

NavIn Verma Vs. Assistant Commissioner of

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SooperKanoon Citation : sooperkanoon.com/74753

Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Feb-28-2006

Reported in : (2006)100ITD73(Delhi)

Judge : P Parashar, R Singh

Appellant : NavIn Verma

Respondent : Assistant Commissioner of

Judgement :

1. This appeal has been filed by the assessee against the order of Id.

CIT(A) passed under Section 158BD/144 relating to block period 1-4-1988 to 16-4-1999.

2. Shri Dinesh Verma, Id. Advocate appeared for the assessee whereas Smt. Sangeeta Gupta, Id. CIT DR represented the revenue.

1. The Id. Commissioner of Income-tax (Appeals) erred on facts as well as in law in holding that ACIT, Range-1, had jurisdiction to assess the assessee and consequently, the Block Assessment Order in dispute was valid.

2. The Id. Commissioner of Income-tax (Appeals) erred on facts as well as in law in holding that the mandatory provisions of law were complied with.

3. The Id. Commissioner of Income-tax (Appeals) erred on facts as well as in law in holding that investment of Rs. 11,000 in M/s. Nasa Systems was undisclosed income of the assessee being from unexplained sources.

4. The Id. Commissioner of Income-tax (Appeals) erred on facts as well as in law in holding that investment of Rs. 1 lakh in Agriculture Land measuring 20 KBM was undisclosed income of the assessee being from unexplained sources.

5. The Id. Commissioner of Income-tax (Appeals) erred on facts as well as in law in holding that the investment of Rs. 43,750 in PUNB Building at Ballabgarh was undisclosed income of the assessee being from unexplained sources.

6. The Id. Commissioner of Income-tax (Appeals) erred on facts as well as in law in holding that advance of Rs. 10,000 paid for purchase of plot No. 438/3 was undisclosed income of the assessee being from unexplained sources.

7. The Id. Commissioner of Income-tax (Appeals) erred on facts as well as in law in holding that the source of payment of Rs. 34,155 towards booking of plot at Gurgaon was undisclosed income of the assessee being from unexplained sources.

8. The Id. Commissioner of Income-tax (Appeals) erred on facts as well as in law in holding that the income from STD Booth and M/s.

Spreadcom could not be established and, therefore, the same was nil 9. The Id. Commissioner of Income-tax (Appeals) erred on facts as well as in law in not considering incomes earned from M/s. Spreadcom and STD Booth and in denying set-off of the same against alleged undisclosed investment to the assessee.

10. The assessee craves leave to add, amend or delete any of the Grounds of Appeal.

4. Before dealing with the specific grounds, as reproduced above, we consider it proper to narrate the facts in brief, which are as under: 4.1 A search and seizure operation under Section 132 was conducted at the residence of Shri Subhash Verma and Smt. Krishna Verma at 1-16, Sector 10, Faridabad. The search started

on 12-3-1999 and continued up to 16-4-1999. During the search operations, certain incriminating documents were seized. Examination of some of the seized documents revealed undisclosed income of the assessee also. Accordingly, notice under Section 158BD of Income-tax Act, 1961 was issued on 23-4-2001.

This notice was served upon the assessee on 24-4-2001. The assessee was required to file return within seven days.

4.2 As the assessee did not comply the notice, a notice under Section 142(1) on 7-11-2002 and further notice on 12-12-1992 were issued. The assessee did not file return but vide letter dated 23-12-2002 raised several objections to challenge the validity of the notice. The assessee was required to appear on 27-12-2002. However, the assessee did not appear despite repeated notices. Vide letter dated 4-3-2003, the assessee again challenged the validity of the notices issued by the Assessing Officer. As the assessee did not file any return, the Assessing Officer completed the assessment under Section 158BD, read with Section 158BC(c)/144 on 30-4-2003. The Assessing Officer, while doing so, also discussed the pleas raised by the assessee in its letter filed before him relating to jurisdiction to make assessment and rejected the same.

4.3 On the basis of various documents found during the course of search, the Assessing Officer computed total disclosed income at Rs. 1,20,14,405. Various additions made by him in the assessment order are as under: (i) Investment by way of share application Rs. 10,000 money para 3(i) above. (a) Investment as share in capital para 3(ii) Rs. 1,000 above. (iii) Investment in 20 kanals 8 marlas of land Rs. 2,24,000 at Village Dhatir, Tehsil Palwal, Distt. (iv) Investment in 1/4th share in PNB Building Rs. 43,750 at Ballabgarh - para 3(iv) above. (v) Investment in Plot No. 438/3, Faridabad Rs. 3,60,000 Para 3(v) above. (vi) Investment in 6 marla plot at Gurgaon - Rs. 34,155 para 3(vi) above. (vii) Investment in various properties as Rs. 1,13,41,500 mentioned in document No. A-I- Total undisclosed income Rs. 1,20,14,405 ----- 4.4 The assessee challenged the assessment order before the Id. CIT(A), before him, several grounds were taken. The assessee also moved application under Rule 46A for admitting evidence. This application was allowed by the Id. CIT(A) after obtaining comments from the Assessing Officer.

4.5 So far as the legal grounds are concerned, the Id. CIT(A) did not find force and rejected the same. The Id. CIT(A) also considered various additions made by the Assessing Officer and gave some relief.

He deleted the addition of Rs. 1,13,41,500.

6. Ground Nos. 1 & 2 challenge the validity of the assessment proceedings.

7. At the time of hearing, the Id. counsel for the assessee, Shri Dinesh Verma raised various legal pleas in support of these grounds, which are as under: (i) That the jurisdiction for making assessment in the case of the assessee was not vested with the then ACIT, Range-I. It was pointed out by him that no order for transferring the jurisdiction was passed by the competent authority and, therefore, the Assessing Officer i.e., ACIT range-I, Faridabad, who made the assessment, had no jurisdiction to do so and for want of jurisdiction, the assessment order has to be treated as illegal and void ab initio.

(ii) There is mandatory requirement for providing minimum 15 days period in the notice for filing the return as per provisions of Chapter XIV-B and since, in the instant case, such period was not given in the notice, the notice is invalid and subsequent proceedings in pursuance of such notice are also void ab initio and, therefore, the block assessment is, therefore, liable to be quashed on this ground.

(iii) Section 158BD mandatorily requires recording of satisfaction by the Assessing Officer having the jurisdiction over the persons under Section 132. As no satisfaction has been recorded in this case, the block assessment order framed under Section 158BD is invalid.

7.1 In support of the above pleas, the Id. counsel has placed reliance on the following decisions : (ii) Gorakhpur Petro Oils Ltd. v. Addl CIT [2005] 95 TTJ (All.) (TM) 489 : 3 SOT 661; Microfin Securities (P.) Ltd. v. Addl CIT [2005] 3 SOT 302 (Lucknow).

7.2 In order to support his plea regarding lack of jurisdiction, the Id. counsel also placed on record some orders/notifications of Income-tax Department, which include the following : Copies of these orders are available at pages 109 to 119 of

the paper book.

7.3 The contention of the Id. counsel for the assessee was that regular jurisdiction was with ITO, Ward 8, Faridabad and, therefore, ACIT did not have any jurisdiction over the assessee in absence of order under Section 127 of the Income-tax Act. He further pointed out that in this case, notice under Section 158BD was issued by CIT, Inv. Circle and the assessment was made by ACIT, Range I, Faridabad. He also pointed out that the notification, dated 3-8-2001 was applicable on the date of issuance of notice and on the date of passing the assessment order and, therefore, neither the authority issuing notification under Section 158BD was competent to do so nor the officer who passed the assessment order was empowered or authorized to pass the order.

8. The Id. Departmental Representative, on the other hand, justified the jurisdictional authority and competency of these authorities. He further submitted that the plea regarding lack of jurisdiction cannot be raised before the ITAT.^{9.1} From the reply of the assessee dated 7-12-2004 available at page 87 of the paper book, it is found that the assessee had contended that the said notice was issued without jurisdiction and was bad in law. On perusal of para 2.1 on page 5 of the assessment order, it is evident that the Assessing Officer has taken note of the objection of the assessee regarding lack of jurisdiction. He has observed as under: 2.1. The reply filed by the assessee on 25-4-2003 has been considered. The contention of the assessee that the proceedings are bad in law and void ab initio being barred by limitation, for non-compliance to mandatory provisions of law and for want of jurisdiction is not correct. Vide letter, dated 20-12-2002, the assessee had earlier also raised the issue of proceedings being barred by limitation of time and subsequent notice under Section 142(1), dated 12-12-2002 being illegal and without sanction of all.

Vide this office letter, dated 23-12-2002, the assessee was informed that the proceedings under Section 158BD of the Income-tax Act, 1961 initiated on 23-4-2001 are not barred by limitation of time and, therefore, subsequent notices under Section 142(1) requiring him to file the return of income for the above block period are valid in law. The time limit for completion of assessment under Section 158BD,

read with Section 158BC(c) of the Income-tax Act, 1961 is the period of two years from the end of the month in which the notice under Section 158BD was issued which in the present case is expiring on 30-4-2003 as provided under Section 158BE(2)(b) of the Income-tax Act, 1961, further, the mandatory provisions of law have been duly complied with and no notice etc., shall be invalid or deemed to be invalid because the same are in substance and effect in conformity with or according to the intent and purpose of the Income-tax Act, 1961 as provided under Section 292B. As regards jurisdiction, the assessee is residing in the territorial jurisdiction of Range-I, Faridabad and is, therefore, within the jurisdictional limits of the undersigned.

9.2 The assessee challenged the jurisdiction of Assessing Officer before the CIT(A) by taking specific ground which is as under : The Block Assessment Order dated 30-2-2003 passed under Section 158BD, read with Section 158BC/144 is illegal, bad-in-law and void ab initio for want of jurisdiction.

9.3 In his letter dated 20-11-2003 available at page 90 of the paper book, the assessee made following specific submissions in support of this ground: Your honour, jurisdiction of the assessee under the Income-tax Act, vested with the Assessing Officer Ward 1(3), Faridabad and not with ACIT, Range-1, Faridabad and, therefore, the assessment having been framed without jurisdiction, is illegal, bad in law and ab initio void, for want of jurisdiction. Not to mention, Assessing Officer was requested time and again to supply a copy of the jurisdiction on the basis of which he assumed jurisdiction to assess the assessee but nothing has been supplied to the assessee till today.

9.4 However, the Id. CIT(A) also failed to properly examine the issue.

He has simply reproduced the reply of the Assessing Officer and as observed in para 5.1, as under: 5.1 The issue has been examined and the stand of the appellant is rejected in view of the fact that the appellant was not an existing assessee and it was only the ACIT, who was the Officer competent to issue a notice under Section 158BD of the Income-tax Act.

9.5 On going through the material on record, it is found that the validity of the assessment made by the Assessing Officer cannot be challenged on the ground that the Assessing Officer did not have a valid authority to make the assessment. It is to be pointed out that the assessee was not assessed to tax and he did not file return in earlier years. Hence, question of transfer of jurisdiction did not arise. Secondly, the CIT concerned had territorial jurisdiction over the assessee and thus the assessment so made by him is justified.

Otherwise also, the validity of the assessment so made cannot be challenged before us on the ground that the JCIT did not have jurisdiction to assess the assessee. It is an administrative matter and, therefore, if the assessee had any grievance in this regard, he could have approached the departmental authorities for transferring the case from the present Assessing Officer to the Assessing Officer, who, according to the assessee, was empowered to make assessment. In view of the above, this ground is found to be without any force and is rejected accordingly.

9.6 In the case of Wallace Bros. & Co. Ltd v. CIT [1945] 13 ITR 39, the Federal Court held that the objection to the place of assessment could not be raised under the 1922 Act on the appeal against the assessment.

The matter was concluded by Teomal v. CIT in which the Supreme Court held that objection to the place of assessment could not be raised under the 1922 Act in an appeal before the AAC or the Tribunal, or on a reference to the High Court. The decision in Teomal's case (supra) holds good under this Act. Although the observation of the Federal Court in Wallace Bros. & Co. Ltd.'s case (supra) that the matter is more one of administrative convenience than of jurisdiction would not apply under this Act, where the statute itself refers to this matter as one of jurisdiction, the question as to Assessing Officer's jurisdiction is still left to be decided, as under the 1922 Act, by the Director General or the Commissioner or by the board and not by the appellate authorities or by the Court on a reference. However, if the assessee obtains a decision on the question under this section and that decision is vitiated by an error apparent on the face of the record, it can be corrected by the High Court by an appropriate writ, direction or order under

Article 226 of the Constitution.

9.7 In the case of Mahalliram Ramniranjan Das v. CIT the Hon'ble Patna High Court has observed as under: Held, that this was not a case of total lack of jurisdiction. In the present case, the irregularity had occurred at the stage after a petition was filed objecting to the jurisdiction of the Income-tax Officer, 'C' Ward, to proceed with the case and the Income-tax Officer without referring the matter to the Commissioner for deciding the matter, himself completed the assessment. Thus, the irregularity was at that stage and so the case had to be restored to that stage. The Appellate Assistant Commissioner was justified in setting aside the assessment order for making a fresh assessment according to law and the Appellate Tribunal was justified in upholding the order of the Appellate Assistant Commissioner.

9.8 In view of the above, the plea regarding validity of jurisdiction cannot be entertained and, therefore, the ground is rejected.

9.9 The next legal plea taken by the assessee is that the Assessing Officer has not recorded satisfaction for making assessment. The assessee has not taken specific plea by raising specific ground in the appeal before us. Neither the assessee nor the Department has filed the assessment in the case of the person searched. The satisfaction can be recorded in the case of the person searched or even otherwise i.e., separately and thus it is not necessary to record the satisfaction in the assessment order made under Section 158BD. In view of the above, we do not find force in this plea of the assessee, which is rejected.

10. The last plea taken by the assessee for challenging the validity of the assessment order is that under Section 158BC/158BD a notice is to be issued by the Assessing Officer requiring the assessee to file return after 15 days. According to learned Counsel for the assessee if the assessee is provided a period of less than 15 days, then such notice is not a valid notice and assessment made pursuant to such notice cannot be legally sustained. In support of this argument, the learned Counsel placed reliance on various authorities including the decision of Agra Bench of ITAT in Kishore Agrawal v. Dy. CIT [IT (SS) Appeal No. 7 (Agra) of 2001, dated 11-5-2005]. He also placed reliance on the order of ITAT Delhi

Bench 'E' in the case of Smt. Neera Agarwal and Anil Kumar Agarwal v. Dy. CIT [IT (SS) Appeal Nos. 142 and 143 (Delhi) of 2003, dated 9-2-2005].

10.1 We have carefully considered the facts and circumstances relating to this matter and the rival submissions. On going through the relevant material, including the written submissions and letters of the assessee as well as the assessment order, the following facts are found to be undisputed: (a) The Assessing Officer issued notice under Section 158BD on 23-4-2001. Through this notice, the assessee was required to file return within 8 days. Again vide notice, dated 4-2-2003 the assessee was required to file return within 7 days. Vide another notice dated 27-1-2003 also the assessee was required to file return on 22-4-2003 i.e., within 8 days. Thus, through the above notices the assessee was not given time to file return beyond 15 days.

(b) The assessee did not file return in compliance to the above notice or otherwise. The assessment has been made under Section 158BD, read with Section 158BC/144 of the Act.

10.2 Coming to the legal provision regarding issuance of notice for making assessment under Section 158BD, the notice is to be issued as provided under Section 158BC. The provisions of Section 158BC are as under : 158BC. Where any search has been conducted under Section 132 or books of account, other documents or assets are requisitioned under Section 132A, in the case of any person, then,- (i) in respect of search initiated or books of account or other documents or any assets requisitioned after the 30th day of June, 1995, but before the 1st day of January, 1997, serve a notice to such person requiring him to furnish within such time not being less than fifteen days; (ii) in respect of search initiated or books of account or other documents or any assets requisitioned on or after the 1st day of January, 1997, serve a notice to such person requiring him to furnish within such time not being less than fifteen days but not more than forty-five days, as may be specified in the notice a return in the prescribed form and verified in the same manner as a return under Clause (i) of Sub-section (1) of Section 142, setting forth his total income including the undisclosed income for the block period.

10.2.1 In view of the above provisions contained under Section 158BC(a), the notice is to be served upon the assessee, requiring him to furnish the return within such time not being less than 15 days. The provision is unambiguous and clear. The intention of the Legislature in using the words "not less than 15 days", is clear. The rule of literal construction has to be followed for ascertaining the plain meaning of the terms used. There being no ambiguity in the language adopted, no other construction except that a clear notice of more than 15 days is to be given, is possible.

10.3 The contention of the learned DR that if a notice does not provide a period of clear 15 days, that is merely an irregularity, which is curable is not acceptable in view of specific provision of law referred to above which casts a specific obligation upon the Assessing Officer.

When the law requires a particular act to be done in a particular manner and within a particular time, then no addition, subtraction or modification of such requirement is permissible. If the requirement of law is clear, the authorities cannot be allowed to subvert the provision by curing such an irregularity. The requirement of giving notice under Section 158BC is a precondition for making assessment. No assessment under Section 158BC or 158BD can be made without issuing a statutory notice as provided in Section 158BC. The notice of less than 15 days is equal to no notice. As no assessment can be made under Section 158BC in absence of notice, the assessment made by issuance of notice otherwise than in accordance with the provisions of law, has to be treated on the same footing i.e., without notice. If the Assessing Officer cannot cure the irregularity in relation to non-issuance of notice, he equally cannot cure the irregularity in relation to a notice which is not in accordance with the provisions of law i.e., notice providing a lesser period than the prescribed clear period of 15 days.

Thus, the argument of the learned DR fails on this count also.

10.4 The issue has been examined by various courts. In the case of *Mir Iqbal Hussain v. State of UP*, the Hon'ble Allahabad High Court examined the provisions of Section 34 of the Income-tax Act, 1922. The assessing authority directed the assessee to appear on the next date and to submit return. As per

Section 15(3), the notice of 30 days was required to be given. The provisions of Section 15(3) are as under: A notice in the prescribed form requiring such person to furnish within such period, not being less than thirty days, as may be specified in the notice a return in the prescribed form and verified in the prescribed manner....

10.5 Since the notice of 30 days was not given, the assessee challenged the assessment order. The issue involved was as to whether the assessment was illegal on account of the defect in the notice. Before the Hon'ble Allahabad High Court for justifying the notice it was urged that the specification of the period for furnishing the return was not a requirement which was to be included in the notice. According to learned DR, the law only required that the notice for filing of return must be issued and if the notice specifies that condition, then it is a valid in law. The Hon'ble Court did not accept this contention and observed as under: We are unable to accept the contention advanced on behalf of the State. The notice under Section 25 must contain the requirements which may be included in a notice under Section 15(3). The notice under Section 15(3) requires an assessee to furnish a return. The requisition does not stop there. It proceeds further, and, indeed, must proceed further. It requires the assessee to furnish a return within a certain period. It appears to us that unless the period for furnishing the return is specified in the notice, it is an incomplete notice. The very object of the Act, which is a fiscal statute, indicates that the assessment should be completed within a definite period and, therefore, it is necessary that the assessee should be required to file a return within a specified period. An assessee who fails without reasonable cause or excuse to furnish a return in due time is liable to penalty under Section 37. The enactment of Section 37 testifies to the intention of the Legislature that the return is required to be filed within a definite period, and accordingly a duty is cast upon the assessing authority to specify such period in the notice calling for the return. The notice must not merely require an assessee to furnish a return. It must require an assessee to furnish a return within a specified period, that period being not less than thirty days. It is only then a notice containing the requirements of Section 15(3).

10.6 The Hon'ble Court also followed the decision in the case of CIT v. Ramsukh Motilal and held that the issue of notice is a condition precedent to the assumption of jurisdiction for assessing such income. It was also held that without issue of a valid notice under Section 25 the assessment in consequence to invalid notice must be held to be bad in law.

10.7 It is to be pointed out that in that case the assessee had filed return in compliance to the notice but the Hon'ble Court held that an objection to the validity of the notice cannot be waived even if the assessee had filed return. Placing reliance on the ratio of decision in the case of Manek Lal v. Dr. Prem Chand 1937 SCR 575, it was held that waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question. Reliance was also placed in the case of A.C. Dutta v. Mst. Bibi Akmedi Begum 1954 ALJ 622, wherein it was held that a waiver of a privilege or a right to be effective must be based upon full knowledge of the privilege or right to which the person waiving them is entitled. It is to be mentioned here that in the present case the assessee had not waived this right, rather the assessee repeatedly challenged the validity of notice and did not file any return in compliance to such illegal or defective notice.

10.8 In the case of CIT v. Brathwaite & Co. Ltd. , the Hon'ble Supreme Court of India considered the issue which arose regarding the requirement of 'period not less than seven years', appearing in proviso to Rule 1(v) of Schedule II to the Companies (Profits) Surtax Act, 1964. After making reference to the decision of Hon'ble Bombay High Court in the case of CIT v. Ramsukh Motilal , the Hon'ble Court held that the only interpretation which could be given to the expression 'during a period of not less than seven years' for the proviso is that the period should go beyond seven years.

10.9 In the case of CIT v. Ikbāl & Co. [1945] 13 ITR 154 (Bom.), the question for consideration before the Hon'ble High Court was, as to whether a notice under Section 22(2) of the Act, requiring the assessee to furnish the return of income (within thirty days of the receipt of the notice), as against the required period of 'not less being less than 30 days', was a valid notice. The assessee had challenged

the validity of the notice in that case, but the Tribunal upheld the plea of the assessee though the assessee had filed return. It was observed that the fact that the assessee submitted return later on or that it was accepted for the purpose of making the assessment, does not cure the defect that initially lay in the notice. The observations of the then Chief Justice Sif Leonard Stone, in this regard are as under : I agree with that statement in the judgment of the Tribunal, computation of periods of time has given rise to a great many cases, both in this country and in England. Time can be infinitely divided.

There is no fraction of second, which is so short in duration that it cannot be divided into something smaller, in my judgment expressions 'within thirty days' and 'not less than thirty days' are two quite different things. 'Within thirty days' is within two points of time one at which the period begins and the other at which it expires. On the other hand, 'not less than thirty days' is outside these two points of time. There must be an interval of not less than thirty days and that means thirty days clear [see *In re*.

Railway Sleepers Supply Company (1885) 29 Ch. D. 204]. The period must continue beyond the expiration of the stated time. Whereas 'within' the stated period must mean what it says, something less than the moment of expiration. In my opinion, therefore, the notice is invalid and the question referred to must be answered in the negative. The Commissioner must pay the costs of the reference.

10.10 In the case of *CAIT v. Ramkuvar* , the Hon'ble High Court has also considered the issue. In that case under Section 41 of Maharashtra Agriculture Act, 1962, a clear notice of 30 days was required to be given. It was held that a defect in the notice is not a procedural defect but a failure to comply with a condition precedent to the assumption of jurisdiction. It was further held that irregularity in a notice under Section 41 cannot be waived by the assessee.

10.11 In view of the above authorities and also in accordance with the view taken by the Agra Bench of the ITAT in the case of *Kishore Agarwal* (supra) and the order of Delhi Bench of the ITAT in the case of *Smt.*

Neera Agarwal(supra), it is clear that this requirement of law has to be satisfied for making assessment under Section 158BC/158BD. As in the present case, the assessing authority did not provide clear period of 15 days for filing the return, in our considered opinion, the basic and prerequisite conditions of law or mandatory requirement of legal provision was not satisfied. Such a notice is illegal and void and neither the departmental authorities are capable to cure the defect nor the assessee can waive such a prerequisite requirement of law. In view of the above, the notice is held to be illegal, void and the assessment order passed in consequence of such illegal notice is void ab initio and such assessment is to be quashed. Ground No. 2, taken by the assessee is therefore allowed.

10.12 We may mention here that in the case of Smt. Mahesh Kumari Batra v. Joint CIT [2005] 95 ITD 152 (Asr.), the Special Bench of the ITAT was considering the issue relating to an irregularity of notice under Section 158BC. However, the statutory provision as contained under Section 158BC(1) requiring notice providing time of not less than 15 days, was not an issue before that Bench and, therefore, the same was not considered. In that case, defect in the notice as pointed out, was that the notice was served upon one lawyer Shri R.K. Dhawan who was assessee's advocate and who was appearing on behalf of the assessee.

The plea of the Department was that under a bona fide belief, the Assessing Officer handed over the notice to Shri Dhawan and even the assessee had filed return in compliance to such notice. On these facts, it was held that the defect in the notice, if any, was curable under Section 292B. Thus, the issue which is involved in this appeal, was not directly involved before the Special Bench.N.K. Parwanda v.Dy. CIT vide order dated 16th January, 2004 rendered in IT(SS) Appeal No. 129 (Delhi) of 2003 has considered the issue relating to requirement of issuance and service of notice under Section 158BC. In that case, the plea of the assessee was that the notice was sent at the old address of the assessee and, therefore, it was not served. On enquiry, it was found that the notice was sent through registered post on the old address of the assessee. The assessee had participated in the proceedings. After placing reliance on the ratio of decision in the case of Swam Yash v. CIT , it was observed that it was not possible for a party to confer jurisdiction by consent. It was further held that mere issuance of notice

under Section 158BC does not confer jurisdiction on the Assessing Officer to make assessment inasmuch as service of such notice is a condition precedent to proceed to make the assessment of undisclosed income. The Bench has also observed that Section 292B has no application to the facts of the case.

This decision of the ITAT was challenged by the revenue before the Hon'ble Delhi High Court. The Hon'ble Court has upheld the view taken by the ITAT by observing as under: On the appreciation of facts, which have been discussed in detail, the Tribunal has arrived at a conclusion that no notice under Section 158BC of the Income-tax Act, 1961 was served upon the assessee. Hence, no interference is called for.

10.14 It is to be pointed out that this decision of Hon'ble Delhi High Court was not brought to the notice of the Special Bench (supra), of the ITAT.10.15 In the case of Janki Exports International v. Union of India , the Hon'ble Delhi High Court has held that Section 158BC is somewhat analogous to Section 147 insofar as the procedure that is required to be followed. This decision of the Hon'ble Delhi High Court was also not brought to the notice of the Special Bench.

10.16 The Hon'ble Jurisdictional High Court has considered the issue relating to recording of satisfaction in the case of Amity Hotels (P.) Ltd v. CIT Thus, it is very clear that satisfaction is required and it cannot be said that proceedings can be initiated without such satisfaction.

10.17 On the basis of the above preposition, it is observed that the foundation for assumption of jurisdiction is the satisfaction to proceed under Section 158BD against a person not searched. The issuance of notice, after record of such satisfaction, is another requirement, which entitles the Assessing Officer to assume jurisdiction to assess the undisclosed income of such person. Thus, if necessary satisfaction has not been recorded prior to making of assessment under Section 158BD, such assessment cannot be legally justified. Thus, on this basis the assumption of jurisdiction to assess under Section 158BD is on different footing than the assumption of jurisdiction under Section 158BC. It can, therefore, be concluded that if the Assessing Officer does not record satisfaction prior to the making of assessment under Section 158BD, such assessment has to be

quashed, as was done in the case of Amity Hotels (P.) Ltd. (supra).

10.18 In the case of Sakun International v. Jt. CIT [2005] 94 ITD 138 (Delhi) also, since no satisfaction was recorded by the Assessing Officer, before issuing notice, the proceedings initiated under Section 158BD were quashed. The Bench has observed as under: As per provisions of Section 158BD, for assessing the undisclosed income of any other person, i.e., other than the person with respect to whom search was made under Section 132, the Assessing Officer must be satisfied that the undisclosed income belongs to such person, i.e., the person other than the searched person. Thus, the Assessing Officer cannot proceed against 'such other person', without having required satisfaction. The requirement of proceedings against 'any other person' under Section 158BD. The word 'satisfaction' appearing in Section 158BD clearly denotes that it should be based upon the material before the Assessing Officer and such satisfaction should be brought on record.

In view of the above it could be concluded that the jurisdiction under Section 158BD was not properly assumed and exercised by the Assessing Officer inasmuch as before assuming such jurisdiction he had not indicated any incriminating material belonging to the assessee upon the basis of which he had any satisfaction that undisclosed income of the assessee required assessment under Section 158BD. Thus, the jurisdiction under Section 158BD had not been invoked validly, and the assessment made consequent thereto deserved to be annulled and quashed.

10.19 It may be pointed out that assumption of jurisdiction for making assessment is based upon different legal requirements. The foundation for assessment may be on different basis, but where for making assessment some mandatory requirements are prescribed, for example, issuance of notice etc., then the jurisdiction to make assessment can be assumed only after satisfying such legal requirements.

10.20 In the case of R.K. Upadhyaya v. Shana Bhai P. Patel , the Hon'ble Supreme Court, has held that there is a clear distinction between issuance of notice and service of notice. It was observed in that case that service under the

new Act is not a condition precedent to the confirmation of jurisdiction on the ITO but it is a condition precedent for making the order of assessment. Thus, the service of a valid and legal notice requiring the assessee to furnish return after fifteen days is a necessary condition and mandatory requirement for assuming jurisdiction for making assessment under Section 158BD and if such condition is not satisfied then the assumption of jurisdiction for making assessment under Section 158BD cannot be legally justified.

10.21 In view of the above, we allow the plea of the assessee for challenging the assessment order on the basis of a defective notice, which is to be treated as no notice in the eye of law. It is to be repeated here that the assessee has not acquiesced in the exercise of jurisdiction by the Assessing Officer in the present case nor did he file any return in pursuance or in compliance to the notice issued to him, rather he challenged the very validity of the notice and also of the jurisdiction of the Assessing Officer.

10.22 In view of the above legal position and on the facts and circumstances of this matter, the assessment made in this case is liable to be quashed on the ground mentioned above. Hence, the assessment is quashed on this ground itself.

10.23 Consequently, ground No. 1 as taken by the assessee stands allowed.

11. As we have quashed the assessment order on the ground as mentioned above, we are not required to dispose off other grounds of appeal on merit.

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