IN THE HIGH COURT OF DELHI AT NEW DELHI

CW Nos.4997/2005, 5010/2005, 5062/2005

BASU DISTRIBUTORS PVT. LTD. ...Petitioner through
Mr. Y.K. Kapoor, Adv.

Versus

INCOME TAX OFFICER WARD 2(3) NEW DELHI ...Respondent through
Mr. J.R. Goel, Adv.

Date of Hearing : 30th October, 2006

Date of Decision : 15th December, 2006

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether reporters of local papers may be allowed to see the Judgment?

2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in the Digest?

J U D G M E N T

VIKRAMAJIT SEN

1. These Writ Petitions were filed on 17.3.2005 and Notice came to be issued on 21.3.2005. It pertains to combined Assessment Years (AYs) 1992-93, 1993-94 and 1994-95. The Income Tax Appellate Tribunal(ITAT) had allowed the Petitioner's Appeal on 23.6.2000 and had held that "it is imperative in the interest of justice and fairplay to set aside and restore the matter

to the Assessing Officer for reconsideration after giving sufficient reasonable opportunity to the assessee to furnish necessary details, explanations and evidences in support of the above and then to pass fresh orders as per law, rule and CBDT circulars". The Petitioner submits that it had apprised the Assessing Officer (AO) of these Orders of the ITAT in August, 2002. Reliance has been placed on Section 153 (2A) of the Income Tax Act (IT Act) which, at the relevant time, mandated that a 'Fresh Assessment' in pursuance of an Order under Sections 250, 254, 263 or 264, setting aside or cancellation of an order must be made before the expiry of two years (currently one year) from the end of the Financial Year in which such order is received by the Chief Commissioner or Commissioner. It appears that on 22.12.2004 the AO eventually issued a Notice under Section 152 of the IT Act to the Petitioner, who immediately responded vide its communications dated 11.1.2005 and 24.2.2005 that the proceedings were no longer competent, as they had travelled beyond the time prescribed in Section 153(2A) of the statute. The present Writ Petition is predicated on this factual matrix. The AO, however, framed the Assessment on 28.2.2005, i.e., before the filing of the present Writ Petition. Indeed, it is remarkable that the averment in the Writ Petition is that as on 11.3.2005 "the

assessing officer despite objection is adamant in framing assessment despite the fact that he has no jurisdiction, the Petitioner is left with no alternative but to file the present Petition", whereas the Assessment had by then already been completed.

2. On behalf of the Revenue it has been asseverated that the AO issued a Notice under Section 143(2) of the IT Act and served the same on the Petitioner on 2.9.2004, requiring the Petitioner to appear on 10.9.2004. As there was no representation for the Petitioner on that date, a notice under Section 142 of the Act was issued on 22.12.2004; requiring the Petitioner to produce its Books of Accounts and Vouchers. On the Petitioner's request the hearing was adjourned to 4.1.2005 and thereafter to 11.1.2005, 21.1.2005, 27.1.2005 and then 3.2.2005. It is further pleaded that the Petitioner was informed that the matter was only partly set aside by the ITAT and therefore the proceedings were legally competent. At that stage the Petitioner's representatives sought time to file Written Arguments and argue the matter on merits, and accordingly the case was adjourned to 17.2.2005. Written Arguments were filed on 24.2.2005 on which date the case was further discussed. The AO thereafter passed the Orders dated

28.2.2005. The stand of the Revenue is that Section 153 (2A) is not attracted; that the Writ Petition ought not to be entertained since the Petitioner could have assailed the Orders dated 28.2.2005 by means of an Appeal. We propose to discuss the maintainability of a writ petition filed in these circumstances, before analyzing the provisions of Section 153 of the IT Act. Admittedly, no Appeal has been preferred by the Petitioner against the said Orders dated 28.2.2005 till date.

3. In ***The National Institute of Immunology -vs- Municipal Corporation of Delhi,*** AIR 2002 Delhi 192 a Division Bench has rejected a request for dismissal of the Writ Petition on the grounds that the Petitioners have not approached the Appellate Authority against the action of the Assessing Authority, holding that declining to entertain a writ petition because of the availability of an alternative remedy is only a self-imposed restriction by the High Courts for exercise of the powers contained in Article 226 of the Constitution of India. In ***Chemical Sales Corporation -vs- New Delhi Municipal Council,*** 1996 V AD (Delhi) 89 another Division Bench has observed that in the ordinary course it may not be very appropriate to take resort to Article 226 if an alternative

efficacious remedy is available. Nevertheless the Division Bench entertained the writ petition since the orders that had been assailed could have been viewed as void and non est and for the reason that the adjudication involved the determination of pure questions of law. Yet another Division Bench has dealt with this very question in ***Indian Hotels Co. Ltd. -vs- New Delhi Municipal Council,*** 1996 III AD (DELHI) 299 noting that an earlier Judgment of the Constitution Bench of the Supreme Court had not been laid before their Lordships when called upon to decide the appeal in ***Shyam Kishore -vs- Municipal Corporation of Delhi,*** AIR 1992 SC 2279. The Division Bench observed, inter alia, as follows:

> "34. Yet another aspect which needs to be taken note of is the provision by the legislature for 100% deposit of tax before filing and appeal. This provision has been introduced obviously in the interest of revenue, so as to see that unwilling tax payers do not delay payment of tax by filing underserving appeals. Challenge was laid to the vires of Section 170(b) of DMC Act providing for 100% deposit of tax as a condition precedent to the hearing of the appeal. Challenge has been turned down and the provision upheld as intravires by the Supreme Court in Shyam Kishore & Ors. vs. Municipal Corporation of Delhi, AIR 1992 SC 2279. Their Lordships have also held that resort to Articles 226-27

challenging the orders of assessment of property tax should be discouraged when there is an alternative remedy of an appeal - a more satisfactory solution being available on the terms of the statute itself. An earlier decision of the Supreme Court in Himmat Lal Hari Lal Mehta Vs. State of Madhya Pradesh, AIR 1954SC 403 was not placed before the Supreme Court deciding Shyam Kishore's case (supra) in Himmat Lat Hari Lal Mehta's case, the Constitutional Bench has held:-

> "Moreover the remedy provided by the Act is of onerous and burdensome character. Before the appellant can avail of it, he has to deposit the whole amount of the tax. Such a provision can hardly be described as an adequate alternative remedy."

35. Be that as it may, the fact remains that inspite of availability of alternative remedy of an appeal good number of writ petitions are being filed before the High Court invoking its jurisdiction under Articles 226 and 227 of the Constitution. Some of such writ petitions have to be entertained because in the facts and circumstances of those cases the assessee cannot be left to pursue the remedy of appeal which would prove too onerous.

36. A condition requiring 100% amount of tax to be deposited as a condition precedent to hearing by the appellant authority may amount to negation of right of appeal in some cases. To illustrate, a property may be assessed in the name of someone who is neither the

owner nor occupier thereof and fixed with liability to pay tax; a property not falling within the limits of the Municipal Corporation may come to be assessed and taxed; property may be grossly overvalued by the Assessing authority attracting an obligation to pay an amount of tax absolutely disproportionate with the value of the property and means of the owner. In all such cases under the present law, the assessee must deposit the tax before he may deserve a hearing from the appellate authority. This provision too deserves to be suitably amended so as to confer a discretionary power on the appellate authority allowing dispensation of the deposit of the amount of tax wholly or partially in very deserving cases made for payment of interest so as to adequately compensate the Corporation for the delayed recovery in the event of appeal being dismissed or interim order being vacated. Such a provision would serve the ends of justice giving relief to the assessee/appellants in deserving cases and reduce the filing of writ petitions in superior courts."

4. Another Division Bench of this Court in ***D.R.Aggarwal -vs- New Delhi Municipal Committee,*** 1998 (47) DRJ (DB), has rejected a similar objection, and has articulated the following enunciation of the law:-

" The Full Bench decision of this Court in Shyam Kishore vs. Municipal Corporation of Delhi and others,

AIR 1991 Delhi 104, which was affirmed by the Supreme Court in 1993(1) SCC 22, was mainly concerned with the question of validity of the provisions of Section 170(b) of Delhi Municipal Corporation Act, 1957. The Supreme Court while affirming the said Full Bench decision only stated that the resort to Articles 226 and 227 should be discouraged when there is an alternative remedy. It is one thing to hold that on facts if it is so justified, a petition under Article 226 may be discouraged but it is another thing to hold that the writ petition is not maintainable. In Shyam Kishore's case (supra) the Supreme Court did not hold that the writ petition is not maintainable. It deserves to be emphasised that a statutory law cannot take away the constitutional powers of the Court. Reference may be made to the Constitution Bench decision of the Supreme Court in the case of Himmat Lal Hari Lal Mehta vs. State of Madhya Pradesh and others, AIR 1954 SC 403, which rejected the contention that because a remedy under the impugned Act is available to the assessee, he is disentitled to relief under Article 226. Referring to an earlier decision in the case of State of Bombay vs. United Motors (India) Limited, AIR 1953 SC 252 it was held that the principle that a Court will not issue a prerogative writ when an adequate alternative remedy was available does not apply where a party has come to the Court with an allegation that his fundamental right had been infringed and sought relief under Article 226. Moreover, since the remedy provided by the Act is of an

onerous and burdensome character and before the assessee can avail of it, he has to deposit the whole amount of the tax, such a provision can hardly be described as an adequate alternative remedy. The decision in Himmat Lal's case(supra) was again cited with approval by the Supreme Court in the case of Srikant Lashinnath Jituri and others vs. Corporation of the city of Belgaum, 1994(6) SCC 572. In this case the Supreme Court while examining the question whether the remedy of suit and/or petition under Article 226 would be barred, held that such an onerous provision may be a ground for entertaining a writ petition on the ground that alternative remedy provided by the statute is not adequate or efficacious remedy but that can never be a ground for maintaining a civil suit. Both the jurisdictions are different and are governed by different principles. Article 226 provides a constitutional remedy. It confers the power of judicial review on High Courts. The finality clause in a statute is not a bar to the exercise of this constitutional power whereas the jurisdiction of a civil court arises from another statute, viz., Section 9 of the Code of Civil Procedure. In our view it has always been the law in our country that a constitutional remedy available to a citizen cannot be barred by a provision regarding finality or alike in a statute".

It may also be recalled that the Seven Judge Constitution Bench had clarified, in ***L.Chandra Kumar -vs- Union of India,*** (1997)

3 SCC 261; AIR 1997 SC 1125 that the powers reposed in the High Courts under Article 226 of the Constitution cannot be rendered nugatory by any statutory enactment. The Court opined that the "jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution".

5. Very recently, in ***State of H.P. -vs- Gujarat Ambuja Cement Ltd.,*** AIR 2005 SC 3936 this very aspect of the law has been discussed in detail. The decision constitutes a Restatement of the law on the interplay between Article 226 of the Constitution and statutory provisions prescribing ouster of jurisdiction of civil courts and availability of redress by way of Appeals. Almost all the precedents on this question have been considered and thereafter the Court has enunciated the law in these concise words viz.- "when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ

petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more than in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute".

6. It is in this context that Mr. Kapur, learned Counsel for the Assessee has drawn attention to the decision in ***Jiyajeerao Cotton Mills Ltd. -vs- Income Tax Officer***, [1977] 107 ITR 253 (Cal) holding that if the question whether the action of the Authority is barred by limitation is predicated on admitted facts, a writ petition would not be inappropriate. Sabyasachi Mukharji, J., as the learned Chief Justice of India then was, also rejected the argument that since the order of reassessment dated 25.3.1969 did not alter the ground on which rectification was proposed of the order dated 29.4.1967, limitation should be computed from the latter date. Strictly speaking, this may not be a precedent for the proposition that time will start ticking from the date of the passing of the order rather than when it came to be officially served on the concerned party. Thereafter, K.S. Paripoornan, J. (as His Lordship then was), speaking for the

Bench as Chief Justice of the High Court of Patna, in ***Dhanaraj Singh -vs- Commissioner of Income Tax***, [1996] 218 ITR 312 (Pat) opined that if the prerequisites envisaged in Sections 147 and 148 of the IT Act were absent, there being an absolute want of jurisdiction, an appropriate writ could certainly issue. We cannot do better than to reproduce the following extract from the decision of their Lordships as the Constitution Bench in ***Calcutta Discount Co. Ltd. -vs- Income Tax Officer***, [1961] 41 ITR 191 (SC):-

> 15. In the present case, the company contends that the conditions precedent for the assumption of jurisdiction under s.34 were not satisfied and came to the Court at the earliest opportunity. There is nothing in its conduct which would justify the refusal of proper relief under Art.226. When the Constitution confers on the High Courts the power to give relief it becomes the duty of the Courts to give such relief in fit cases and the Courts would be failing to perform their duty if relief is refused without adequate reasons. In the present case we can find no reason for which relief should be refused.
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> 16. We have therefore come to the conclusion that the company was entitled to an order directing the ITO not to take any action on the basis of the three impugned notices.
>
> We are informed that assessment orders were in fact made on 25th March, 1952, by the ITO in the

proceedings started on the basis of these impugned notices. This was done with the permission of the learned judge before whom the petition under Art.226 was pending, on the distinct understanding that these orders would be without prejudice to the contentions of the parties on the several questions raised in the petition and without prejudice to the orders that may ultimately be passed by the Court. The fact that the assessment orders have already been made does not therefore affect the company's right to obtain relief under Art.226. In view, however, of the fact that the assessment orders have already been made we think it proper that in addition to an order directing the ITO not to take any action on the basis of the impugned notices a further order quashing the assessment made be also issued.

7. Article 226 and 227 of the Constitution were invoked in ***Daffadar Bhagat Singh -vs- Income-Tax Officer, A Ward, Ferozepure,*** [1969] 71 ITR 417(SC). The same view has been taken in ***Mercury Travels Ltd. -vs- Deputy Commissioner of Income Tax,*** [2002] 258 ITR 533 (Cal), ***T.S. Santhanam -vs- Expenditure Tax Officer,*** [1973] 87 ITR 582(Mad.), ***S. Chattanatha Karayalar -vs- Excess Profits Tax Officer,*** [1973] 92 ITR 384(Mad.), ***M.M. Stores -vs- A.K. Bandopadhyay,*** 66 CWN 170 and ***Panama Private Ltd. -vs-***

Income Tax Officer, [1971] 82 ITR 205(Cal.). Accordingly, there are no fetters on the issuance of any of the prerogative writs and the exercise of the extraordinary powers of the High Courts under Article 226 will always,call for jural discretion. There is virtually no scope for controversy that appropriate writs should issue where an authority is conducting or continuing proceedings in respect of which there is a statutory interdiction including stipulations prescribing time periods for their initiation or completion. It is trite that IT Act contains myriad measures on both. Parliament is fully alive to the perniciousness of rendering a citizen vulnerable to the harassment of unjustified Departmental investigations. A tax-state is as abominable as a police-state.

8. We shall now turn our attention to the facts that have arisen in the proceedings before us. A Notice under Section 143 (2) was issued on 18.6.1997 notifying the Petitioner of the compulsory scrutiny of its Returns for the AY 1992-93. The gravamen of the dispute revolves around the application of Section 40A(3). The Assessment has been completed at a total income of Rs.16,25,723/- as against the Return of Rs.2,24,362/- incorporating the following additions:-

1. Cash payments to Ritz Theatres (P) Ltd.

in violation of section u/s. 40A(3) of the Act.	12,24,576/-
2. Cash payments to Honey Enterprises in violation of section u/s. 40A(3) of the Act	97,500/-
3. PF Collection u/s. 36(i) (va)	8,148/-
4. Unclaimed sundry balance over three Years	71,137/-

9. The matter eventually came to be disposed of by the ITAT vide their consolidated Order dated 23.6.2000 in three Appeals covering three combined AYs 1992-93, 1993-94 and 1994-95. The operative part of the Order, which is at the fulcrum of the disputes before us, reads as follows:

> 15. We have considered the rival submissions and the materials on the file. We are of the view that the case had not been properly examined by the AO and the Ld. CIT(A). It appears that sufficient reasonable opportunity was not given to the assessee to place the complete facts and to furnish necessary explanation and evidences regarding the cash payment in question. Both the AO and the Ld. CIT(A) considered the issue in question in a routine manner. It was a case where huge amounts were involved in all the three years in question and the case required proper consideration of the details, explanations. We find that neither the AO nor the Ld. CIT(A) had looked into the relevant accounts to have proper appreciation of the peculiar facts and circumstances of the present case. A perusal of the impugned order shows that specific opportunity was not

given to the assessee to explain the exceptional and unavoidable circumstance under which the cash payment were made and to furnish certificate from the concerned parties to the effect that they insisted on cash payment. In view of the amount involved, the authorities below should have given specific opportunity to the assessee in this regard.

16. The explanations furnished by the Ld. Sr. counsel before us as above had not been furnished before the authorities below. We are of the view that in the interest of justice and fair play these explanations had to be properly considered by the AO. The contention of the Ld. Sr. Counsel that the payments were not in cash but they were through book entry must be examined with reference to the books of accounts like the cash book, ledger account etc. The explanations that since Ritz Theatres (P) Ltd. was holding the cash collection on behalf of the assessee and out of the same hire charges were recovered for which necessary entries were made in the account, which did not amount to cash payment required proper consideration and appropriate findings thereon. Again the explanations that in view of the nature and requirement of the business of both the assessee and Ritz Theatres (P) Ltd. the cash collections from the cinema had to be kept in cash and out of the same, the hire charges had to be recovered by Ritz Theatres (P) Ltd. will have to be considered by the AO with reference to the facts of the case, books of accounts, evidence etc.

18.(sic.) Similarly, the details, explanations and evidences regarding the cash payments to the other parties as above will have to be considered by the AO for coming to fair and just conclusion in the case.

19. On the facts and circumstances of the case, therefore, we consider it imperative in the interest of justice and fairplay to set aside and restore the matter to the AO for reconsideration after giving sufficient reasonable opportunity to the Assessee to furnish necessary details, explanations and evidences in support of the above and then to pass fresh order as per law, rule and CBDT circulars.

10. Along with the Writ Petition the Petitioner has annexed a copy of the letter dated 18.8.2000 addressed to the Dy. CIT, Co. Circle 2(1), New Delhi forwarding a photocopy of the aforementioned consolidated Order of the ITAT, and stating that -"Perusal of the order would show that the Hon'ble Court Tribunal has given directions for fresh order and has allowed the appeals for statistical purposes". There is a stamp of the Assessee of even date. The contention of Shri J.R. Goel, learned counsel for the Revenue, is that the above extract clearly shows that the remanded Assessment was to be made in order to give effect to the findings and directions made by the ITAT in the Order passed under Section 254 of the Act. Although the

Remand Order is dated 23.6.2000, a Notice under Section 143(2) is stated by the Department to have been served on the Assessee as late as on 2.9.2004, requiring the Assessee to appear before the AO on 10.9.2004. No explanation has been offered for the absence of any action on the part of the AO for over four years, viz., between 23.6.2000 and 2.9.2004. The reason for the Assessee's repeated objection that the proceedings have become time-barred is, therefore, obvious. This objection has been overruled in the Assessment Order dated 28.2.2005 ascribing the following reasons:-

> (a) The ITAT has set aside the assessment partly limited to the question of payments made u/s. 40A(3) only and was thus partly set aside which do not fall under the purview of section 153(2A).
> (b) The departmental appeal relevant to Assessment Year 1992-93 was decided on 25.11.2003.

11. The said Assessment Order further records that this opinion was conveyed to the Assessee's representative who thereupon requested to argue the case on merits. It is within these parameters that the present Writ Petitions have to be decided. The quantum has not been assailed before us as that would have to be questioned only by way of an Appeal. The cryptic manner in

which the Objection pertaining to the time-barring of the proceedings is articulated leaves much to be desired. It would not be unreasonable to draw the inference that the AO was uncomfortable in dealing with the objection raised and hence took the easy way out of adopting an evasive line and conveying the impression that the representative of the Assessee was satisfied that the proceedings had not become time-barred and, therefore, willingly argued the Appeals on merits. It also appears to us that the order of the ITAT is ambiguous so far as the contentions of the Revenue are concerned since it provides an arguable case to both sides. This may well be because the ITAT did not expect the Department to sleep over the matter for over four years and presumably expected that requisite action would be taken expeditiously and certainly not beyond two years. It leaves to us the task of extracting the true meaning behind the words employed by the ITAT in paragraph 19 extracted above. There would have been little room for controversy if the ITAT had explicitly set aside the impugned Assessment. Alternatively, had the ITAT indicated the selected aspects of the Assessment which it had 'restored' for reconsideration of the AO, arguments pertaining to the time-barring of the proceedings would have been obviated. Further still, instead of the words 'fresh order as

per law' it should preferably have used the words 'fresh assessment' or 're-assessment' or 'recomputation'. The language employed by the ITAT is most unsatisfactory and has resulted in creating scope for further litigation.

12. The time limit for completion of assessments and reassessments is to be found in Section 153 of the IT Act. It has already been noted that different period has been prescribed for actions envisaged in the statute. Thus limitation is presently two years for first assessments as it used to be for Sections 147/148 (which stands reduced to one year by the Finance Act 2001) etc. etc. We are presently concerned with sub-section (2A) relied upon by Mr. Kapur, learned Counsel for the Assessee whereas sub-section 3(ii) is referred to by Shri Goel, learned Counsel for the Revenue:-

> 153.(2A) Notwithstanding anything contained in sub-sections(1), (1A), (1B) and (2), in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment in pursuance of an order under section 250 or section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of one year from the end of the financial year in which the order under section 250 or

section 254 is received by the Chief Commissioner or Commissioner, as the case may be, the order under section 263 or section 264 is passed by the Chief Commissioner or Commissioner.

(3) (ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 250, 254, 260, 262, 263 or 264 [or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act].

13. In ***Rajinder Nath -vs- CIT***, 120 ITR 14 (SC) the question was whether the firm was the owner of a building and the legal propriety of reassessment of one of its partners was under jural consideration. In this context their Lordships made these observations:-

> The expressions "finding" and "direction" are limited in meaning. A finding given in an appeal, revision or reference arising out of an assessment must be a finding necessary for the disposal of the particular case, that is to say, in respect of the particular assessee and in relation to the particular assessment year. To be a necessary finding, it must be directly involved in the disposal of the case. It is possible in certain cases that in order to render a finding in respect of A, a finding in respect of B may be called for. For instance, where the

facts show that the income can belong either to A or B and to no one else, a finding that it belongs to B or does not belong to B would be determinative of the issue whether it can be taxed as A's income. A finding respecting B is intimately involved as a step in the process of reaching the ultimate finding respecting A. If, however, the finding as to A's liability can be directly arrived at without necessitating a finding in respect of B, then a finding made in respect of B is an incidental finding only. It is not a finding necessary for the disposal of the case pertaining to A. The same principles seem to apply when the question is whether the income under enquiry is taxable in the assessment year under consideration or any other assessment year. As regards the expression "direction" in s.153(3)(ii) of the Act, it is now well settled that it must be an express direction necessary for the disposal of the case before the authority or court. It must also be a direction which the authority or court is empowered to give while deciding the case before it. The expressions "finding" and "direction" in s.153(3)(ii) of the Act must be accordingly confined. S.153(3)(ii) is not a provision enlarging the jurisdiction of the authority or court. It is a provision which merely raises the bar of limitation for making an assessment order under s.143 or s.144 or s.147 : ITO v. Murlidhar Bhagwan Das [1964] 52 ITR 335 (SC) and N.K.T. Sivalingam Chettair v. CIT [1967] 66 ITR 586(SC). The question formulated by the Tribunal raises the point whether the AAC could convert the provisions of s.147(1)

into those of s.153(3)(ii) of the Act. In view of s.153(3)(ii) dealing with limitation merely, it is not easy to appreciate the relevance or validity of the point.

14. Mr. Y.K. Kapur, learned Counsel for the Assessee has also drawn our attention to ***Prem Nath Mayor -vs- CIT, Jullunder,*** 148 ITR 588 [P & H] in which the Bench held that it is open to the appellate authority to remand a case and in this event the AO is bound to frame a fresh assessment in accordance with the directions contained in the order of remand. It was further observed that by virtue of Section 153(2A) of the IT Act a fresh assessment under Section 143 pursuant to an order under Section 250 can be made within two years from the end of the financial year in which the order of remand is passed. However, the legal nodus before us is somewhat different, in that it is the argument of the Department that a fresh assessment had not been ordered; on the contrary the case had been remanded to give effect to the finding or direction of the ITAT.

15. ***Daffadar Bhagat Singh*** was decided in the context of the second proviso to Section 34(3) of the 1922 Act which is in pari materia with Section 153(3)(ii) of the IT Act. Their Lordship observed thus:-

"…. It is true that in the assessment order of the Income-tax Officer the status of the assessee is shown to be Hindu undivided family but that has been apparently shown in the order because the Income-Tax Officer gave an express decision about the status of the assessee and held that it constituted a Hindu undivided family. It, however, stands proved that the assessee filed the return claiming the status of a firm together with an application under section 26A for its registration which was disallowed by the Income-tax Officer but was allowed by the Appellate Assistant Commissioner. The substantial issue before the Appellate assistant Commissioner was one of status of the assessee and he held that it was a partnership firm and not a Hindu undivided family. This finding was necessary for deciding the appeal before the Appellate Assistant Commissioner and it is not possible to understand how it can be regarded as having been made only incidentally. Once a finding is given which was necessary for the disposal of the appeal the second proviso to section 34(3) of the Act would be attracted and the bar of limitation would be lifted".

16. The question that had arisen before the Division Bench of the Patna High Court in ***CIT -vs- Dhanpatram Chhotelal,*** [156] ITR 682 was whether the assessment of a firm for Assessment Year 1966-67 had become barred by limitation. The erstwhile Members of an HUF had entered into a partnership which filed

its Return on 26.9.1996. The HUF had also filed a Return on the same date. The Appellate Order was passed on 31.12.1971 and the Assessment was made on 14.2.1972 in the status of a registered firm. The Appellate Assistant Commissioner(AAO) negatived the plea of limitation since, in his opinion, Section 153 (3) of the IT Act was operative as the ITO had acted on the directions of the AAO. The ITAT reversed the position. Applying ***Daffadar Bhagat Singh*** the Patna High Court took the view that in order to decide the Appeal it was necessary to determine whether the firm or the HUF was liable to be taxed, and hence Section 153(3)(ii) had the effect of enlarging limitation. These decisions do not advance the case of the Petitioners although they delineate the distinction between a remand for purposes of a fresh assessment and an enquiry into a specific aspect in the absence of which the Appeal cannot be decided.

17. We shall now briefly analyse the other precedents relied upon by Mr. Y.K. Kapur. In ***CIT -vs- Mohini Thapar Charitable Trust,*** [1986] 160 ITR 408(Cal) the Calcutta High Court was confronted with the decision of the AAC who had considered it proper to "set aside the assessment and direct the ITO to make fresh assessment according to law". The High Court took the

view that the entire matter was at large and therefore the assessment was not "absolved of the period of limitation prescribed by s.34(3) of the Act" (which corresponds to Section 153(3)(ii) of the IT Act). ***Kulamani Deo, D.I.G. of Police -vs- Commissioner of Income-Tax,*** [1993] 204 ITR 693(Ori) the Bench presided over by Justice A. Pasayat, as His Lordship then was, held that a fresh assessment had to be completed within two years [as per Section 153(2A)] as it stood prior to the amendments carried out with effect from 1.6.2001. Similarly, **Gulabchand Motilal -vs- CIT,** [1988] 174 ITR 117(MP) falls in the category of fresh assessments. In ***CIT -vs- Jodhana Real Estate Development Corporation(P) Ltd.,*** [2004] 190 CTR (Raj.) 124 the CIT(A) had set aside an order under Sections 104 and 143(3) on 31.3.1980 and the assessment completed on 31.5.1982 was held to be beyond limitation. His Lordship B.P. Jeevan Reddy, as Chief Justice of the High Court of Allahabad, had the occasion to rule on this controversy in ***Renusagar Power Co. Ltd. -vs- Income Tax Officer,*** [1992] 196 ITR 903 (All), in which case a writ in the nature of prohibition was sought for for restraining the assessing Authorities under the IT Act from proceeding with further under Section 148 of the Act. The Order of Assessment was proposed to be revised on eight points as per

the Notice issued in the matter but eventually by Orders dated 26.2.1977 the matter was remitted to the ITO for fresh assessment in accordance with law, confined only to five points which were remitted to the ITO which did not pertain to the points which had been held against the Assessee. The ITAT observed, by Orders dated 28.2.1979, that since "the Order has to be passed in accordance with law de novo, the ITO has to be left unfettered to act in the light of his judgment, to consider the law and to pass orders, in accordance therewith. We, therefore, direct that while passing such order, the ITO will ignore the various observations made by the CIT in his order enunciating his views under the law....." This decision is not directly relevant since what was held was that two years period was to be reckoned from the date of the Tribunal's Order and not of the CIT. A perusal of the facts of the case in ***Rikhabdas Jhaverchand -vs- Commissioner of Income Tax,*** [2001] 169 CTR (Bom) 196 is directly relevant. The Bench was presided over by His Lordship S.H. Kapadia and it was held that Section 153 (2A) refers to an Order of fresh assessment being passed pursuant to the Assessment Order being set aside. Since the Tribunal in its Order dated 10.1.1989 had only directed the AO to clarify the correctness of the claim for bad debts made by the

Assessee by calling for information from the debtors or by getting the details verified through the ITO, it did not tantamount to a fresh assessment. Hence, Section 153(2A) was not relevant, whereas Section 153(3) clearly stood attracted.

18. Mr. J.R. Goel, learned counsel for the Revenue, has drawn our attention to the decision of this Court in ***R.K. Sawhney, Executor of the Estate of Late R.B. Nathu Ram -vs- Commissioner of Income-Tax,*** *Delhi-II, [1987]* 166 ITR 128. However, Section 153(3) of the Act came to be considered in circumstances not relatable to the present cases, inasmuch as the contention that was raised was whether the assessment was void and legal *ab initio* and, therefore, the Tribunal was not competent to give any direction at all, and the proper course was to annul the assessment and not to set it aside. Mr. Goel has also relied on ***Mohammadi Begum -vs- Commissioner of Income-Tax,*** [1986] 158 ITR 662 which is closer to the neat point that arises before us. The Assessee had not included the income of her legal heirs who had been admitted to the benefits of the partnership in the Returns for AYs 1964-65 and 1965-66. Nevertheless, the AO completed the assessments including the income of the minors in the Assessee's total income, without

issuing notice to the Assessee. The Commissioner, acting under Section 264, set aside the assessments and directed the AO to make fresh assessments in accordance with law. Thereupon, the AO issued a Notice and completed the assessments in 1973. The High Court held that the directions given by the Commissioner to make fresh assessment was a positive direction within the meaning of Section 153(3) and hence the assessments made pursuant thereto were not fresh assessments within the meaning of Section 153(3)(i) but fell within the sweep of Section 153(3)(ii) and were, therefore, not barred by limitation. The direction issued by the Commissioner was couched in these words-"The Income-tax Officer is directed to make the fresh assessment as per the provisions of law". This decision can be harmonised with those relied upon by Mr. Kapur by noting that in substance the Return filed by the Assessee had not been set aside; rather the matter was remanded to ascertain the income of the minor children which would have been liable to be assesseed in the hands of the Assessee.

19. Mr. Goel has also relied on the Constitution Bench decision of the Supreme Court in ***Estate of Late Rangalal Jajodia -vs- Commissioner of Income-Tax, Madras,*** [1971] 79 ITR 505.

Rangalal Jajodia had filed his Income-Tax Return for the AYs 1942-43 and 1943-44 but died subsequent thereto. On a construction of his Will it was evident that his second wife was one of the heirs as well as the executors and since the assessment had not been completed without notice to her, the AAC set aside the assessments, directing the officer to make fresh assessment after giving notice to the heirs/executrix. The assessment was made more than four years after the end of the AYs. The Supreme Court held that the failure to give Notice to the Widow/second wife only rendered the assessments as defective. The Order for issuance of a notice to the said heirs/executrix was a "finding and direction" as contemplated in the second proviso to Section 34(3)[corresponding to Section 153(3)(ii)].

20. Having had the advantage of perusing the plethora of precedents on the aspect of law which has engaged our attention, we are of the view that Section 153(2A) is not attracted in the facts of the present case; no period of limitation is prescribed as per the provisions of Section 153(3)(ii). It is trite that Parliament is continuously concerned with the evils or undesirability of the proverbial sword hanging over the head of an Assessee. Parliament has, therefore, set-down the parameters within which

an assessment must be completed, and over the years has shortened the span of time in this regard. It has, however, carved out an exception to the rule where a specific, limited or restricted direction is passed by an Appellate Authority which is of the opinion that it would not be possible to decide the appeal before it without a clarification on this point. The Appellate Authority has also the power to set-aside the Assessment Order and direct a *de novo* enquiry, in which case every aspect, computation and dimension is open for consideration. This partakes of the nature of an assessment which is akin to the original assessment and, therefore, the period of limitation applicable to the original assessment must apply to the fresh assessment. Where the Appellate Authority remands the case for a determination on a selected issue or aspect of the assessment, the uncertainty or discomfort of the sword of uncertainty provides no peril to the assessee. All the parties are fully aware of the parameters within which the fresh enquiry is circumscribed and limited. It is obviously for this reason that the rigours of limitation are totally removed. If the AO is unduly slow in completing the assessment, it may be open to the assessee to approach the High Court under Articles 226 and 227 of the Constitution seeking a direction for an expeditious end and closure to the restricted enquiry.

21. Reverting to the facts of the case at hand it is manifestly clear that in substance the entire assessment had not been set aside. The Assessee's contention was that Section 40A(3) had not been violated in its spirit since no expenditure exceeding Rupees Twenty Thousand had been incurred in cash; these were incurred by effecting entries in the Books of Accounts and hence were as undisputable as payments made by Account Payee Cheques or Account Payee Bank Draft. It was only on this restricted aspect of the assessment that the Tribunal had remanded the case to the AO. The entire assessment exercise, therefore, had not been undertaken *de novo*, thereby rendering Section 153(2A) of the IT Act inapplicable to the case.

22. We conclude by holding that a writ petition under Articles 226 and 227 of the Constitution is always maintainable if the High Courts find that any authority is acting contrary to the powers bestowed upon it. Writ Petitions, therefore, cannot be dismissed *per se*. The objection on this score cannot be appreciated; the Revenue would be justified in contending that in the facts of the case invoking the extraordinary jurisdiction of this Court was not called for. Considerable time of this Court has been needlessly spent on adjudicating on this preliminary

objection. However, we dismiss the writ petitions as meritless since, in the facts and circumstances of the case, it cannot be argued that Section 153(2A) is attracted and constitutes an absolute power on assessment proceedings. This is obviously the manner in which all the authorised representatives of the Petitioners understood the law since they chose to address the AO on the merits of the case. The Petitioners have chosen to file the present petitions after considerable delay in the vain attempt to avoid payment of Income-Tax on technicalities which do not exist in their favour. We would have dismissed the writ petitions with heavy costs but decline from doing so because the Revenue has unreasonably raised preliminary objection pertaining to the maintainability of the writ petitions.

23. Writ Petitions are dismissed with no order as to costs.

VIKRAMAJIT SEN, J

S. MURALIDHAR, J

DECEMBER 15, 2006
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