IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL (L) NO.3475 OF 2008

The Commissioner of Income Tax – 12, Mumbai ..Appellant.

Versus

Ms.Mudera G. Nanawati, Mumbai ..Respondent.

Mr.P.S. Sahadevan for the appellant.

Mr.Jitendra Jain with Mr.Jas Sanghvi i/by PDS Legal for the respondent.

CORAM : V.C. DAGA & J.P. DEVADHAR, JJ.

DATE : 21ST JULY, 2009.

**P.C. :**

1. Heard. Both parties agree that the issue sought to be raised in this appeal is covered against the revenue by the judgment of this Court in the case of Commissioner of Wealth Tax V/s. HUF of H.H. Late J.M. Scindia reported in [2008] 300 ITR 193 (Bom). In this view of the matter, no substantial question of law is involved in this appeal. The appeal is accordingly dismissed with no order as to costs.

(J.P. Devadhar, J.) (V.C. Daga, J.)

Rcvd 9-6-08

752

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCH "D"

BEFORE SHRI G E.VEERABHADRAPPA VICE PRESIDENT
& SHRI RAJPAL YADAV (J M)

IT(SS)A No. 80/M/04
(Block Period 1991-92 to 2001-02 )

| | | |
|---|---|---|
| Mrs. Mudra G. Nanavati,<br>141-D, Tanhee Heights,<br>Neapepan Sea Road,<br>Mumbai – 06<br>P.A. No.AAAFN 5739 P<br>(Appellant) | Vs. | The DCIT, Cen. Cir.9,<br>Old CGO Bldg. Annexe,<br>M.K.Road, Mumbai – 20.<br><br>(Respondent) |

IT(SS)A No.158/Mum/04
(Block Period 1/4/90 to 24/8/2000)

| | | |
|---|---|---|
| The DCIT, Cen. Cir.9,<br>Old CGO Bldg. Annexe,<br>M.K.Road, Mumbai – 20.<br>(Appellant) | | Mrs Mudra G Nanavati,<br>141-D. Tanhee Heights.<br>Neapepan Sea Road,<br>Mumbai – 06<br>P A No.AAAFN 5739 P<br>(Respondent) |

Assessee by : Shri Arvind Sonde
Respondent by : Shri S.D Srivastava

ORDER

PER RAJPAL YADAV, J.M.

The assessee and revenue are in cross appeals against the order of ld. CIT(A) Cen VII, dated 26/11/03 passed for the block period starting from 1/4/90 and ending on 24/8/2000.

2 The ld. Counsel for the assessee at the very outset pointed out that in Ground No.1 assessee has pleaded that notice under section 143(2) of the Act was not issued within 12 months from the date assessee has filed the return

Therefore, as per the proviso appended to section 143(2) the A O is precluded to pass the impugned order under section 158BC of the A O The assessment order deserves to be declared as null and void and not sustainable in law The ld Counsel for the assessee while taking us through the facts submitted that a search under section 132 of the Act was conducted at the residential premises of the assessee on 24/8/2000 It was concluded on 3/10/2000 A notice under section 158BC was issued on 1/2/01. This was served upon the assessee on 10/2/01. In response to the notice assessee has field the return for the block period on 23/2/01. He pointed out that as per the scheme of the block assessment the A.O either can accept the return filed by the assessee as it is within the contemplation of section 158BC(a) of the Act, however, if the A O wants to scrutinize the documents and other details then he was supposed to issue a notice under section 143(2) within 12 months from the date of filing the return. The moment this limitation expires the A.O has no jurisdiction to investigate the details and pass an order under section 158 BC of the Act The notice under section 143(2) was issued on 12/4/02 i.e after the expiry of 12 months from the date return was filed. In support of his contention he relied upon the decision of the Hon'ble Gauhati High Court rendered in the case of Smt Bandana Gogoi vs. CIT and Another, 289 ITR 28 He also relied upon the following orders of the Tribunal wherein this decision of the Gauhati has been followed:

(1) Mumbai ITAT's order dt. 27/7/07 in the case of Vin Vish Corporation P Ltd in IT(SS)A No. 364 & 506/M/2003
(2) Delhi ITAT's order dt. 29/8/2007 in the case of Atul Glass Industries Ltd in IT(SS)A Nos. 237 & 317/Del/2003.

(3) Delhi ITAT's order dt 21/3/2007 in the case of Smt Tulika Mishra in IT(SS)A Nos.81& 79/Del/2003
(4) Pune ITAT's order dt 26/9/07 in the case of Aurangabad Holiday Resorts P Ltd . IT(SS)A No 701 & 631/Pn/2003. (Reported in 111 ITJ 741)

3 The ld D.R on the other hand, contended that decision of Hon'ble Gauhati High Court is not binding upon the Mumbai Benches of ITAT This decision is binding on the Tribunals and sub-ordinate courts situated within the territorial jurisdiction of Hon'ble Gauhati High Court For buttressing his proposition he relied upon the decision of Hon'ble Bombay High Court rendered in the case of Thane Electricity Supply Ltd., 206 ITR 727 and Consolidated Pneumatic Tools Co., 209 ITR 277 He contended that the moment it is held that the decision of Hon'ble Gauhati High Court is not binding on the Mumbai Benches then decision of the Special Bench of the Tribunal rendered in the case of Naval Kishore & Sons Jewellers vs. DCIT, 265 ITR (AT) 75 would come in play, according to which non issuance of a notice under section 143(2) of the Act within 12 months from the date of filing of return would not be fatal to the assessment order, it is simply an irregularity. He also pointed out that another Special Bench decision of the Tribunal in the case of Smt. Krishna Verma vs ACIT, 107 ITD Pg.1 is also to the same effect. The ld. D.R further contended that expression 'so far as may be applied" has been used in sub-clause (b) of Section 158BC This expression has fallen for consideration before the Hon'ble Supreme Court in the case of Dr Pratap Singh vs. Director of Enforcement, 155 ITR 166 The Hon'ble Court has held that this expression has to be construed to mean ' to the extent possible Thus the issuance of the notice under section 143(2) as required by this sub-clause is a directory condition and not a mandatory one The Hon'ble Gauhati

High Court has not considered this decision of the Hon'ble Supreme Court hence it is per incuriam as far as the proposition propounded by the ld Counsel for the assessee In his next fold of submission ld D R pointed out that Hon'ble Supreme Court in the case of Bhavnagar University vs Pallana Sugar Mill Ltd (2003) 2 SCC –III has held that when a public functionary is directed to follow certain procedure without any consequence being spell out as to its non compliance then such procedure would be directory only If consequences for the failure are provided then the procedure would be imperative In the present case jurisdiction for passing an assessment under section 158 BC flows from the incident of search. The jurisdiction is to be vested in the A O by section 158 BA of the Act and not by section 158BC

4. We have duly considered the rival contentions and gone through the record carefully. The ITAT Mumbai in the case of M/s Vin Vish Corporation Pvt Ltd. has considered the decision of Hon'ble Gauhati High Court as well as two other orders of the ITAT Delhi in detail. The findings recorded by the Tribunal read as under:-

> 7 The learned Counsel explained that the block return was filed by the assessee on 6.6.2000 and any notice u/s 143(2) has to be issued within a period of one year from the end of the month in which the return was filed. Therefore, in the present case, the learned Counsel submitted that the notice u/s 143(2) ought to have been issued by the Assessing Authority on or before 30.6.2001, whereas the notice was served on the assessee only on 22.10.2001, which is verymuch beyond the due date of 30.6.2001. He, therefore, submitted that the notice was barred by limitation, and therefore, the consequent assessment was also void *ab initio* The learned Counsel made a reference to sub sec.(b) to Sec.158BC, which reads as ". . . *the Assessing Officer shall proceed to*

*determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142 sub section (2) and (3) of section 143 [section 144 and section 145] shall so far as may be. apply* The learned Counsel submitted that Sec 158BB provides for the method of computation of undisclosed income of the block period and Sec 158BC provides for the statutory procedures to be adopted for making a block assessment, and therefore, clause (b) of Sec 158BC which prescribes the modalities of notice have to be followed strictly as more particularly there is a reference to Sec.143(2) and the said section provides for limitation, as well

8 He, thereafter, referred to Sec 143(2) where it is stated in the Proviso to clause (ii), that no notice shall be served on the assessee after the expiry of 12 months from the end of the month in which the return is furnished

9 The learned Counsel, thereafter, relied on the decision of the Gauhati High Court in the case of *Smt.Bandana Gogoi Vs CIT [289 ITR 28]* where the Court has held that where the notice u/s 143(2) is to be served, it must be served within the time prescribed therein and if the notice was issued thereafter, the block assessment will become void He submitted that this decision is squarely applicable to the present case, and therefore, the impugned block assessment may be declared as void

10. The learned Commissioner of Income-tax, appearing for the Revenue, invited our attention to the discussion made by the CIT(A)on this point which is available in pages 2 to 8 of his order. She further relied on the decision of the Supreme Court in the case of *Dr.Partap Singh And Another Vs. Director of Enforcement and Others [155 ITR 166]* where the Court has considered the aspects of procedural formalities where a search was conducted. She submitted that the principles laid down by the Supreme Court in the said case are applicable to a block assessment, as well, and therefore, it is necessary to be held that the procedures of assessment prescribed for a block assessment are not mandatory, as far as the period of limitation is concerned. She submitted that she is relying on the detailed order passed by the CIT(A) on this point

11 We considered the matter in detail While deciding the matter against the assessee, the learned CIT(A) has relied on the decision of the ITAT Delhi Bench in the case of Action Electronics Vs DCIT in ITA No 5215/Delhi/96 and in the case of Electronica Components Vs DCIT in ITA No 5216/Delhi/96, wherein the Tribunal has held that Provisions of Sec 142(1) and Sec 143(2) are procedural and that these Provisions are in regard to the issuance of notice for the purpose of allowing opportunity before completion of assessment and there will be no difference as

assessee was allowed opportunity for explaining and filing the details in regard to the search material

12 We are afraid that the above decisions of the Delhi Tribunal do not match with the facts of the present case placed before us In those cases the Tribunal was in fact examining a case where the Assessing Authority had not issued notice u/s.143(2) Where the Assessing Authority is accepting return filed by an assessee as such, and no addition or adjustment is contemplated, it is not necessary for the Assessing Authority to issue notice u/s.143(2). The question of issuing notice u/s 143(2) arises only when the Assessing Officer is proposing to conduct inquiries on the details furnished in the return In the present case, it is not a case where no notice was issued u/s.143(2). Here the case is issue of notice u/s.143(2) beyond the prescribed time. Therefore, we cannot draw an analogy from the decisions of the Delhi Tribunal mentioned *supra*

13. Moreover, it is not possible to brush-aside the reference made to Secs. 142(1) and 143(2) in Sec.158BC(b). This is for the reason that the Proviso to Sec.143(2) prescribes a time limit for issuing a notice under that section. The rule regarding the limitation requires strict interpretation and strict compliance. Limitation is one of the most inflexible rule in any scheme of assessment. Therefore, Sec.143(2) cannot be brushed-aside as a procedural section. It is a procedural section coupled with rule of limitation.

14. The reference made by the learned Commissioner to the decision of the Supreme Court in the case of *Dr.Partap Singh And Anoher Vs Director of Enforcement and Others [155 ITR 166]* is also not relevant in deciding this case before us. In the said case the Court was examining the validity of the issuance of warrant in the light of the argument of the assessee that no further proceedings were initiated by the Directorate of Enforcement after conducting the search and seizing document, and more especially, the said decision does not deal with the rule of limitation or the question of limitation, which is on the other hand is the most important ground taken by the assessee in the present case

15. The Gauhati High Court in the case of *Smt.Bandana Gogoi Vs CIT [289 ITR 28]* has considered a case exactly similar to the case now placed before us. In that case, the block assessment proceedings were initiated after search operations. The assessee filed her return of income in response to notice issued u/s.158BC. The Assessing Officer had also issued notice u/s.142(1) and completed the assessment u/s 158BC and Sec.143(3) of the Act But no notice was issued u/s 143(2) It is also true that the Assessing Officer did not accept the returns filed by the assessee The assessment was completed after making inquiries as envisaged u/s.142. In that circumstances, the Court had to consider the question that

the procedure adopted in completing the said assessment would be relevant for determining whether the words 'as far as may be' are mandatory or directory in the case at hand. The Court, after examining the case, found that the Assessing Officer did not act upon the return filed by the assessee. He had issued notice u/s 142(1). He had proceeded to make an inquiry. This could not be done without a notice u/s 143(2). The provisions of sub-section (3) show that the power under this sub-section should be invoked only after service of notices under sub-section (2). The Assessing Officer admittedly did not follow the proceedings of sub-section (2) of Sec.143. The words "so far as may be", will thus become mandatory where the Assessing Officer proceeds to make an inquiry in repudiation of the return filed in response to a notice u/s.158BC. Similarly, application of the provisions of Sec.142 and sub-sections (2) and (3) of Sec.143 will become directory where the Assessing Officer does not embark upon an inquiry to determine the loss or profit reflected in the return filed. The Court relied on the decision of the Supreme Court in the case of *R.Dalmia Vs. CIT [236 ITR 480]* to explain the meaning of the expression "so far as may be", appearing in Sec.158BC(b). In the said case, the Supreme Court has referred to a similar expression provided u/s.148.

16. The Gauhati High Court in the above case held that – *Clause (b) of section 158BC of the Income-tax Act, 1961 provides that the provisions of section 142 as well as sub-section (2) and (3) of section 143 shall apply even in the case of a block assessment so far as may be. There is no dispute that in the case of assessment under Chapter XIV, a notice under section 143(2) is mandatory where the Assessing Officer proceeds to make an inquiry as provided in section 142. Similarly, the provision of section 143(2) will be mandatorily applicable in the case of block assessment also where the Assessing Officer in repudiation of the return filed under section 158BC(a) proceeds to make an inquiry in the proceeding under Chapter XIV-B. Once the power of inquiry under section 142 is invoked, the Assessing Officer has no option but to follow the provisions of section 143(2). The words "so far as may be", will thus become mandatory where the Assessing Officer proceeds to make an inquiry in repudiation of the return filed in response to a notice issued under section 158BC. The circular issued by the Central Board of Direct Taxes provides that a notice under sub-section (2) of section 143 can be served on the assessee during the financial year in which the return is furnished or within six months from the end of the month in which the return is furnished, whichever is later. The circular further provides that the Assessing Officer must serve notice under sub-section (2) on the assessee within this period if a case is picked up for scrutiny. It is further clarified that if a notice is not served under section 143(2) the assessee can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return. The clarification given by the Board has a binding effect on the Department. Hence in the case of block assessment under Chapter XIV-B where the Assessing*

*Officer does not proceed to make assessment and determine the tax payable on the basis of the return filed in response to a notice under section 158BC(a), he has to follow the provisions of sub-section (2) of section 143. The requirement of a notice under sub-section (2) of section 143 cannot be dispensed with in a case where the Assessing Officer proceeds to make an inquiry for the purpose of assessment and determination of taxes payable after issuing notice under section 142(1) as well.*

17. When the facts of the present case are analysed, we find that the decision of the Gauhati High Court, mentioned above, is squarely applicable. Wherever the Assessing Officer has made inquiries in a return filed in response to notice u/s.158BC, the Assessing Officer has to issue notice u/s.143(2). This is mandatory. If no notice is issued u/s 143(2), the consequent assessment would be void. It is equally true that any assessment made on the basis of an invalid notice is also invalid. A notice barred by limitation is no notice at all. In the present case, the notice u/s.143(2) is issued beyond the prescribed time limit of one year. Therefore, the notice issued by the Assessing Officer u/s.143(2) is a time barred notice. It is as good as there was no notice. In these circumstances, following the decision of the Gauhati High Court, we hold that the impugned block assessment is *ab initio* void and not sustainable in law.

18. Accordingly, the block assessment contested in these appeals is set aside. But we make it clear that if the assessee has returned any positive income in its block return, so much so income returned shall not be disturbed and be assessed to tax.

5 As far as the contention of ld. D.R that decision of Hon'ble Gauhati High Court is not binding upon Mumbai Benches is concerned, we find that similar argument was raised by the ld. D.R before ITAT, Pune in the case of ACIT vs Aurangabad Holiday Resort reported in 111 TTJ 741 wherein the Tribunal has followed the decision of Hon'ble Gauhati High Court in the case of Smt. Bandana Gogoi (supra). The Tribunal has considered the arguments of ld. D.R in detail and rejected the same. The lucid enunciation of law made by the Tribunal in the above order reads as under :-

"3 Learned Departmental Representative, however contends that decision of a non-jurisdictional High Court is not binding precedent for us Our attention is invited to the judgment of Hon'ble Bombay High Court in the case of CIT vs. Thana Electricity Supply Ltd (1993) 112 CTR (Bom) 356 . (1994) 206 ITR 727(bom) wherein their Lorships have held so Learned Departmental Representative submits that Godavaridevi Saraf (supra) judgment is no longer good law as it stands overruled by the later decision in the case of Thana Electricity Supply Ltd.'s case (supra) It is contended that while a non-jurisdictional High Court is not binding on us, a Special Bench decision of this Tribunal is certainly binding on us. It is submitted that this very issue has received consideration of a Special Bench of the Tribunal in thec ase of Nawal Kishore & Sons Jewellers vs Dy. CIT (2003) 81 TTJ (Lucknow) (SB) 362: (2003) 87 ITD 407 (Lucknow) (SB) and the Special Bench has decided the issue against the assessee We are thus urged to follow the Special Bench decision of the Tribunal in the case of nawal Kishore & Sons (supra) and thus dismiss this preliminary issue raised by the assessee.

4. Having given our careful consideration to the rival submissions , we are inclined to uphold the objection taken by the assessee

5. As observed by a co-ordinate Bench of this Tribunal, in the case of Tej International (P) Ltd. vs. Dy. CIT(2000) 69 TTJ (Del) 650, in the hierarchical judicial system that we have in India, the wisdom of the court below has to yield to the higher wisdom of the Court above, and therefore, once an authority higher than this Tribunal has expressed its esteemed views on a an issue, normally the decision of the higher judicial authority is to be followed. The Bench has further held that the fact that the judgment of the higher judicial forum is from a non-jurisdictional High Court does not really alter this position, as laid down by the Hon'ble Bombay High Court in the case of CIT vs. Godavarideevi Saraf(supra) For slightly different reasons and along with some other observations on the issue, which we shall set out a little later, we are in agreement with the conclusions arrived in this case.

6. That takes us to the question whether this decision stands overruled by the Hon'ble Bombay High Court's later judgment in the case of Thana Electricity Supply Ltd.(supra), as submitted by the learned Departmental Representative.

7. It is also important to bear in mind that the question requiring adjudication by their Lordships was whether or not decision of one of the High Courts was binding on the other High Courts This will be clear from the following observations made by their Lordships in the beginning of the judgment:

"On careful consideration of the submissions of the learned counsel for the assessee. We find that before taking up the issue involved in the question of law referred to us in this case for consideration it is necessary to first decide . . . whether this Court while interpreting an all India statute like IT Act is bound to follow the decisions of any other High Court and do decide accordingly even if its own view is contrary thereto, because of the practice followed in this Court. Because, if we are to accept this submission, it will be an exercise in futility to examine the real controversy before us

8. On of the propositions that their Lordships took note of was that the decisions of the High Court on the subordinate Courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercise jurisdiction (but) it does not extend beyond its territorial jurisdiction". Their Lordships, in the same para, also noted that "A Division Bench of the High Court should follow the decision of another Division Bench of equal strength or a Full Bench of the same High Court", and "if one Division Bench differs with another Division Bench of the same High Court, it should refer the case to a larger Bench" Having thus noted the proposition, their Lordships proceeded to "analyse the decisions of this Court, on which reliance has been placed by the learned counsel for the assessee, in support of his contention that decision of any other High Court on all India statute like IT Act, is binding even on this Court and on the Tribunals outside jurisdiction of that High Court" On godavaridevi Saraf's case (supra), which was delivered by a Division Bench of equal strength of this very Hon'ble High Court, their Lordships took note of Revenue's stand as follows.

"Referring to the observations of Godavaridevy (supra), that an all India Tribunal acting anywhere should follow the decisions of any other High Court on the point, it was submitted by the counsel of the Revenue that this observation itself would show that the High Court was aware of the fact that different High Courts were not bound by the decisions of each other, and, as such, there may be contrary decisions of different High Courts on the same point"

9. The issue of consideration was thus confined to the question whether or not a High Court decision is binding on another High Court or not. That admittedly was the core issue decided by their Lordships As for the binding nature of non jurisdictional High Court decisions on the Tribunal, the observation made by their Lordships have held that the even in the case of Hon'ble Supreme Court judgments which are binding on all Courts, except Supreme Court itself, but " what is binding of course is the ratio of the decision and not every expression found therein" Their Lordships have also referred to the oft quoted judgment of the Hon'ble Supreme Court in the case of CIT vs Sun Engineering Works (P) Ltd

(1992) 107 CTR (SC) 209.1992 198 ITR 297 (SC) wherein it is held that " it is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of question under consideration, and treat it to be complete law declared by this Court."

10. In this light, and bearing in mind the fact that limited question before their Lordships was whether or not decision of one of the High Courts is binding on another High Court, it would appear to us that ratio decidendi in Than Electricity Supply Ltd.(supra), is on the non-binding nature of High Court's judgment on another High Court In any case, this Division Bench did not, and as stated in this judgment itself, could not have differed with another Division Bench of the same strength in the case of Godavaridevi Saraf (supra). Therefore, it cannot be open to a subordinate Tribunal like us to disregard any of the judgments of the Hon'ble Bombay High Court, whether in the case of Thana Electricity Supply Ltd (supra) or in the case of Godavaridevi Saraf (supra). It is indeed our duty to loyally extend utmost respect and reverence to the Hon'ble High Court, and to read these two judgments by the division Benches of equal strength of the Hon'ble jurisdictional High Court, i.e. in the cases of Thana Electricity Supply Ltd.(supra) and Godavaridevi Saraf (supra), in a harmonious manner.

11. Let us now take a look at the Hon'ble jurisdictional High Court's judgment in the case of Godavaridevi Saraf (supra). In this case, question before their Lordships was as follows:

> "Whether, on the facts and circumstances of the case, and in view of decision in the case of A.M. Sali Maricar & anr. Vs. ITO & Anr.(1973) 90 ITR 116 (Mad) the penalty imposed on the assessee under s. 140A(3) was legal?"

12 The specific question before their Lordships was whether the Tribunal, while sitting in Bombay, was justified in following the Madras High Court decision holding the relevant section as constitutional Hon'ble High Court concluded as follows:

> "It should not be overlooked that IT Act is an all India statute, and if a Tribunal in Madras has to proceed on the footing that s 140(3) was non-existent, the order of penalty under that section cannot be imposed by any authority under the Act Until a contrary decision is given by any other competent High Court, which is binding on the Tribunal in the State of Bombay ( as it then was), it has to proceed on the footing that the law declared by the High Court, though of another State, is the final law of the land an authority like Tribunal has to respect the law laid down by the High Court, though

of a different State, so long as there is no contrary decision on that issue by any other High Court . "

13 It is thus clear that while the issue before the Hon'ble High Court in Thana Electricity Supply Ltd's case (supra) was whether or not a High Court should follow another High Court, whereas in Godavaridevi Saraf's case (supra), their Lordships dealt with the issue whether or not a non jurisdictional High Court is to be followed by a Bench of the Tribunal To that extent, and irrespective of some casual observations on the applicability of non-jurisdictional High Court judgments on subordinate Courts and Tribunals, these two decisions deal in two different areas As we have noticed earlier also, in Thana Electricity Supply Ltd's case (supra), a note was taken of Godavaridevi Saraf's judgment (supra) and neither the said judgment was dissented nor overruled. In any event, in Thana Electricity Supply Ltd's case (supra), Hon'ble Court was alive to the fact, which was acknowledged in so many words, that a co-ordinate Bench decision cannot be overruled . In view of the matter, it is difficult to hold, as has been strenuously argued before us by the learned Departmental Representative, that the Hon'ble Bombay High Court's judgment in the case of Godavaridevi Saraf's(supra) stands overruled by their Lordships judgment in the case of Thana Electricity Supply Ltd. (supra) The only way in which we can harmoniously interpret these judgments is that these decisions deal with two different issues and ratio decidendi of these decisions must be construed accordingly.

14. Let us also see this issue from a different perspective Even if we are to assume that it is possible to interpret that Godavaridevi Saraf's decision(supra) stands overruled by judgment in the case of Thana Electricity Supply Ltd.'s case(supra), one cannot be oblivious to the fact that an interpretation is indeed possible to the effect that even non-jurisdictional High Court's judgment, for the reasons set out above, is binding on the Tribunal. This non-jurisdictional High Court's judgment in the case of CIT vs. Vegetable Products Ltd. 1973 CTR (SC) 177 . (1973) 88 ITR 192 (SC), when two interpretations are possible, one in four of the assessee must be adopted. For this reason, in our humble understanding, the plea of the assessee deserves to be accepted

15. We may, however, add that the observations that we have made are particularly with reference to the legal position in the jurisdiction of Hon'ble Bombay High Court, as the view so taken in Godavaridevi Saraf's case (supra) has not found favour with Hon'ble Karnataka High Court as well as Hon'ble Punjab & Haryana High Court, in the case of Patil Vijaykumar & Ors. Vs. Union of India & Anr. (1985) 48 CTR (Kar) 41 (1985) 151 ITR 48 (Kar) and CIT vs. Ved Prakash (1989) 77 CTR (P&H) 116 (1989) 178 ITR 332 (P&H). The observations made in this order are subject to this

rider, and, therefore, while we agree with the conclusions arrived at by a co-ordinate Banech in Tej Internation (P) Ltd(supra), our reasons are not exactly the same as adopted by our distinguished colleagues.

6 The arguments of ld. D.R based on the decision of Hon'ble Supreme Court in the case of Dr. Pratap Singh vs. Director Enforcement (supra) has been considered by the Tribunal in the case of M/s Vin Vish Corporation Ltd In that case search under the Customs Act was carried out by the Customs Authorities. Section 37(2) of the Customs Act provide that provisions of the CRPC relating to searches shall so far as may be applied to the searches directed under section 37(1) of the Act. The argument was raised that conditions provided in section 165 of CRPC were not followed by the Customs officials while conducting the search and, therefore, it should be declared as illegal search. In that context Hon'ble Supreme Court while examining the provision held that conditions provided in section 165 of the CRPC are to be followed by the Customs Officials while conducting the search. If they have deviated from those conditions then they are supposed to give justification for the deviation when a challenge before the Court of law is made. Therefore, the expression provided "so far as may be" would be fulfilled by the officials. In the present case the proviso appended to section 143(2) infuse powers in the A.O for making a scrutiny assessment. It provide a time limit of one year. If that time limit is expired then A.O cannot scrutinize the return field by the assessee. It is altogether a different footing. Even otherwise we have to adjudicate whether in view of the decision of the Hon'ble Supreme Court in the case of Dr. Pratap Singh can direct decision of Hon'ble Gauhati High Court in the case of Smt

Bandana Gogoi be ignored In our opinion this decision of the Hon'ble Supreme Court is under different circumstances and not a direct decision, whereas the decision of Hon'ble Gauhati High Court is directly applicable on the facts of the present case. The ITAT has been consistently following this decision of the Hon'ble Gauhati High Court,, the assessee has not only placed on record copy of the ITAT order at Mumbai but it was pointed out to us that similar view has been taken at Delhi, Pune, Hyderabad and Chandigarh in the cases of different assessees. Thus all over India this decision is being followed consistently We at Mumbai are also supposed to adhere to the consistent view unless some decision of the Jurisdictional High Court or of the Hon'ble Supreme Court contrary to the decision of the Hon'ble Gauhati High Court is brought to our notice. In order to maintain judicial disciple and consistency it is incumbent upon us to follow the decisions of the co-ordinate benches which are based on the decision of Hon'ble Gauhati High Court. In this regard it is worth to make reference of the following observation of the Hon'ble Gujarath High Court from its decision rendered in the case of Arvind Boards & Paper Products Ltd CIT 137 ITR 63



> "The decision in CIT v. Straw-Board Mfg. Co. Ltd. has a persuasive value, so far as this court is concerned. It is not a binding judicial pronouncement or precedent. It is open to us to dissent from the decision if we find that its reasoning or the material part thereof is not convincing The question, however, is whether we should look at the matter as if it has fallen for decision for the first time and proceed to ascertain the true meaning of the word " paper " occurring in item 16 of the Sixth Schedule and merely because another view can possibly be taken, we should readily dissent from the decision. Two considerations are relevant while examining the question. First, it is a settled legal position that if two interpretations of a taxing provision are possible, the interpretation which is favourable to the assessee should be accepted and that which is favourable to the Revenue

should be discarded. In the instant case, since one High Court has taken a possible view which is favourable to the assessee, even if another possible view favourable to the Revenue can be adopted, such futile exercise may be avoided, for, ultimately, the view in favour of the assessee might have to be taken. Secondly, in income-tax matters, which are governed by an all-India statute, when there is decision of another High Court on the interpretation of a statutory provision it would be a wise judicial policy and practice not to take a different view (whatever one's own view may be), barring, of course, certain exceptions, like where the decision is sub silentio, Per incuriam, obiter dicta or based on a concession or takes a view which it is impossible to arrive at or there is another view in the field or there is a subsequent amendment of the statute or reversal or implied overruling of the decision by a higher court or some such or similar infirmity is manifestly perceivable in the decision Such practice or policy is followed in income-tax matters by the Bombay High Court since a long time, as is evident from the decisions in Maneklal Chunilal & Sons Ltd. v. CIT [1953] 24 ITR 375 and CIT v. Chimanlal J Dalal & Co. [1965] 57 ITR 285. This High Court is an offspring of the Bombay High Court and there is nothing to show that the policy or practice followed in the Bombay High Court has been consciously departed from by this High Court. On the contrary, in CIT v. Garden Silk Weaving Factory [1975] 101 ITR 658 (Gui), while dealing with an argument to the effect that there being a decision of the Bombay High Ccurt, on the point, there, under consideration, the view expressed in the said decision should be accepted, even if it does not appeal to the court, on the principle of comity of judicial decisions and in the interest of the assessees of the two adjoining States, it was observed by a Division Bench of this court that it would have been inclined to accept the submission provided there were no other views in the filed."

7. In view of the above discussion we hold that notice under section 143(2) issued by the A.O is a time barred notice and consequently the assessment order is a void or ab-initio, accordingly it is quashed Consequently the appeal of the assessee is allowed and that of Revenue is dismissed

Order pronounced on the 23rd day of May, 2008

Sd/- Sd/-

(G.E.VEERABHADRAPPA)
VICE PRESIDENT

(RAJPAL YADAV)
JUDICIAL MEMBER

Mumbai. 23/05/08

Recd. 26/8/09

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI

BEFORE SHRI J. SUDHAKAR REDDY, AM & SHRI V.D. RAO, JM

I.T(SS)A. No.134/Mum/2004
(Block period 10-06-93 to 20-07-03)

| | | |
|---|---|---|
| ACIT, Cir.12(3)<br>Mumbai | vs | M/s Supreme Appar & Associates, 114, Maker Chambers VI, 220, Nariman Point, Mumbai-21<br>PAN : AAAFS5922R |
| (Appellant) | | (Respondent) |

C.O. 418/Mum/2004
(Arising out of I.T(SS)A. No.134/Mum/2004)
(Block period 10-06-93 to 20-07-03)

| | | |
|---|---|---|
| M/s Supreme Appar & Associates<br>Mumbai | vs | ACIT, Cir.12(3)<br>Mumbai |
| (Cross Objector) | | (Respondent) |

Revenue by : Shri Pragati Kumar
Assessee by: Shri Jitendra Sanghavi

O R D E R

J. Sudhakar Reddy : This revenue appeal is filed against the order of the CIT(A)-XII, Mumbai dated 08-12-2003 for the block period 10-06-93 to 20-07-03 wherein the first appellate authority had allowed the assessee's appeal in part. The assessee filed a cross objection on a legal issue which is as follows:

> "On the facts and in the circumstances of the case and in law the learned CIT(Appeals) erred in giving a finding that the assessment made for the Block Period does not get vitiated by non issue of notice u/s 143(2). The respondent submits that passing of order u/s 158BC(c) without issue of notice u/s

143(2) is bad in law and whole assessment proceedings becomes null and void."

2 As submitted by both the parties, we first deal with the legal issue raised in the cross objection.

3. Shri Jitendra Sanghvi, the learned counsel for the assessee submitted that the issue whether it is mandatory for the assessing officer to have issued a notice u/s 143(2), prior to passing an order u/s 158BC stands concluded in favour of the assessee by the decision of the jurisdictional High Court in the case of CIT vs Mundera G Nanavati Income Tax Appeal (L) No. 3475 of 2008 dated 21-07-2009, copy of which has been placed on record. A written submission was also filed and reliance was placed on the decision of the Hon'ble Delhi High Court in the case of CIT vs Pawan Gupta & Ors 223 CTR (Del) 487 and another decision of the Bombay High court in the case of CWT vs HUF of HH Late JM Scindia (2008) 300 ITR 193 (Bom). Shri Pragati Kumar, the learned CIT (DR), on the other hand, though not leaving his ground, ultimately agreed that the Hon'ble Bombay High court had dealt with the issue and decided the matter in favour of the assessee

4 Rival contentions heard. On a careful consideration of the facts and circumstances of the case and on perusal of the papers on record and the orders of authorities below we find that the undisputed fact is that the assessing officer has not issued a notice u/s 143(2), before completing the block assessment u/s 158BC(c) of the Act on 31-07-2002. Under the circumstances, we have to necessarily hold that the impugned block assessment order dated 31-07-2002 is bad in law by respectfully following the judgment of the Hon'ble Bombay High Court in the case of CIT-XII,

Mumbai vs Mundera G Nanavati Income Tax Appeal (L) No. 3475 of 2008 dated 21-07-2009 wherein the Hon'ble Court held that the issue is covered against the revenue by the judgment of the same Court in the case of CWT vs HUF of HH Late JM Scindia (2008) 300 ITR 193 (Bom).

5. The learned counsel for the assessee had filed the appeal papers filed by the revenue wherein the grounds of appeal read as below

> "4.(a) The ITAT failed to appreciate that section 158BC of the Act clearly states that the provisions of section 143(2) would apply "so far as may be" meaning thereby that only the notice under section 143(2) has to be issued for carrying out scrutiny assessment in search cases. It does not mean that the time limit specified under the proviso to section 143(2) is to be applied strictly for scrutinizing the return filed under section 158BC.
>
> (b) The ITAT failed to appreciate that section 143(2) starts with the words "where a return has been furnished under section 139 or in response to a notice under sub section 1 of section 142" and therefore the application of section 143(2) is only in respect of assessments under section 143(3) or under section 143(3) read with section 147 It cannot be applied in case of an assessment under section 158 BC read with section 143(3)
>
> (c) The ITAT failed to appreciate that in the case of Boon Catering Company Pvt Ltd it had itself held that in the case of an assessment u/s 158BC issue of a notice u/s 143(2) beyond the prescribed time limit of one year was only a deviation from rule of law resulting in irregularity which is curable A copy of the said decision of the ITAT is attached and annexed hereto marked **Exhibit G.**
>
> (d) The ITAT failed to appreciate that in the case of Shri Madhukar Dalvi Vs. ACIT and others 287 ITR 242 (BOM) the Hon'ble Mumbai High court has he3ld that Section 158BC is

only a procedural section for the purpose of Block Assessment. It is, therefore, submitted that issuance of notice u/s 143(2) as per section 158BC(b) also forms part of procedure and any lapse with regard to the same becomes a curable procedural defect in terms of Section 292B. A copy of the said judgment of Hon'ble Mumbai High court is attached and annexed hereto marked **EXHIBIT-H.**

6 Thereafter, the following substantial questions of law were raised

"1. Whether on the facts and the circumstances of the case and in law the ITAT was justified in allowing the appeal of the respondent holding that notice issued after the prescribed period under section 143(2) invalidates the assessment under section 158BC?

2. Whether in law for the purposes of proceedings u7nder section 158BC, a notice under section 143(2) is required to be issued within a period of one year from the date of filing of the return under section 158BC?

3. Whether in law since the limitation for making an assessment under section 158BC is already prescribed in law, a notice under section 143(2) can be issued at any time before completion of assessment under section 158BC as long as a reasonable opportunity of being heard has been given to the assessee before completion of assessment."

7 After considering the same, the Hon'ble court upheld the order of the Tribunal wherein it was held that non issual of notice u/s 143(2) invalidates the assessment framed u/s 158BC of the Act

8. Coming to the argument of the learned departmental representative wih reference to section 292BB, it is mutually agreed by both the parties that the issue is dealt by the Special Bench of the Tribunal in the case of

Kuber Tobacco Products (P) Ltd vs Dy.CIT, Co.cir.5(1), New Delhi ( 2009) 28 SOT 292 (Del)(SB) wherein it is held as follows:

> "Section 292BB of the Income-tax Act, 1961 – Notice deemed to be valid in certain circumstances – Block assessment period 1-4-1988 to 25-1-1999 – whether section 292BB, inserted by Finance Act, 2008, has no retrospective effect and is to be construed prospectively – Held, yes – Whether, therefore, upto 31-3-2008, as per section 292BB, assessee is not precluded from taking any objection regarding invalidity of an assessment / re-assessment on ground of improper / invalid issuance / service of notice – Held, yes – whether so far as applicability of section 292BB is concerned, it is not strictly restricted to issue of notice under section 143(2) but it is in respect of other notices relating to any provisions of Act which include notice to initiate re-assessment proceedings and other proceedings also – Held, yes "

9. The Hon'ble Delhi High Court in the case of CIT vs Pawan Gupta 223 ITR (Del) 487 has held as follows.

> "Sec 143(2) has no application in a situation where the AO on receipt of the return of undisclosed income in Form No.2B, is satisfied with the same as reflecting the true state of affairs and no further information or explanation is called for from the assessee but where the AO is not inclined to accept the return of undisclosed income filed by the assessee, the procedure in s. 143(2) has to be followed: if an assessment order is passed in such a situation without issuing a notice under s. 143(2), it would be invalid and not merely irregular."

10. In view of the above and specifically in view of the bindning nature of the decision of the jurisdictional High Court we allow ground 1 of the cross objection and hold that the order passed u/s 158BC is bad in law As the order of the assessing officer itself is cancelled, we need not have to look into the grounds raised by the revenue in its appeal.

11. In the result, the appeal filed by the revenue is dismissed and the cross objection filed by the assessee is allowed.

12. Order pronounced on this 12th day of August, 2009.

Sd/-
(V.D. Rao)
Judicial Member
Mumbai, Dt: 12th August, 2009
pk/-
Copy to:
1. the appellant
2. the respondent
3. the CIT
4. the CIT(A)
5. the DR, G-Bench
(True copy)

sd/-
(J. Sudhakar Reddy)
Accountant Member

By order

Asstt. Registrar, ITAT, Mumbai Benches

Copy to: 1 The Appellant 2 The Respondent 3 The CIT City –concerned C-I
4. The CIT(A)- concerned 5 The D R" D" Bench. C-VII

(True copy)

By Order

Asst. Registrar, ITAT, Mumbai Benches
MUMBAI.

Vm.