee deserves to be given full and complete information at show cause stage u/s 148A(b), which is available in possession of revenue /concerned JAO in view of the overall purpose /scheme of sec. 148A. That is there should be no hide and seek here by revenue.

Reference may be made to leading Hon’ble Supreme court decision in case of Kanwar Natwar Singh vs Director of enforcement reported at 2010 13 SCC 255.

- viii) *Notably , in entire sec. 148A, there are multiple approvals required at different stages , firstly at the point of conducting of enquiry vide sec. 148A(a) and then secondly at the point of providing opportunity of being heard vide sec. 148A(b) and thirdly at the point of final decision and order passing vide sec. 148A(d).*

On the requisite quality of approval on part of specified authority , one may refer to recent Bombay high court leading decision in Svitzer Hazira case reported at 441 ITR 10 and recent Delhi high court decisions reported at 437 ITR 1 and 435 ITR 642 apart from celebrated decision by Hon'ble Apex court in case of Sahara reported at 300 ITR 403.

In authors opinion all these approvals are to be with proper application of mind and reasoning and after perusing the case records in entirety. Further revenue needs to communicate/share, the chain of correspondence and contents of these statutory approvals to assessee which was held to be must in erstwhile old regime in context of sec.151 of the Act (refer Delhi high court decision in Sabha Infra 398 ITR 198 and recent Bombay high court decision in case of . Tata Capital Financial Services Limited WRIT PETITION NO. 546 OF 2022 DATED : 15th FEBRUARY, 2022.

- ix) Further from above narrative it is clear that nature of adjudication u/s 148A by concerned JAO is quasi judicial in nature (refer Hon'ble Apex court recent decision in case of State of AP vs AP State Waqf board in CIVIL APPEAL NO. 10770 OF 2016 vide order dated 07.02.2022 paragraph 140 to 145 as duty to act judicially on part of concerned JAO u/s 148A cannot be ignored. Further reference may be made to Hon'ble Apex court decision in case of NSDL vs SEBI in CIVIL APPEAL NO. 5173 OF 2006 order dated March 7, 2017. referring to three ingredients for qualifying an act as quasi judicial in nature: (i) There must be legal authority; (ii) This authority must be to determine questions affecting the rights of subjects; and (iii) There must be a duty to act judicially. Further reference may be made to : Indian National**

Congress (1) v. Institute of Social Welfare (2002) 5 SCC 685 .All these are present u/s 148A where decision is taken and order is passed finally u/s 148A(d).

- x) *Further duty to act fairly on part of concerned JAO u/s 148A as propounded in paper of Justice CK Thakker reported at 2003 4 SCC (Jour) 1 , and Hon'ble Apex court decision in case of M S Nally Bharat Engg Co Ltd vs State of bihar reported at 1990 SCR (1) 290, 1990 SCC (2) 48 and locus classicus English decision in Ridge vs Baldwin reported by Lord Reid [1964] AC 40/ (1963) 2 All ER 66 : (1963) 2 WLR 935], remains very much there.*

4. **Scope of Judicial review under article 226 of Constitution of India by jurisdictional high court in orders passed u/s 148A(d)** : In authors opinion applying the well established and well recognized tests of *illegality , irrationality and procedural impropriety* if shown to be there in order passed u/s 148A(d) , same under rubric and label of *permissible judicial review can be raised and agitated before constitutional courts vide article 226 /article 227 etc.* (reference may be made to Hon'ble Supreme court three judge bench decision in case of *Mohd Mustafa vs UOI in Civil Appeal no. 6905 of 2021 order dated 16.11.2021 by Justice L Nageswara Rao ; Constitution 5 Judge bench Hon'ble Apex court decision in case of Rajendra Dhawan vs Pradeep Kumar Ranibala in Civil appeal 3613/2016 ORDER DATED 10.12.2019 by Justice Indira Banerjee (para 87 on scope of interference under article 226/227) and ; recent calcutta high court decision in case of Ashwika Kapur vs UOI in WP 2821 of 1993 ORDER dated 24.02.2022 by Justice T.S.Sivagnanam (paragraph 16 – referring to 261 ITR 446- Delhi high court decision in Mrs Sunny Uppal vs Appropriate Authority).* Further on scope of interference vide article 226 in writ

jurisdiction reference may be made to **Hon'ble Apex court recent order in case of State of Andhra Pradesh vs AP State Wakf Board & Ors in CIVIL APPEAL NO. 10770 OF 2016 order dated 07.02.2022** (on scope on writ remedy vide article 226 of Indian constitution entire law discussed— paragraph 106 to 119) and **three judge bench latest apex court decision in case of M/s Magadh Sugar & Energy Ltd vs state of bihar order dated 24.09.2021** , on scope of article 226 (writ petition before Hon'ble high court); three judge bench, in this case , after extensively noting erlier decisions in cases of **Whirpool Corporation v. Registrar of Trademarks, Mumbai (1998) 8 SCC 1** and **Harbanslal Sahni v. Indian Oil Corporation Ltd (2003) 2 SCC 107**. Recently, in **Radha Krishan Industries v. State of Himachal Pradesh & Ors 2021 SCC OnLine SC 334**, Assistant Commissioner of State Tax v. M/s Commercial Steel Limited Civil Appeal No. 5121 of 2021, **State of HP v. Gujarat Ambuja Cement Ltd 2005) 6 SCC 499**, **Executive Engineer v. Seetaram Rice Mill (2012) 2 SCC 108**, **Union of India v State of Haryana 2000) 10 SCC 482**, held In view of the law discussed above on the rule of alternate remedy, the High Court can exercise its writ jurisdiction if the order of the authority is challenged for want of authority and jurisdiction, which is a pure question of law). Further on scope of interference under article 226 reference may be made to **three judge bench decision in case of Ghanshyam Mishra vs Edlewiss Asset Reconstruction Co ltd in Civil appeal no. 8129/2019 order dated 13.04.2021 (paragraph 129)** and Latest Allahabad high court decision in case of **Bharat Mint and Allied Chemicals vs Commissioner commercial taxes in WRIT TAX 1029/2021 vide order dated 04.03.2022** has culled out following principles on scope of article 226 in **paragraph 16**.

5. Whether failure to follow specific course of action as spelt out in section 148 from clauses a to d would be **fatal** to the final order passed u/s 148A(d),

in authors opinion yes it would be fatal as entire sec. 148A is mandatory/imperative in its nature. *Since this is jurisdictional requirement, failure to obey any of the specified action point u/s 148A would nullify the final order passed u/s 148A(d) as per hon'ble apex court dictum in case of Raza Textiles reported at 87 ITR 539. Even principle of Taylor vs Taylor and Nazir vs Emperor that where a statute requires an act to be done in specified way , all other ways to do the same are forbidden. (refer Hon'ble apex court constitution bench decision in case of CIT v. Anjum M.H. Ghaswala reported at (2002) 1 SCC 633 and decision of Hon'ble apex court in case of Babu Verghese v. Bar Council of Kerala (1999) 3 SCC 422.*

6. Whether order passed u/s 148A(d) can be revised u/s 263 or sec. 264 of the Act? As per recent Madras high court decision in case of *CIT vs M/s Barry Wehmiller International Resources Pvt Ltd in Tax case appeal no. 1132/2010 order dated 03.08.2021* in context of sec. 263 on dropping of proceedings u/s 148 in objection disposal it is held in paragraph 17 that CIT has no jurisdiction u/s 263 to invoke his power to examine the correctness of decision taken by AO in dropping the proceedings u/s 148 after issuance of notice u/s 148 and after considering objections filed by the assessee. In authors humble view analogy can be extended to order passed vide sec. 148A(d) also.
7. Whether in case assessee does not file any reply in response to SCN issued u/s 148A(b) , can same tantamount to waiver on part of assessee ? Answer in authors humble opinion on basis of connotation of WAIVER as decided by Hon'ble apex court in latest decisions in cases of a) Arce Polymers Pvt ltd vs M/s Alphine Phramaceuticals Pvt Ltd Civil appeal no. 7372/2021 order dated 03.12.2021 (paragraph 14 to 16) b) Kaplraj Dharmashi vs Kotak Investment Advisors Ltd 2021 SCC Online 204 (104).
For considering, as to whether a party has waived

its rights or not, it will be relevant to consider the conduct of a party. For establishing waiver, it will have to be established, that a party expressly or by its conduct acted in a manner, which is inconsistent with the continuance of its rights. However, the mere acts of indulgence will not amount to waiver. A party claiming waiver would also not be entitled to claim the benefit of waiver, unless it has altered its position in reliance on the same.) and Kerala high court decision in case of CIT vs P.Premkumar reported at , when applied in context of sec. 148A, it seems answer is NO. *It is evident from plain reading of sec. 148A(d) where it is stated that even when assessee do not reply to SCN u/s 148A(b), even then , on basis of material on record , concerned JAO, has to take final decision as to whether the given case is fit for proceeding u/s 148 of the Act.*

8. Whether decision of JAO u/s 148A(d) as to whether case is fit for issue of notice u/s 148 is conclusive and if not assailed in writ , would assessee be precluded from raising it at subsequent stage when proceedings u/s 148 are initiated or when case goes in appeal before first appeal or ITAT ?

As per leading decision of Hon'ble Apex court in case of Kiran Singh vs Chaman Paswan AIR 1954 SC 340 in authors humble opinion answer is No as assessee can be allowed to raise in subsequent proceedings u/s 148 and at appeal stage also, the validity of order passed u/s 148A (d) as it is jurisdictional issue and goes to the root of the matter.

9. Whether in a case where assessee comes with revised computation showing enhanced taxable income and consequential/resultant upward tax payment etc vis a vis original return filed u/s 139(1), in response to SCN issued u/s 148A(b), how far JAO is supposed to apply its mind to the same along with approving authority before decision is reached to invoke sec. 148 of the Act? This would although depend on particular facts and circumstances of

each case but salutary duty to apply mind on part of JAO and approving authority could not be abdicated and mechanical /light hearted invocation of sec. 148, in the final decision u/s 148A(d), would not be in true spirit of the stated legislative intent.

10. Can order passed u/s 148A(d) be rectified u/s 154 of the Act if any mistake apparent is there on record? Yes subject to patent and apparent mistake from record, correction u/s 154 could be possible without entering into debatable, contentious and investigative issues.
11. Is order passed u/s 148A (d) is appealable u/s 246A of the Act before first appeal authority? No **as per list of orders u/s 246A(1)**
12. Can any separate penalty be levied for not replying in proceedings u/s 148A of the Act? No
13. Whether during inquiry proceedings u/s 148A, further inquiry powers u/s 131/133(6) of the Act, be used by concerned JAO to ultimately reach to judicious view before making final decision u/s 148A(d)? **YES because ultimate purpose of sec. 148A is to use sec. 148 in rare and exceptional and deserving cases only .**
14. Whether confrontation of back material and cross examination principle would apply at stage of sec. 148A proceedings? Yes because there is no specific exclusion to the same rather emphasis is on full play to opportunity of being heard to be provided along with adequate and valid SCN. **So assessee must advisably request for the same in appropriate and suitable cases wherever SCN refers to any back material for its confrontation and rebuttal and/or where statement of any person used as witness against assessee its cross examination.**
15. Whether oral/personal hearing can be requested by assessee u/s 148A before JAO? Yes (refer Hon'ble Apex court decision in Radha Krishan industries case reported at 88 GSTR 228 and Hon'ble Apex court decision in 300 ITR 403 **as also there is no express exclusion for oral hearing u/s 148A).**

16. Where extended period of limitation is invoked u/s 149(1)(b) and then there is use of sec. 148A by concerned JAO, are there any special precautions to be made by assessee? Yes one may duly verify and check whether there is valid existence of requisite jurisdictional conditions stipulated u/s 149(1) for invoking extended period like monetary threshold of INR 50 lacs and availability of incriminating material etc. Onus is on revenue to establish the same.

17. Whether once order u/s 148A(d) is quashed by concerned high court for violation of any of the prescription u/s 148A, can on same information, fresh /second hand proceedings u/s 148A be launched? In authors humble opinion, *No refer Hon'ble apex court dictum in 106 ITR 1 SC concept of finality of proceedings as stale issues should not activated beyond a point in time.*

Although solemn attempt is made to take up some emerging /current issues u/s 148A, still it is advised that assessee/tax consultant takes his own expert judgment before proceeding further in the matter.

18. Illustrative Checklist on sec. 148A

<i>S.No</i>	<i>Particular aspect</i>
<i>1.</i>	<i>Whether concerned competent JAO has initiated the inquiry u/s 148A?</i>
<i>2.</i>	<i>Whether valid prior approval (s) from prescribed/ specified authority u/s 148A(a) and (b) is there ?</i>
<i>3.</i>	<i>Whether notice u/s 148A is in normal limitation or extended limitation or time barred as per sec. 149 ?</i>
<i>4.</i>	<i>Whether valid and adequate SCN is there u/s 148A(b)?</i>

5.	<i>Whether opportunity given to assessee is adequate or not to respond to SCN as per natural justice /fair play?</i>
6.	<i>Whether information spelt out for sec. 148A is within four corners of expl 1 to sec. 148 and whether same is fully and completely disclosed to the assessee for rebuttal?</i>
7.	<i>Whether back material is properly confronted as per principle of natural justice ?</i>
8.	<i>Whether cross examination is required of any revenue witness?</i>
9.	<i>Whether reply filed by assessee comprehensively /adequately responds /addresses/rebutts on facts and law ,the information referred to invoke sec. 148A?</i>
10.	<i>Whether there is proper consideration/application of mind to assessee's reply and the material available on record by JAO/approving authority in passing of final order u/s 148A(d) specially where decision to invoke sec. 148 is taken?</i>

19. Closure with the following observations by the Constitution Bench of this Court in Pannalal Binjraj v. Union of India [(1957) 31 ITR 565 : AIR 1957 SC 397] are apt: 'A humane and considerate administration of the relevant provisions of the Income Tax Act would go a long way in allaying the apprehensions of the assesseees and if that is done in the true spirit, no assessee will be in a position to charge the Revenue with administering the provisions of the Act with 'an evil eye and unequal hand'.' Same way refer to

*recent Karnataka high court decision in Wipro case reported at 438
ITR 581*

SEC 148A/KAPIL GOEL ADV