

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "TM", MUMBAI

Before Justice (Retd.) Dev Darshan Sud, President
As Third Member

ITA Nos.525 to 530/Mum/2008 : Asst.Years 1999-2000 to 2005-2006

Smt.Sumanlata Bansal 1502/1503, Safalya, Tarabaug Lovelane, Byculla Mumbai - 400 010. PAN : AAHPB0141N.	बनाम/ Vs.	The Asst.Commissioner of Income-tax Central Circle 8 Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

आवेदक की ओर से /Appellant by : Shri Hiro Rai

प्रत्यर्थी की ओर से /Respondent by : Shri S.D.Srivastava, Principal CIT-DR

Date of Hearing : 18.05.2015

Date of Pronouncement : 20.05.2015.

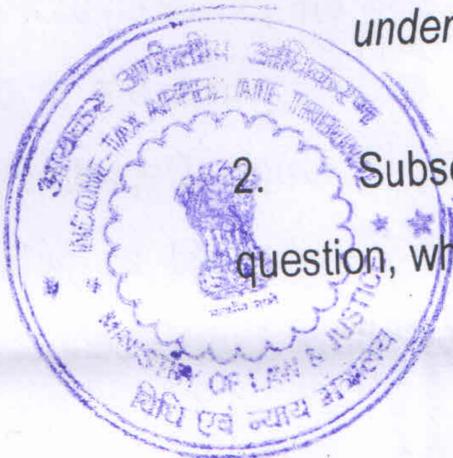
आदेश / ORDER

There is a difference of opinion between the Members, dealing with ITA Nos.525 to 530/Mum/2008. Two questions were framed and referred to the Third Member for decision, viz :-

"(a) Whether non-issuance of the notice as provided in Sub-section (2) to Section 143 of the I.T.Act in the case of assessment framed under section 153A, in consequence of search under section 132, is merely an irregularity and the same is curable?

(b) Whether on the facts of the case, failure on the part of the Assessing Officer to issue notice to the assessee as per provisions of sub-section (2) to section 143 shall have the effect of rendering the entire assessment framed under section 153A of the Act as null and void?"

2. Subsequently, the Principal Commissioner of Income-tax (DR) also raised a third question, which is noted by Shri D.Manmohan, Hon'ble Vice-President, viz :-



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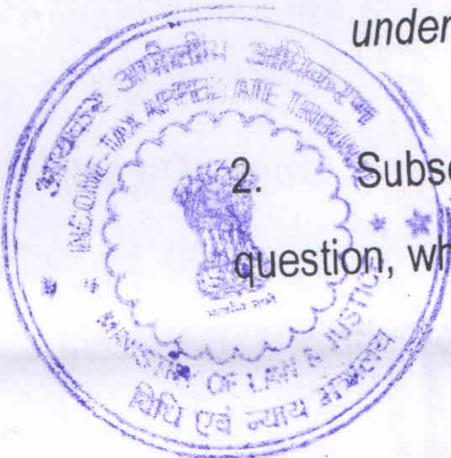
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2. Subsequently, the Principal Commissioner of Income-tax (DR) also raised a third question, which is noted by Shri D.Manmohan, Hon'ble Vice-President, viz :-



“(a) Whether it is necessary to issue notice under section 143(2) to acquire jurisdiction in proceedings under section 153A of the I.T.Act?”

3. Under these circumstances, in the Third Member reference, the Hon'ble Vice-President, put forth two preliminary issues for decision, as under:-

“(a) Whether the Hon'ble President / Third Member is competent to reframe the points of difference to bring to focus the issues that emerge out of the orders passed by the respective Members of the Division Bench? and

(b) Whether the learned CIT-DR is authorized to request the Hon'ble President for reframing of question to bring into focus the points of difference emerging out of the orders passed by the respective Members of the Division Bench?”

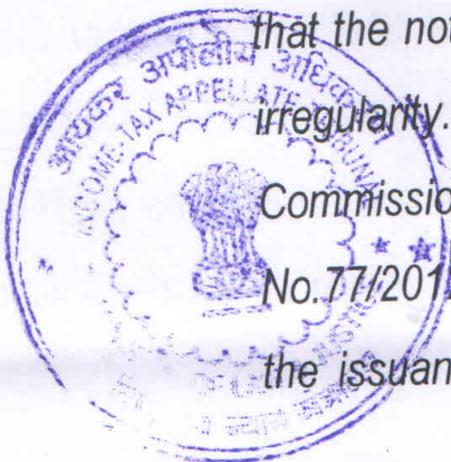
4. I have carefully considered the submissions made by the learned Counsels appearing for the parties. I do not find that the additional issue raised by the CIT-DR in the reference under consideration requires to be considered as in fact both the questions on the difference of opinion take care of the department's additional issue. Insofar as the preliminary issues framed are concerned, I do not express my opinion on these issues as they do not require adjudication.

5. I now advert to the main question raised i.e. whether provisions of section 153A of the Income-tax Act, 1961 (hereinafter referred to as “the Act”) mandates issuance of notice u/s 143(2) of the Act. Learned Counsel for the assessee submits that on a plain reading of this provision, the requirement of issuance of notice u/s 143(2) of the Act is a condition precedent to proceed further. Learned Counsel has relied on a number of decisions including that of the Hon'ble Supreme Court as also the jurisdictional High Court, to urge that on an interpretation of the provisions therein, which are in pari material to sec.153A notice is mandatory u/s 143(2). Learned Departmental Representative submits that the requirement of notice as incorporated by judicial interpretation or by statutory mandate in sections 147, 148, 158BB, 158BH cannot be



read into the provisions of section 153A, as this is not the legislative intent and the case is squarely covered by the decision of the Hon'ble Delhi High Court in the case of *Ashok Chaddha v. ITO* [(2011) 337 ITR 399 (Delhi)].

6. I now advert to the law cited before me by Learned Counsel for the assessee. In *ACIT & Anr. v. Hotel Blue Moon* [(2010) 321 ITR 362 (SC)], the Hon'ble Supreme Court, while dealing with the question of issuance of notice u/s 143(2) in search and seizure cases, after noting the contentions of Counsel holds ".....the only question that arises for our consideration in this batch of appeals is, whether service of notice on the assessee under section 143(2) within the prescribed period of time is a pre-requisite for framing the block assessment under Chapter XIV-B of the Income-tax Act, 1961? (page 367)". Court further considers the case put forth by the Revenue that ".....The case of the Revenue is that the expression "so far as may be apply" indicates that it is not expected to follow the provisions of section 142, sub-sections (2) and (3) of section 143 strictly for the purpose of block assessments. We do not agree with the submissions of the learned Counsel for the Revenue, since we do not see any reason to restrict the scope and meaning of the expression "so far as may be apply". In our view, where the Assessing Officer in repudiation of the return filed under section 158BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of section 142, sub-sections (2) and (3) of section 143." (page 370) (emphasis supplied). Learned Counsel for the assessee also contended that the jurisdictional High Court in *ACIT v. Geno Pharmaceuticals Ltd.* in Tax Appeals No.75, 76, 77 & 78 of 2012 after noticing the factual matrix holds ".....However, ITAT dismissed the appeal by order dated 11th May, 2012 and accepted the new ground which was raised by the respondent, namely that the notice under Section 143(2) of the Act is mandatory and it is not a procedural irregularity. Similarly, for the AY 2006-2007 also the same orders were passed by the Commissioner of Income Tax (Appeals) and the ITAT." "4. So far as Tax Appeals No.77/2012 and 78/2012 are concerned, in both these appeals, the ITAT has held that the issuance of notice after reopening of the case was mandatory and this order is



under challenge. It is contended that the said order is contrary to the provisions of Sections 292BB which was introduced by the Finance Act 2008 w.e.f. 01.04.2008, in which it is stated that in a case where an assessee has appeared in any proceedings or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of the said Act which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of the said Act. Perusal of the order of the ITAT reveals that this aspect was not canvassed before the ITAT. 5. Apart from that, it is an admitted position that no notice under Section 143(2) had been issued while making assessment under Section 143(3) read with Section 147. The Apex Court in the case of National Thermal Power Co. Ltd. vs. Commissioner of Income-Tax, report in 229 ITR 383 has held that the Tribunal has discretion to allow or not to allow a new ground to be raised. But in a case where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee. The ITAT, after relying on the judgment of the Apex Court in R.Dalmia vs. CIT, reported in 236 ITR 480, came to the conclusion that issuance of notice under Section 143(2) was mandatory. The ITAT has taken into consideration the relevant provisions and has also taken into consideration the judgment of the Apex Court and relying on the said judgments, the ITAT has held that notice under Section 143(2) is mandatory and in the absence of such service, the Assessing Officer cannot proceed to make an inquiry on the return filed in compliance with the notice issued under Section 148." Learned Counsel also relies upon the decision of the Hon' ble High Court of Delhi in Alpine Electronics Asia Pte. Ltd. Director General of Income-tax & Ors. [(2012) 341 ITR 247 (Del.)] to urge that the requirement of issuance of notice u/s 143(2) is mandatory and on similar facts he also relies upon the decision of the Allahabad High Court in CIT v. Rajeev Sharma [(2011) 336 ITR 678 (Allahabad)]. Learned Counsel submits that the provisions of law dealt with



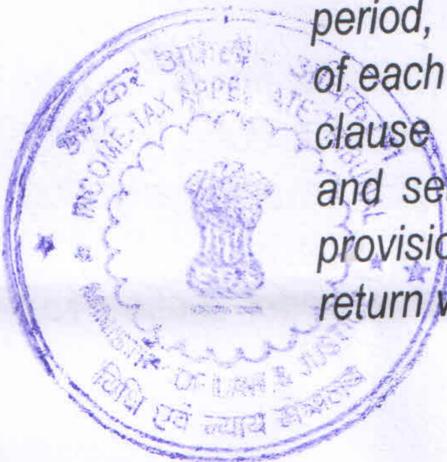
in the judgments (supra) are no different from those of the provisions of requirement of issuance notice in proceedings u/s 153A of the Act.

7. Learned Departmental Representative places reliance on the decision of the Delhi High Court in *Ashok Chaddha v. ITO* [(2011) 337 ITR 399 (Delhi)]. This was a case u/s 153A of the Act and the question raised was whether the provisions of section 143(2) of the Act for issuance of notice are attracted or not. In this case, two issues were raised for the consideration of the High Court, viz., "(a) Whether the issue of notice under section 143(2) of the Income-tax Act is mandatory for finalization of assessment under section 153A?, (b) Whether the findings of the authorities below upholding the addition of Rs.10 lakhs of cash seized from Mr.D.S.Rawat in the hands of the assessee was perverse and required to be set aside?". The issue was answered by the High Court against the assessee. Proceeding with the reasoning, holds :-

"8. Admittedly, the assessee was issued a notice under section 153A of the Act, in response to which he had filed a return of income. Thereafter, two detailed questionnaires were issued to the assessee before the completion of assessment. Section 153A of the Act provides procedure for assessment in case where a search is initiated or documents are requisitioned. The relevant portion of section 153A is reproduced hereunder :

"153A. Assessment in case of search or requisition.—(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), 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;"



9. There is no specific provision in the Act requiring the assessment made under section 153A to be after issue of notice under section 143(2) of the Act. Learned counsel for the assessee places heavy reliance on the judgment of the Hon'ble Supreme Court in *Hotel Blue Moon* [2010] 321 ITR 362 wherein it was held that where an assessment has to be completed under section 143(3) read with section 158BC, notice under section 143(2) must be issued and omission to do so cannot be a procedural irregularity and the same is not curable. It is to be noted that the above said judgment was in the context of section 158BC. Clause (b) of section 158BC expressly provides that "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-sections (2) and (3) of section 143, section 144 and section 145 shall, so far as may be, apply. This is not the position under section 153A. The law laid down in *Hotel Blue Moon* [2010] 321 ITR 362 (SC), is thus not applicable to the facts of the present case.

10. The decision of *Lunar Diamond Ltd.* [2006] 281 ITR 1 (Delhi); *Vardhman Estates* [2006] 287 ITR 368 (Delhi) and *Bhan Textiles* [2006] 287 ITR 370 (Delhi) relied upon by learned counsel for the assessee related to the requirement of service of notice upon the assessee within a prescribed time and thus not applicable to the present case. The case of *Pawan Gupta* [2009] 318 ITR 322 (Delhi) related to mandatory issue of notice under section 143(2) of the Act in the case of regular assessment as also on block assessment. This being a case of assessment based on search under section 153(A), the same is not applicable to the present case. In the case of *Raj Kumar Chawla* [2005] 227 ITR (AT) 225 (Delhi) [SB] relied upon by learned counsel for the assessee was that of the Tribunal, wherein, a view was taken that if a return filed under section 148 of the Act is sought to be scrutinized, the compliance of provision contained in proviso under section 143(2) of the Act is mandatory. The issue of requirement of notice under section 143(2) for an assessment under section 147 came up for consideration before this Court recently in *CIT vs. Madhya Bharat Energy Corporation Ltd.* (I.T.A No. 950 of 2008, decided on July 11, 2011) 337 ITR 389 (Delhi). In that case also, this Court has held that in the absence of any specific provision under section 147 of the Act, the issuance of notice under section 143(2) cannot be held to be a mandatory requirement.

11. It is also to be noted that section 153A provides for the procedure for assessment in case of search or requisition. Sub-section (1) starts with non-obstante clause stating that it was "notwithstanding" anything contained in sub sections 147, 148 and 149, etc. Clause (a) thereof provides for issuance of notice to the person searched under section 132



or where documents etc are requisitioned under section 132(A), to furnish a return of income. This clause nowhere prescribes for issuance of notice under section 143(2). Learned counsel for the assessee/appellant sought to contend that the words, "so far as may be applicable" made it mandatory for issuance of notice under section 143(2) since the return filed in response to notice under section 153A was to be treated as one under section 139. Learned counsel relies upon *R. Dalmia vs. CIT (supra)* wherein the question of issue of notice under section 143(2) was examined with reference to section 148 by the Supreme Court in the context of section 147. The Apex Court held as under (page 488) :

"As to the argument based upon sections 144A, 246 and 263, we do not doubt that assessments under section 143 and assessments and reassessments under section 147 are different, but in making assessment and reassessments under section 147 the procedure laid down in sections subsequent to section 139, including that laid down by section 144B, has to be followed."

12. The case of *R. Dalmia vs. CIT [1999] 236 ITR 480 (SC)* primarily was with regard to applicability of section 144B and section 153 (since omitted with effect from April 1, 1989) to the assessment made under sections 147 and 148 and thus cannot be said to be the decision laying down the law regarding mandatory issue of notice under section 143(2).

13. The words 'so far as may be' in clause (a) of sub-section (1) of section 153A could not be interpreted that the issue of notice under section 143(2) was mandatory in case of assessment under section 153A. The use of the words "so far as may be" cannot not be stretched to the extent of mandatory issue of notice under section 143(2). As is noted, a specific notice was required to be issued under clause (a) of sub-section (1) of section 153A calling upon the persons searched or requisitioned to file return. That being so, no further notice under section 143(2) could be contemplated for assessment under section 153A.

14. No specific notice was required under section 143(2) of the Act when the notice in the present case as required under section 153(A)(1)(a) of the Act was already given. In addition, the two questionnaires issued to the assessee were sufficient so as to give notice to the assessee, asking him to attend the office of the Assessing Officer in person or through a representative duly authorized in writing or produce or cause to be produced at the given time any documents, accounts, and any other evidence on which he may rely in support of the return filed by him." (pages 404 to 406)



8. Learned Counsel for the assessee urges that the decision ignores the ratio laid down in *Hotel Blue Moon (supra)* as also of the jurisdictional High Court in *Geno Pharmaceuticals Ltd. (supra)*. Adverting to the first submission, the case of *Hotel Blue Moon* was urged before the Court in *Ashok Chaddha* and has been distinguished on its applicability to section 153A. Adverting to the decision of *Geno Pharmaceuticals Ltd. (supra)*, all I need to say that it does not interpret the provisions of section 153A of the Act. It is urged before me that series of decisions were rendered with respect to proceedings u/s 148, which mandates the issue of notice where income has escaped assessment. I cannot accept this contention as firstly, the law is settled in *Ashok Chaddha (supra)*. In these circumstances, the first question raised for consideration is answered that non-issuance of notice under sub-section (2) of section of the Act is not mandatory. As a consequence, the second question is also answered against the assessee. Assessment proceedings u/s 153A cannot be held as null and void, for non-issuance of notice u/s 143(2) of the Act, as this provision is not attracted to proceedings u/s 153A of the Act.

9. The Registry is directed to post the case before the Bench dealing with the case for passing appropriate order after hearing the parties.

Order pronounced on this 20th day of May, 2015.

आदेश की घोषणा दिनांक: को की गई ।



मुंबई Mumbai; दिनांक Dated : 20th May, 2015.

Devdas*

TRUE COPY

Sd/-

(Justice (Retd.) Dev Darshan Sud)
PRESIDENT

Signature
अहाबक पंजीकार/Assistant Registrar
आयकर अपीलिय कक्षिकरण
Income-Tax Appellate Tribunal
मुम्बई/Mumbai.