THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:. 15.04.2009

\+ ITA.No.200/2008

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

PAWAN GUPTA ...Respondent

WITH

ITA.No.1173/2007

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

TULIKA MISHRA ...Respondent

WITH

ITA.No.1034/2008

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

NAREASH KUMAR ARORA ...Respondent

WITH

ITA.No.916/2008

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

ATUL GLASS INDUSTRIES LTD. ...Respondent

WITH

ITA.No.203/2008

KAMAL GUPTA ...Respondent

WITH

ITA.No.862/2008

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

SUNITA SAXENA ...Respondent

WITH

ITA.No.655/2008

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

ANAND SAXENA ...Respondent

WITH

ITA.No.204/2008

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

AMAR GUPTA ...Respondent

WITH

ITA.No.1139/2008

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

ASHOK KHETRAPAL ...Respondent

WITH

ITA.No.1202/2008

COMMISSIONER OF INCOME TAX ...Appellant

PRASHANT KUMAR DASH ...Respondent

WITH

ITA.No.831/2008

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

NAREASH KUMAR ARORA ...Respondent

WITH

ITA.No.1323/2008

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

KHATRI HOTELS PVT. LTD. ...Respondent

WITH

ITA.No.202/2008

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

VEENU JEWELLERS (INDIA) ...Respondent

WITH

ITA.No.209/2008

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

GOVIND RAM GUPTA ...Respondent

WITH

ITA.No.207/2008

COMMISSIONER OF INCOME TAX ...Appellant

PADAM CHAND GUPTA ...Respondent

WITH

ITA.No.915/2008

COMMISSIONER OF INCOME TAX ...Appellant

- versus -

ATUL GLASS INDUSTRIES LTD. ...Respondent

Advocates who appeared in this case:

For the Appellants : Ms P.L. Bansal with Mr Sanjeev Rajpal and Mr R.D. Jolly with Ms Anshul Sharma and Ms Rani Kiyala

For Respondents : Mr Prakash Kumar in ITA 200/08.
Mr Satyen Sethi with Mr Johnson Bara for Respondent in ITA 831/08 and 1034/08
Mr Manu Kumar Giri with Mr Anoop Sharma for the respondent in ITAs 655/08 and 862/08.
Ms Aarti Saini for the respondent in ITA 1139/08.
Mr M.P. Rastogi for the Respondent in ITA 1202/08.
Mr Salil Aggarwal with Mr Prakash Kumar for the respondent in ITA 915/08 and 916/08.

CORAM:-
HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE RAJIV SHAKDHER

1. Whether Reporters of local papers may be allowed to see the judgment ? YES

2. To be referred to the Reporter or not ? YES

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

BADAR DURREZ AHMED, J

1. In this batch of appeals the following substantial questions of law have been framed:-

> "(I) Whether issuance/service of notice under section 143 (2) within the prescribed period of time is a prerequisite of framing the block assessment order under chapter XIV B of the Income-tax Act, 1961 ?

2. ITA 200/2008 entitled CIT v. Pawan Gupta was taken as the lead matter. This case is part of a batch of 5 other appeals of assesses, all belonging to the same group. The appeal in Pawan Gupta has been preferred against the common order dated 27.04.2007 passed by the Income-tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') pertaining to the block assessment period 01.04.1986 to 10.10.1996. The grounds which were *inter alia* pressed by the assessees before the ITAT were:-

> "a) That the assessing officer has erred both in law as well as in the facts of the case in passing the impugned block assessment order under section 158 BC of the act without serving on the assessee any notice under section 143 (2) of the act.
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> b) That the block assessment so made without serving any notice under section 143 (2) of the act is without jurisdiction and deserves to be quashed.
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> c) That the completion of the block assessment under section 158 BC of the act without allowing any opportunity under section 143 (2) of the act is in violation of the principles of natural justice and is therefore null and void ab initio."

3. Before the Tribunal, the assessees had pressed into service the decision of the Gauhati High Court in the case of ***Smt. Bandana Gogoi v. CIT: 289 ITR 28***. The question before the Gauhati High Court was as under:-

> "Whether, on the facts and in the circumstances of the case, the decision of the learned Tribunal is not erroneous in holding that non-issuance of notice under section 143(2) of the Income-tax Act, 1961, did not invalidate the assessment relating to the block period and was at best a mere procedural irregularity ?"

The facts were that the proceedings for block assessment were initiated after search and seizure and the assessee therein submitted the return in response to a notice issued under section 158BC. The Assessing Officer also issued the notice under section 142(1), and completed the assessment under section 158BC and section 143(3) of the Act. Admittedly, no notice had been issued under section 143(2). The Gauhati High Court held as under:-

> "Under Chapter XIV, the powers of assessment under sub-section (3) in determining the total income or loss could be invoked only after service of notices as contemplated under clauses (i) and (ii) of sub-section (2). In the case of block assessment under Chapter XIV-B, where the Assessing Officer does not proceed to make an 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."
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> "In the instant case, the Assessing Officer did not act upon the return filed in response to the notice issued under section 158BB(a). He had issued a notice under section 142(1). He had proceeded to make an inquiry. This could not be done without a notice under sub-section (2) of section 143. The provisions of sub-section (3) quoted above clearly show that the powers under this sub-section could be invoked only after service of notices under sub-section (2). In the instant case, the Assessing Officer admittedly did not follow the provisions of sub-section (2) of section 143."
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> "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. Similarly, application of the provisions of section 142 and sub-sections (2) and (3) of section 143 will become directory where the Assessing Officer does not embark upon an

"It is true that the return was filed by the assessee in response to a notice under section 158BC(a). Clause (b) of section 158BC provides that the provisions of section 142 as well as sub-sections (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 a 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). For this reason, we hold that the provisions of section 142 and sub-sections (2) and (3) of section 143 will have mandatory application in a case where the Assessing Officer in repudiation of the return filed in response to a notice issued under section 158BC(a) proceeds to make an inquiry. The defects crept in cannot be cured at this stage in view of the limitation provided in section 143(2). The assessment order in the instant case thus suffers from both procedural and jurisdictional error. The option left with the Assessing Officer is to compute the income and levy taxes on the basis of the return filed by the assessee.The question formulated is answered against the Revenue and in favour of the assessee. Consequent thereupon, the orders passed by the authorities below are set aside. The appeal, accordingly, stands allowed."

4. In view of this decision, the Tribunal accepted the contention advanced on behalf of the assessee that since notice under section 143 (2) of the Income Tax Act, 1961 (hereinafter referred to as "the said Act") had not been issued, the block assessment under section 158 BC of the said Act cannot be upheld and that the same was liable to be quashed. The Tribunal also noted that the department had been given full opportunity to produce evidence in

decisions which in turn followed the said Gauhati High Court decision, allowed the assessees' appeals.

5. The Revenue, being aggrieved by the said decision and other similar decisions of the Tribunal in the connected matters has preferred these appeals. Mr. Jolly, the learned counsel appearing on behalf of the revenue in some of the appeals, submitted that the time limit prescribed under the proviso to section 143 (2) is only for ensuring that in cases where an assessee files a return under section 139, the assessing Officer must either issue the intimation under section 143 (1) or issue a notice under section 143 (2) for completing assessment under section 143(3). He submitted that the requirement of a notice under section 143 (2) is essential for production of material by the assessee. This is so because in regular assessments the assessing officer in the first instance has no material available to him except the return. He submitted that chapter XIV B provides a special procedure for search cases and is a complete code in itself. Referring to the provisions of the said Chapter, Mr. Jolly submitted that the expressions "block period" and "undisclosed income" are defined in section 158-B. Section 158 BA provides for assessment of undisclosed income as a result of search. He submitted that in such a case the material is already found and is in the knowledge of the assessing officer. This is distinct and different from the

any material other than the return. Mr. Jolly then referred to the provisions of section 158 BC (b) of the said act which reads as under:-

> "(b) the assessing officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158 BB 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;"

6. Mr. Jolly submitted that although section 143 (2) has been specifically mentioned in the above provision it is to be applicable only to the extent possible and that is why the expression "so far as may be" is used in the said provision. He further contended that the computation of undisclosed income of the block period has to be done in accordance with the provisions of section 158 BB and that too on the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the assessing officer and relatable to such evidence. He, once again, laid stress on the difference in the assessment procedures under chapter XIV B and normal assessment. It was, therefore, contended by him that the issuance of a notice under section 143 (2) is not an essential requirement in block proceedings. Consequently, he submitted that the questions be answered in favour of the Revenue and the appeals be allowed.

7. Mrs Bansal who also appeared for the Revenue in some of the appeals made similar submissions with regard to there being a distinction between the procedure of regular assessment under chapter XIV and the procedure of block assessment in search cases under chapter XIV B. She also contended that chapter XIV B of the said act is a self-contained code dealing with the substantive as well as procedural aspects of search cases. Under section 139 an assessee has to file the income tax return voluntarily if he is exigible to income tax. But, under chapter XIV B, there is no provision for filing the return voluntarily. She submitted that in the case of normal assessment if the assessee does not file a return under section 139 (1) then the assessing officer may call upon the assessee to file a return under section 142 (1) (i) of the said act. Where a return is filed either under section 139 or under section 142 (1) and if the assessing officer considers it necessary or expedient to ensure that the assessee has not understated the income etc then he is required to serve on the assessee a notice requiring him to attend on a specified date or to produce such evidence as he may rely upon in support of the return. According to the learned counsel, section 143 (2) has two limbs. The first limb deals with jurisdiction and the second with procedure. She submitted that the proviso to section 143 (2) puts an embargo on the assessing officer to exercise jurisdiction after the expiration of 12 months from the end of the month

assessing officer to accept the return as it is or to proceed further with the assessment of income. Once the assessing officer decides to proceed he has to issue a notice under section 143 (2) within the prescribed time to make the assessee aware that his return has been selected for scrutiny assessment.

8. In distinction to this procedure, the learned counsel submitted, under the special procedure prescribed in chapter XIV B there is no discretion left with the assessing officer. The source and origin of a block assessment is the search which has been conducted under section 132 of the said act. Once the search has been carried out, the assessing officer is left with no discretion but to proceed with block assessment of the undisclosed income.

9. Continuing with the contention that regular assessment proceedings and block assessment proceedings were different and distinct, Mrs Bansal submitted that in a normal assessment, tax is to be charged at the rate prescribed in the Finance Act whereas under the provisions of section 158- BA(2), undisclosed income is to be charged to tax at the rate prescribed in section 113. She further submitted that it is a well-established principle of law that block assessment is in

cannot be assessed again in the course of a block assessment. Similarly, what is assessed in block assessment, cannot be the subject matter of a regular assessment. While section 158 BB provides for computation of undisclosed income, there is no such provision in the case of a normal assessment.

10. It was further contended that in a case of regular assessment, the decision to complete the assessment under section 143 (3) is taken after the filing of the voluntary return whereas the decision to make the block assessment is taken before the filing of the return pursuant to the section 158 BC notice. The submission is that while the notice under section 143 (2) is passed on the filing of a return under section 139, the return filed under section 158 BC (a) is the consequence of search and the assumption of jurisdiction to ascertain undisclosed income.

11. Mrs Bansal submitted that in the case of a regular assessment the interaction with the assessee starts by the assessing officer issuing a questionnaire under section 142 (1)(ii) and (iii). She submitted that section 158 BC(b) prescribed the same manner for determining undisclosed income as is adopted in the case of a regular assessment but this is qualified by the words "so far as may be" which, according to her, means to the extent it is possible and practicable. It was her

already aware of the block assessment proceeding. She however admitted that for the purpose of observing the principles of natural justice, section 158 BC (b) has prescribed a manner of assessment similar to the manner stipulated for regular assessment. For this purpose, she submitted that, in terms of the provisions of section 143 (3), income is to be determined on the basis of evidence voluntarily filed by the assessee under section 143 (2) or as required by the assessing officer under section 142 (1). By observing the same procedure as that in the case of a regular assessment, the assessing officer, in the case of block assessment, can gather evidence for making the assessment.

12. Summing up her submissions thus far, Mrs Bansal submitted that the provisions of section 142, 143 (2), 143 (3) and 144 are to be observed by the assessing officer for the purposes of observing principles of natural justice, that is, to interact with the assessee so as to give him an opportunity of being heard. She submitted that an interaction with the assessee pre-supposes some sort of formal notice by the assessing officer. The question would therefore be whether the notice under section 158 BC had the same effect as a notice to be issued under section 143 (2) of the said act. Referring to the decision

Enforcement: ***155 ITR 166***, she submitted that the words "*so far as may be*" have always been construed to mean to the extent possible. Therefore the provisions of section 143(2) and other provisions mentioned in section 158 BC (b) are to be applied only to the extent possible/practical and not in the literal sense. Since the provisions incorporated in the chapter XIV B constitute a special code to assess the undisclosed income in search cases, they would override the provisions of chapter XIV being the procedure for normal assessments. She submitted that it is a settled legal position that the special provisions would override the general provisions.

13. Another submission made by her was that a notice under section 143 (2) read with section 158 BC (b) does not entail any jurisdictional aspect inasmuch as jurisdiction to proceed already stands bestowed on the assessing officer by virtue of the provisions of section 158BA. From this, she concluded that the requirement of a notice under section 143 (2) read with section 158 BC (b) impinges only upon the procedural aspect of assessment. Thus, the embargo placed by the proviso to section 143 (2) in respect of regular assessments would not be applicable to a block assessment proceeding. She also submitted that when chapter XIV B was introduced the limitation for completion of a

last of the authorisations under section 132 was executed. This was provided in section 158 BE of the said act. From this alone it is apparent that the Legislature never intended to apply the provisions of section 143 (2) strictly in the case of block assessment proceedings and, particularly so, the proviso thereto.

14. She submitted that in the case of a block assessment proceeding if there was some lapse on the part of the assessing officer in the issuance of a notice under section 143 (2) then such lapse would not render the block assessment invalid and would only be a curable irregularity. It was her contention that it is a well-established principle of law that where there is a lapse with regard to some procedural aspect then the same can be cured afterwards and would not render the consequential assessment order null and void. For this proposition she placed reliance on a decision of the Supreme Court in the case of ***CIT v. Jai Prakash Singh: 219 ITR 77.***

15. It was also her submission that once the search is valid and some incriminating material is found during the search, the assessing officer has no option but to issue a notice under section 158 BC (a) and once such notice is validly issued then the assessing officer would be in seizin of the case and have jurisdiction to determine the undisclosed

procedural part would not render the assessment order to be null and void. It was her contention that the procedural part of section 143 (2) is nothing but the incorporation of the rule of the *audi alterem partem*.

16. Finally, she submitted that in all the appeals, the assessee had participated in the block assessment proceedings. It is not the case that no opportunity of hearing had been given to the assessee. In virtually all the cases the assessing officer had issued notices to the assessee requiring some material or the other. Since there is no specific proforma prescribed for the issuance of a notice under section 143 (2), such notices/letters could be treated as having been issued under section 143 (2). She submitted that even if section 143 (2) is made applicable to block assessment proceedings by virtue of section 158 BC, the proviso would not be applicable to such proceedings.

17. Mr. Salil Aggarwal, the learned counsel who appeared for the assessees in ITA 200/2008 and connected matters, submitted at the outset that mere participation in the block assessment proceeding would not amount to conferring jurisdiction on a person who otherwise lacks jurisdiction. For this proposition he placed reliance on a decision of a Division Bench of this court in the case of ***Swaran Yash v. CIT: 138 ITR 734 (Del)***. He submitted that mandatory provisions cannot be

ITR 22 (Guj) and ***Inventors Industrial Corporation Ltd v. CIT:*** *194 ITR 548 (Bom).*

18. Thereafter, Mr. Aggarwal submitted that there are three processes for assessment. The first process is where a return is filed voluntarily under section 139 (1) or on the asking of the assessing officer under section 142 (1). If the assessing officer wants to tinker with the return so filed, he has to issue a notice under section 143 (2). Thereafter, the assessee is required to produce evidence in support of the return and the assessment is completed under section 143 (3) after hearing or at least giving an opportunity of hearing to the assessee. The second stream for assessment is when no return is filed pursuant to a section 142 (1) notice. In such an eventuality, the assessing officer proceeds to make the best judgement assessment under section 144 of the said act. The third stream or process of assessment relates to the escapement of income and is initiated through the procedure prescribed under section 147/148 of the said act. This also follows the route of a regular assessment under section 143 (3) of the said Act. Referring to the decision of a division bench of this court in the case of ***Janki Exports International v. Union of India:*** *278 ITR 296 (Del)*, Mr. Aggarwal submitted that the provisions of section 158 BD have been found to be analogous to section 148 insofar as the procedure that is

19. It was further contended that after a notice under section 158 BC is issued the assessee is required to file a return within the stipulated period. Once the return is filed, it is open to the assessing officer to accept the same or to require further investigation. If he accepts the return of undisclosed income as it is then, there would be no necessity of issuing any notice under section 143 (2) of the said act. However, if the assessing officer is not satisfied with the return so filed then he is required to issue a further notice under section 143 (2) before an assessment order is passed. At this juncture, it would be appropriate to refer to the provisions of section 143 (2) as applicable to the present appeals:-

> "(2) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer shall, if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return:
>
> Provided that no notice under this sub-section shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished."

20. Reading the said provision, Mr. Salil Aggarwal submitted that it is

issuance of a notice under section 143(2). It is under this provision that an opportunity is given to the assessee to support his return. It is an admitted position that in the case of a regular assessment, if no notice is issued under section 143 (2) then, the assessment order would be a nullity. The requirement of issuance of a notice under section 143 (2) is not an empty formality and cannot be done away with even in the case of a block assessment.

21. He further contended that the expression "so far as may be" which appears in section 158BC (b) is referable to situations. For example, section 142 is mentioned in section 158 BC (b) and would apply only to the situation where no return is filed pursuant to the section 158 BC notice.

22. It was further submitted that where a return has been filed pursuant to a notice under section 158 BC, the assessing officer cannot determine undisclosed income contrary to the return unless a notice under section 143 (2) is issued. The learned counsel made a reference to the Supreme Court decision in the case of ***R Dalmia v. CIT: 236 ITR 480***. He submitted that although that decision pertained to the provisions of section 148, the ratio would be applicable to block proceedings also. A reference was also made to the Bombay High Court decision in the case of ***CWT v. HUF of JM Scindia:***

17 (1) of the Wealth Tax Act, the expression employed was "*and the provisions of this act shall so far as may be apply as if the return was a return required to be furnished under section 14*". The Bombay High Court after referring to the decision of the Gauhati High Court in ***Smt. Bandana Gogoi (supra)*** was of the view that the language used in section 143 (2) of the said act was similar to the language used in section 16 (2) of the Wealth Tax Act. The Bombay High Court also took the view that two High Courts, Madras and Gauhati, had taken a view that the notice under section 143 (2) was mandatory even in a case of reopening of assessment under section 148 of the said act. Even independently, the Bombay High Court after having examined the scope and effect of sections 14 to 16 on the one hand and section 17 on the other of the Wealth Tax Act was of the opinion that there was no escape from arriving at the conclusion that when the assessing officer invoked section 17, the provisions of sections 14 and 16 to the extent applicable, for the purposes of making an order of reassessment, would have to be followed and the same would include the time limit prescribed for a notice under section 16 (2). The Court observed that once the language of section 17 itself required that other provisions, to the extent applicable, would apply considering the return is filed under section 14, it contemplated that both procedural and substantive provisions would apply. Consequently, the Bombay High Court was of the opinion that while invoking powers under section 17, the assessing officer was bound by the mandate of the proviso to

jurisdiction and consequently the order of re-assessment would have to be set aside. Mr. Aggarwal submitted that similar reasoning would be applicable in respect of the provisions of section 158 BC (b) read with section 143(2) of the said act. He submitted that by incorporating section 143(2) in respect of block assessment proceedings the assessing officer would also be bound by the mandate of the proviso to section 143 (2) and on failure to follow such a procedure the block assessment order would be without jurisdiction and would have to be set aside.

23. Mr. Aggarwal referred to the decision in ***Vikrant Tyres v. First ITO: 247 ITR 821*** wherein it was observed thus:-

> "It is a settled principle in law that the courts while construing revenue acts will have to give a fair and reasonable construction to the language of a statute without leaning to one side or the other, meaning thereby that no tax or levy can be imposed on a subject by an act of Parliament without the words of the statute clearly showing an intention to lay the burden on the subject. In this process, the courts must adhere to the words of the statute and the so-called equitable construction of those words of the statute is not permissible. The task of the court is to construe the provisions of the taxing enactments according to the ordinary and natural meaning of the language used and then to apply that meaning to the facts of the case and in that process if the taxpayer is brought within the net he is caught, otherwise he has to go free."

24. It was next contended by Mr. Aggarwal that it is also a well-established

consequence of the omission to do the thing in the manner prescribed could be fatal to its validity. For this proposition he placed reliance on the case of ***Dr. Nalini Mahajan and Others v. Director of Income-tax (Inv.) & Others:*** **257 ITR 123 (Del)** as also on ***Commissioner of Income-tax v. Smt Phoolmati Devi:*** **144 ITR 954 (All).**

25. Mr. Aggarwal summed up his arguments by submitting that the proviso to section 143(2) was applicable to chapter XIV B proceedings. Since section 143(2) was a condition precedent for a regular assessment under section 143 (3) it was equally so for computing undisclosed income.

26. Mr. Ashwini Taneja, advocate, appearing for the respondent assessee in ITA 1139/2008 pointed out that the decision of the Gauhati High Court in ***Bandana Gogoi*** *(supra)* was taken in appeal before the Supreme Court by the Department. However, the special leave petition was dismissed by the Supreme Court on 05.09.2008 on the ground of delay though the question of law was kept open. He also contended that in case an assessing officer wants to make a variation to the return as filed, a notice has to be issued under section 143 (2) and that, too, within the time limit prescribed by the proviso thereto. He further submitted that section 158 BC of the said act prescribes the procedure for block assessment. Sub-clause (a) thereof requires the

return within the stipulated period in the prescribed form [form 2B] and verified in the same manner as a return under section 142 (1) (i) of the said act. This in itself indicates that there is a link with section 142 of the said act. Referring to section 158-BC(b), he submitted that here, too, specific sections have been mentioned. In fact, even sub-sections have been specified. The intention of the legislature can be easily discerned. Had the intention been to exclude the proviso to section 143 (2) then it would have been clearly indicated. Referring once again to section 158 BC(a), the learned counsel submitted that the first proviso thereto clearly stipulates that no notice under section 148 would be required to be issued for the purposes of proceeding under chapter XIV B. What the learned counsel contended was that where the legislature intended to exclude provisions it did so specifically and where it intended to include provisions it also did so specifically. Thus, when section 158 BC(b) specifically refers to the applicability of section 143(2) of the said act the applicability of the proviso thereto cannot be excluded.

27. He also referred to Circular No. 717 dated 14.08.1995 (215 ITR 70 statutes at page 95). The said circular *inter alia* explained the procedure for making a block assessment as under:-

"(e) Procedure for making block assessment: The assessing

verified in the same manner as a return under clause (i) of subsection (1) of section 142 setting forth his total income including undisclosed income for the block period. **The officer shall proceed to determine the undisclosed income of the block period and provisions of section 142, subsections (2) and (3) of section 143 and section 144 shall apply accordingly. ..."**

(emphasis supplied)

28. Thus, it was contended that even as per the understanding of the Department the provisions of sub-sections (2) and (3) of section 143 were to apply to block assessment proceedings.

29. The learned counsel appearing on behalf of the respondent/assessee in ITA 1202/2008 referred to the principle of incorporation. In that context he placed reliance on the decision of the Supreme Court in the case of ***M/s Surana Steels Pvt. Ltd v. The Deputy Commissioner of Income Tax and Ors:*** *237 ITR 777*. The Supreme Court quoted the following passage from the Principles of Statutory Interpretation (7th edition, 1999) by Justice GP Singh:-

"Incorporation of an earlier act into a later act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier act into the later. When an earlier act or certain of its provisions are incorporated by reference into a later act, the provisions so incorporated become part and parcel of the later act as if they had been 'bodily transposed into it'. The effect of incorporation is admirably stated by Lord Escher, M.R.: 'if a subsequent act brings

sections into the new act as if they had been actually written in it with the pen, printed in it'."

Consequently, it was submitted that the provisions of section 143 (2) have been incorporated in section 158 BC (b). It would mean that the said provision ought to be read as if it had been actually written in it. Therefore, section 143 (2) would apply in its entirety, that is, including the proviso thereto. The learned counsel also submitted that the proviso to section 143(2) placed an embargo upon assessment beyond a certain period of time. It was not merely procedural but was substantive in nature and therefore must be applied strictly. For this proposition, the learned counsel placed reliance on the decision in ***KM Sharma v. Income Tax Officer, Ward 13(7), New Delhi:*** **254 ITR 772 (SC).**

30. Mr. Anoop Sharma, the learned counsel appearing for the assessee respondents in ITA 655/2008 and ITA 862/2008, pointed out that there is a difference between nullity and irregularity. He placed reliance on the Gujarat High Court decision reported in ***Doshi v. Commissioner of Income-tax, Gujarat:*** **113 ITR 22 (Guj)** wherein the following observations were made:-

"The settled distinction between invalidity and nullity is now well brought out in the decision in Dhirendra Nath Gorai v. Sudhir Chandra Ghosh, AIR 1964 SC 1300, 1304, where their Lordships had gone into this material question as to whether the

referred to in Ashutosh Sikdar v. Bihari Lal Kirtania [1907] ILR 35 Cal 61 [FB], at page 72, was in terms relied upon as under:

> "...no hard and fast line can be drawn between a nullity and an irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is proceeding that is taken without any foundation for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated."

Thereafter, their Lordships pointed out that whether a provision fell under one category or the other was not easy of discernment, as in the ultimate analysis, it depended upon the nature, scope and object of the particular provision. Their Lordships in terms approved a workable test laid down by Justice Coleridge in Holmes v. Russel [1841] 9 Dowl 487 as under:

> "It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

Thereafter it was pointed out that a waiver is an intentional relinquishment of a known right, but obviously an objection to jurisdiction could not be waived, for consent could not give a court jurisdiction where there was none. Even if there was inherent jurisdiction, certain provisions could not be waived. What can be waived would be only those provisions which are for the private benefit and protection of an individual in private capacity, which might be dispensed with without infringing any public right or public policy.

The learned Chief Justice in terms pointed out that the revenue statutes are based on public policy. The revenue statutes protect the public on the one hand and confer power on the State on the other. Therefore, even in the context of such a revenue statute like a taxation measure such fetter on the jurisdiction being a fetter laid to protect public on wider ground of public policy, it was held that such provisions which confer jurisdiction on assessment and reassessment could never be waived for the simple reason that jurisdiction could neither be waived nor

section 7(2) was a condition precedent to the exercise of jurisdiction to make the best judgment assessment, the doctrine of waiver could never confer jurisdiction so as to enable the parties to avoid the effect of violating a mandatory provision on a jurisdictional matter even by agreement. This decision completely settles the legal position."

31. Therefore, Mr. Anoop Sharma submitted that neither can the provisions of section 143 (2) be waived nor would the non-compliance of the said provision be a mere irregularity.

32. Mrs Bansal, in rejoinder submitted that section 143 (2) in the case of a regular assessment was mandatory as it went to the root of jurisdiction. But, insofar as proceedings under chapter XIV B are concerned, jurisdiction is vested in the assessing officer by the fact of search itself. The evidence is already with the assessing officer. She reiterated that a default in a procedural aspect does not vitiate the assessment.

33. The aforesaid detailed resume clearly discloses that the learned counsel appearing on both sites have made compelling and forceful arguments. We have given a great deal of thought to the said arguments. In the ultimate analysis, the arguments and submissions made on behalf of the assessees/respondents have found favour with us.

34. We have the benefit of the decision of the Gauhati High Court in the case of ***Bandana Gogoi (supra)***. The very provision which calls for interpretation in the present appeals has been construed by that High Court. Although the Supreme Court, while dismissing the special leave petition preferred from that judgement, on the ground of delay, has left the question of law open, it does not mean that the Supreme Court has overturned that decision. The Gauhati High Court in ***Bandana Gogoi (supra)*** was clearly of the view that the words "*so far as may be*" appearing in section 158 BC (b) would have to be construed as mandatory or merely directory depending upon what action the assessing officer takes. If the assessing officer accepts the return of undisclosed income as it is then obviously there is no necessity to issue a notice under section 143 (2). However, if the assessing officer does not agree in the first instance with the return of undisclosed income filed by an assessee pursuant to a notice under section 158 BC then the only course left to the assessing officer is to investigate further into the matter and have an interaction with the assessee. This further interaction can only be done by following the procedure of issuance of notice prescribed under section 143 (2).

35. While we do not entirely agree with the analysis that the provision becomes mandatory or directory depending upon what action the assessing

Gauhati High Court. We are of the view that section 143 (2) is a mandatory provision whether we look at it from the standpoint of a regular assessment or from the standpoint of an assessment under chapter XIV B. If the assessing officer, on receipt of the return of undisclosed income in the Form 2B from the assessee, is satisfied with the same as reflecting the true state of affairs then it is not necessary for him to embark upon any further enquiry or investigation. No further information or explanation is called for from the assessee. In such an eventuality he can straightaway pass the order under section 158 BC (c) of the said act. And, if he does so, the assessee cannot be heard to complain that no notice under section 143(2) was served upon him because his return as filed has been accepted. It is here that the expression "so far as may be apply" comes into play. Section 143 (2) has no application in such a situation and therefore no notice under that provision would be necessary. If the assessing officer makes the assessment order in terms of the return of undisclosed income filed by the assessee without issuing a notice under section 143 (2) then he would not have committed any mistake. This is a situation where the section 143(2) notice would not be necessary at all.

36. However, where the assessing officer is not inclined to accept the return of undisclosed income filed by the assessee then the procedure prescribed in section 143 (2) would have to be followed. If he does not issue

such an assessment order would not be a mere irregularity but would be invalid. The requirement of making an assessment order pursuant to the grant of a hearing and an opportunity to the assessee to produce material in support of his return is not an empty formality. It is a substantive right of the assessee to be presented with the fullest opportunity to support the return filed by him. If such right is denied to the assessee, it would amount to a travesty of justice apart from being in violation of the statutory prescription of section 143(2) and 143(3) read with section 158 BC (b) of the said Act.

37. Both Mr. Jolly and Mrs Bansal appearing for the revenue forcefully argued that the scheme of things under chapter XIV for a regular assessment and under chapter XIV B for block assessments were different. They had submitted that while no assessment under section 143 (3) could be completed without the issuance of a notice under section 143 (2), the same restriction would not be applicable in the case of a block assessment. There is no doubt that there are several distinguishing features between the two processes of assessment. But, this does not enable us to detract from the position that section 158 BC (b) itself requires that the provisions of section 143 (2) be followed. The intention of the legislature is quite clear inasmuch as specific provisions have been mentioned. The qualifying words "so far as may be" have already been construed by us to indicate situations where a notice under section 143(2) would or would not be required. That is a secondary issue. The

main point is that section 143 (2) has been specifically incorporated in the scheme of block assessment proceedings and that cannot be ignored.

38. Thus, we are of the clear view that where the assessing officer is not inclined to accept the return of undisclosed assessment filed by the assessee issuance of a notice under section 143(2) is a prerequisite for framing the block assessment order under chapter XIV B of the Income Tax Act, 1961. We are also of the view that if an assessment order is passed in such a situation without complying with section 143(2), it would be invalid and not be merely irregular.

39. Consequently, we answer both the questions against the revenue. The decision of the Tribunal in each of the appeals is upheld. The appeals are dismissed. The parties are left to bear their own costs.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

April 15, 2009
HJ