IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO.494 OF 2017

Pr. Commissioner of Income Tax - 19 … Appellant

Vs

Shri Fareed A. Noorani … Respondent

Mr.Sham Walve for the Appellant

Mr.S.R. Mody with Ms.Aasifa Khan for the Respondent

CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.

DATED: JULY 22, 2019

P.C.:

1. This Appeal is filed by the Revenue to challenge the judgment the Income Tax Appellate Tribunal (for short, 'the Tribunal'). The following questions are presented for our consideration:

i) Whether on the facts and circumstances of the case and in Law, the Tribunal erred in holding that the assessment was bad in law not appreciating the provisions of section 143(2) mandate that the AO served on the assessee a notice calling for evidence on which it may rely in support of the return of income and, in the instant case, a letter dated 29.05.2002 had been issued to the assessee, subsequent to the filing of return of income which substantially complies with the aforesaid provisions inasmuch as the additions to the total income made in the assessment order relate to issues raised in the said letter, on which the explanation of the assessee had been sought?

ii) Whether on the facts and circumstances of the case and in Law, the Tribunal has erred in holding the assessment as void for the purported failure of the AO in not granting a minimum of 15 days for filing of return of income in response to notice under section 158-BC not appreciating that the term "within the period of 15 days" does indeed provide for a period of 15 days, further that, in the case of Shirirsh Madhukar Dalvi, the High Court held that where an error in statutory notice suffered only from technical defect, it was protected under provisions of section 292B of the Income Tax Act, 1961 and that the said error did not cause a prejudice to the assessee?

2. The respondent – assessee is an individual. The subject matter is the order of assessment passed under section 158-BC of the Income Tax Act for the block period between 1.4.1990 to 16.9.2000. The assessee contended that the entire assessment was completed without issuing notice under section 143 (2) of the Act. The Tribunal upheld the contention and deleted the assessment. Therefore, before the Tribunal as also this Court, the Revenue argued that such notice was issued, however, without specifying the provisions under which the notice is issued. According to the Revenue, therefore, there was sufficient compliance on the part of the Assessing Officer of the requirements of section 143 (2) of the Act. The Tribunal, therefore, ought to have upheld the assessment.

3. The materials on record, however, show that as per the Tribunal, no notice under section 143 (2) of the Act was issued. The previous notice to which reference is made by the Revenue was only for collecting general information.

4. The Tribunal noted that after filing of the return, no scrutiny assessment notice was issued. That being the position, the

appellant would be covered by the Supreme Court decision in the case of **Assistant Commissioner of Income Tax, Hotel Blue Moon** reported in [**2010] 188 Taxman 113 (SC)** in which it was held as under:

> “15) We may now revert back to Section 158 BC(b) which is the material provision which requires our consideration. Section 158 BC(b) provides for enquiry and assessment. The said provision reads "that 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-section (2) and (3) of Section 143, Section 144 and Section 145 shall, so far as may be, apply." An analysis of this sub section indicates that, after the return is filed, this clause enables the assessing officer to complete the assessment by following the procedure like issue of notice under Sections 143(2)/142 and complete the assessment under Section 143 (3). This Section does not provide for accepting the return as provided under Section 143(i)(a). The assessing officer has to complete the assessment under Section 143(3) only. In case of default in not filing the return or not complying with the notice under Sections 143(2)/142, the assessing officer is authorized to complete the assessment ex-parte under Section 144. Clause (b) of Section 158 BC by referring to Section 143 (2) and (3) would appear to imply that the provisions of Section 143(1) are excluded. But Section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under Section 143 (2). However, if an assessment is to be completed under Section 143 (3) read with Section 158-BC, notice under Section 143 (2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under Section 143(2) cannot be a procedural irregularity and the same is

not curable and, therefore, the requirement of notice under Section 143 (2) cannot be dispensed with. The other important feature that requires to be noticed is that the Section 158 BC(b) specifically refers to some of the provisions of the Act which requires to be followed by the assessing officer while completing the block assessments under Chapter XIV-B of the Act. This legislation is by incorporation. This Section even speaks of sub- sections which are to be followed by the assessing officer. Had the intention of the legislature was to exclude the provisions of Chapter XIV of the Act, the legislature would have or could have indicated that also. A reading of the provision would clearly indicate, in our opinion, if the assessing officer, if for any reason, repudiates the return filed by the assessee in response to notice under Section 158 BC(a), the assessing officer must necessarily issue notice under Section 143(2) of the Act within the time prescribed in the proviso to Section 143 (2) of the Act. Where the legislature intended to exclude certain provisions from the ambit of Section 158 BC(b) it has done so specifically. Thus, when Section 158 BC(b) specifically refers to applicability of the proviso thereto cannot be exclude. We may also notice here itself that the clarification given by CBDT in its circular No.717 dated 14th August, 1995, has a binding effect on the department, but not on the Court. This circular clarifies the requirement of law in respect of service of notice under sub-section (2) of Section 143 of the Act. Accordingly, we conclude even for the purpose of Chapter XIV-B of the Act, for the determination of undisclosed income for a block period under the provisions of Section 158 BC, the provisions of Section 142 and sub-sections (2) and (3) of Section 143 are applicable and no assessment could be made without issuing notice under Section 143 (2) of the Act. However, it is contended by Sri Shekhar, learned counsel for the department that in view of the expression "So far as may be" in Section 153 BC(b), the issue of notice is not mandatory but optional and are to be applied to the extent practicable. In support of that contention, the learned counsel has relied on the observation made by this Court in Dr. Pratap Singh's case [1985] 155 ITR 166(SC). In this case, the Court has observed that Section 37(2) provides that "the provisions of the Code relating to

> searches, shall so far as may be, apply to searches directed under Section 37(2). Reading the two sections together it merely means that the methodology prescribed for carrying out the search provided in Section 165 has to be generally followed. The expression "so far as may be" has always been construed to mean that those provisions may be generally followed to the extent possible. The learned counsel for the respondent has brought to our notice the observations made by this Court in the case of Maganlal Vs. Jaiswal Industries, Neemach and Ors., [(1989) 4 SCC 344], wherein this Court while dealing with the scope and import of the expression "as far as practicable" has stated "without anything more the expression `as far as possible' will mean that the manner provided in the code for attachment or sale of property in execution of a decree shall be applicable in its entirety except such provision therein which may not be practicable to be applied."

5. Non-issuance of notice under section 143 (2) of the Act is thus seen as a jurisdictional error vitiating the assessment. In view of this discussion, the second discussion presented by the Revenue becomes one of the academic nature.

6. In the result, the appeal is dismissed.

(S.J. KATHAWALLA, J.) **(AKIL KURESHI, J.)**