

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI
BEFORE SHRI SANJAY ARORA, ACCOUNTANT MEMBER &
SHRI VIKAS AWASTHY, JUDICIAL MEMBER

ITA Nos. 4924 & 4925/Mum/2014
Assessment Years: 1992-93 & 1993-94

Nandlal L. Kodnaney 1007, Natasha Tower, RCTS, 1310, Andheri (W), Mumbai – 400063 PAN : AAHPK4363M (Appellant)	v. ..	ITO 26(2)(4) K.G. Mittal Ayurvedic Hospital Bldg, 6 th Floor, Charni Road, Mumbai. (Respondent)
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Appellant by :	Shri Mayur A. Shah, CA
Respondent by :	Ms. Kavita P. Kaushik (Sr. DR)

Date of Hearing	24.02.2020
Date of Pronouncement	21.08.2020

ORDER

Per Sanjay Arora, AM:

This is a set of two Appeals by the Assessee for two consecutive years, being Assessment Years (AYs.) 1992-93 and 1993-94. The appeals raising common issues, were fixed for hearing and, accordingly, heard, together, and are being decided per a common order.

Arguments

2. Taking us through the sequence of events with reference to a chronological chart of events placed on record, the assessee's counsel, Sh. Mayur Shah, would submit that this is the third round before the Tribunal. Assessments for both the years were framed u/s. 147 r/w s.

143(3) of the Income Tax Act, 1961 ('the Act') on 31.3.1999 (PB pages 4-7, 8-11). The same were disposed of by the first appellate authority on 25.02.2000 for being decided *de novo* by the Assessing Officer (AO) (PB pgs. 12-21, 21-28). Fresh assessments were accordingly framed by the AO on 07.3.2002 (PB pgs. 29-33, 34-38), which were decided on merits by the first appellate authority vide a common order dated 30.12.2002 (PB pgs. 39-45). The matter travelled to the Tribunal at the instance of the Revenue, before whom the assessee also raised legal objections, being, in principal, of the assessments framed being bad in law as the notice/s u/s. 143(2) of the Act had been issued on 21.7.1998 (as against the due date of 31.3.1998), i.e., beyond time (PB pgs.52-62). The Grounds were subsequently concised by the assessee to bring them in conformity with the Appellate Tribunal Rules (PB pgs. 63-65). The Tribunal, vide its' order dated 30/11/2006 (PB pgs. 64-65), dismissed the Revenue's appeals as well as the assessee's cross objections for both the years. The dismissal of the COs though was *in limini* inasmuch as the same did not survive in view of the dismissal of the Revenue's appeals. The assessee filed Miscellaneous Applications for both the years on 09.01.2007, which were admitted and accepted by the Tribunal vide order 07.3.2007 (PB pgs. 75-77). The issues raised by the assessee per its' cross objections were set aside by it to the file of the AO for being decided in light of the material on record, as well as that which the assessee may file before him. The additions on account of unexplained cash credits in bank account and unexplained investments were confirmed by the AO vide separate orders dated 05.3.2010. The assessee disputed the assessments on, besides the maintainability of the additions,

the ground that *no notice* u/s. 143(2) of the Act had been issued or served on him prior to the framing of the assessment/s u/s. 147 r/w s.143(3) (on 31.3.1999) (Ground # 7). The assessee was allowed part-relief by the Commissioner of Income Tax (Appeals)-28, Mumbai ('CIT(A)') for the both the assessment years vide a common order dated 13.5.2014. The assessee's appeals before the Tribunal, filed for both the years on 28.7.2014, remained unprosecuted despite grant of several adjournments at the assessee's request. And were, therefore, disposed on 04.6.2018, upholding the findings by the Id. CIT(A) inasmuch as no contrary material had been brought on record by the assessee. The same was, however, recalled by the Tribunal vide order dated 17.12.2019 on the assessee satisfying it that the non-attendance on the relevant date was unintended, and as a result of a *bona fide* mistake. It is under these circumstances that the appeals came up for hearing before us.

3. The principal issue that therefore needs to be decided is as to the legal validity of the assessments u/s. 147 r/w s. 143(3) of the Act in view of the issue (& service) of the notices u/s. 143(2) of the Act, stated to be beyond a period of twelve (12) months from the end of the financial year in which the returns for the relevant years were furnished. The notices u/s. 148 for both the years were responded to by the assessee vide letter/s dated 29.3.1997 (filed on 31.3.1997), stating that the return already filed u/s. 139 of the Act may be treated as a return furnished in response to the notice u/s. 148(1) (dated 26.3.1997). The notice/s u/s. 143(2) of the Act could, therefore, be issued only by 31.3.1998, while was only on 21/7/1998. The second legal plea raised by the assessee is that the assessments framed by the AO in pursuance to the Tribunal's order dated

30.11.2006, as modified by it on 07.3.2007, could be, in view of sec. 153(2A) of the Act, only within a period of nine months from the end of the year of the receipt of its' order by the Pr. CIT/CCIT, i.e., by 31/12/2008, and are, as on 05/3/2010, barred by time.

4. We have heard both the parties at length and perused the material on record.

4.1 At the very outset, it needs to be clarified that the two legal issues raised before us by the assessee are the only issues requiring adjudication in the facts and circumstances of the case. We clarify this as the Tribunal, while restoring the assessee's COs to the file of the AO on 07.3.2007, required him to decide all the issues as raised by the assessee thereby, and which included addition/s on quantum, i.e., as made, since partly allowed in first appeal, as well as the levy of interest u/ss. 234A/B/C of the Act. These instructions, binding on the Revenue authorities, were duly complied with, resulting in the assessee being allowed part relief in first appeal in respect of the quantum addition/s. It was, however, explained by Sh. Shah, the assessee's counsel, that the assessee has no material with him to challenge the quantum addition/s, decided on merits by the Revenue authorities, even as the levy of interest, also challenged per the COs, is consequential.

4.2 The first issue before us, thus, is the validity of the assessment/s u/s. 147 r/w s. 143(3) of the Act, assailed for non-issue and, resultantly, non-service of the notice/s u/s. 143(2) within the stipulated time, for which the assessee relies, among others, on the decision in *Raj Kumar Chawla v. ITO* [2005] 94 ITD 1 (Del)(SB). The proposition that an

assessment u/s. 143(3) repudiating the assessee's return without issue of notice u/s. 143(2) of the Act, i.e., within the prescribed time, is not valid, admits of no two views in view of the decisions by the Apex Court, as in *CIT v. Laxman Das Khandelwal* [2019] 417 ITR 325 (SC); *CIT (Pr.) v. Maruti Suzuki India Ltd.* [2019] 416 ITR 613 (SC); *CIT (Asst.) v. Hotel Blue Moon* [2010] 321 ITR 362 (SC).

The proposition afore-noted, however, is not applicable in the given facts and circumstances of the case, and for more than one reason. The assessments dated 31.3.1999, in framing which the notices u/s. 143(2) of the Act are, as claimed, issued and served belatedly, obtain no longer. The relevant part of the separate appellate orders dated 25/2/2002 for both the years, reads as under:

AY 1992-93

“10. In view of the facts and circumstances as mentioned above, I find that I have no option but to set aside the assessment order to be framed *de novo* in the light of my directions given above. However, the AO is free to make any other enquiry/investigation as he deems fit before completion of the re-assessment.”

AY 1993-94

“8. On a careful examination of the facts of the case, reasonings given by the AO and submissions of the appellant, I find that the assessment order for AY 1993-94, i.e., under consideration, suffers from more or less the same defects/shortcoming/lack of evidences as was mentioned while deciding the appeal for AY 1992-93. Therefore, for the same reasons as given therein, the assessment order for AY 1993-94 is also set aside to be framed *de novo* with the same directions as given therein. As mentioned while setting aside the order for AY 1992-93, the AO while framing the assessment afresh is free to make any further enquiries/investigations as he deems fit.”

The said assessments were set aside by the first appellate authority for framing assessments *de novo*. That is, the earlier assessments dated 31.3.1999 get, in law, effaced/obliterated. It is only the assessment/s framed afresh on 07.3.2002, for both the years, i.e., pursuant to the directions by the first appellate authority vide his separate orders dated 25.2.2000, that have a legal existence. The assessee, if he wanted to pursue the legal ground of the assessment/s dated 31.3.1999 being not a valid assessment/s for want of a timely notice/s u/s. 143(2) of the Act, ought to have challenged the direction/s by the first appellate authority for a *de novo* assessment/s in appeal before the Tribunal. Accepting the same, the issue of a valid assumption of jurisdiction by the A.O, i.e., to frame an assessment u/s. 143(3) of the Act, gets frustrated/ foreclosed. Even as the law in the matter is trite, reference, with profit, may be made to the decision in *Hindustan Coca Cola Beverages (P.) Ltd. v. CIT* [2007] 293 ITR 226 (SC), or for that matter by the Tribunal in *Jaiprakash Power Venture Ltd. v. Asst.CIT* (in ITA No. 88/Jab/2018, dated 12/12/2019), rendered with reference to a host of decisions.

Here it may also be relevant to state that the comments of the AO on the various issues raised by the assessee before him, were sought by the first appellate authority from the AO, which were duly confronted to the assessee prior to framing his orders dated 25.02.2000. For AY 1992-93, the first year, the AO, vide his letter dated 17.11.1999, in response to para 5 of the assessee's letter dated 25.8.1999 (reproduced at page 7 of the appellate order), clearly states of the issue of notice u/s. 143(2) on 26.10.1997, so that the contention of the assessee (vide letter dated 19.9.1999) as to the notice u/s. 143(2) being issued for the first time only

on 21.7.1998 and, thus, beyond time, was factually incorrect and, thus, without merit and, rather, an afterthought, having not been raised by the assessee at any time in the assessment proceedings. This perhaps also explains the decision by the first appellate authority – who could not but be, in setting aside the assessment being contested before him, and directing *de novo* assessment, aware of the assessee's challenge to the assessment impinging on the AOs' legal competence to frame an assessment u/s. 143(3), i.e., of the said challenge being without merit. It perhaps also explains, as it now transpires, the assessee's non-challenge of the said decision by the first appellate authority. In fact, Sh. Shah also could not, on being questioned during hearing on this claim of the Revenue, i.e., issue of notice u/s. 143(2) on 26.10.1997, i.e., within time, furnish any satisfactory answer. This is precisely the reason for our stating as to the inapplicability of the legal proposition being advanced by the assessee in the facts and circumstances of the case for more than one reason. Further, though there is no such specific comment by the AO – who, to be fair to him, has commented on all the objections by the assessee, for AY 1993-94, the fact of the matter is that the first appellate authority has arrived at the same finding for that year as for AY 1992-93, observing at para-8 of his order of the assessment for that year to be suffering from the same defects as that for AY 1992-93. In fact, as per the assessee's objections for AY 1993-94, the first notice u/s. 143(2) was, as for AY 1992-93, issued only on 21.7.1998, i.e., the assessee's as well as the Revenue's case for both the years is the same, to be therefore decided like-wise.

4.3 The assessee's legal challenge, invoking the proposition as to the invalidity of the notice/s u/s. 143(2) and, thus, of the assessments framed in pursuance thereto, therefore, fails.

5.1 The only other issue in these appeals is as to the assessments, being dated 05.3.2010 for both the years, being barred by time in view of the breach of the time limit specified in their respect u/s.153(2A). The said provision in its relevant parts reads as under:

Time limit for completion of assessment, reassessment and recomputation.

153. (1)....

(2)

(2A). Notwithstanding anything contained in sub-sections (1) and (2), in relation to the assessment year commencing on the first day of April, 1971, and any subsequent assessment year, an order of *fresh assessment* in pursuance of an order under section 250, section 254, 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 or, as the case may be, the order under section 263 or section 264 is passed by the Chief Commissioner or Commissioner.

Provided further that where the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner on or after the 1st day of April, 2005 but before the 1st day of April, 2011, the provisions of this sub-section shall have effect as if for the words "one year", the words "nine months" had been substituted;

(3). The provisions of sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, subject to the provisions of sub-section (2A), be completed at any time.

- (i)
- (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;
- (iii) Where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147.'

(emphasis, in italics, ours)

5.2 The assessee's case is that the Tribunals' order dated 07.3.2007, which is a combined order for both the years, having been admittedly received by the Revenue on 05.4.2007, the assessment/s could, in view of s. 153(2A), be framed latest by 31.12.2008, while were actually completed on 05.3.2010, and are accordingly barred by time. The same did not find favour with the Id. CIT(A) as the Tribunal had vide its' order dated 07.3.2007 (PB pgs. 75-77) not cancelled or set aside the assessments, but done so to the extent of requiring the AO to adjudicate the assessee's CO/s. Sec. 153(2A) was, therefore, in his view, not applicable, and toward which reliance stands placed by him on the decision in *Krishna Devi (Lt.) v. Asst. CIT* [2004] 270 ITR (AT) 24 (Agra).

6. We have heard the parties, and given a careful consideration to the matter.

6.1 Para 4 of the the Tribunals' common order dated 07.3.2007, modifying paras 6 & 7 of its' order dated 30/11/2006, reads as under:

'4. We have carefully considered the contentions of the both the sides and have carefully gone through the records including the paper-book that were already

filed before the AO as well as before the CIT(A). We are convinced that neither the Assessing Officer nor the CIT(A) have properly verified the facts of the case in light of the material that were already available with them. We, therefore, modify our order dated 30.11.2006. Paras 6 & 7 will now read as under:

“6. As regards the cross objections filed by the assessee for the assessment years 1992-93 and 1993-94, the same are restored to the file of the AO with direction to decide the same in the light of the material that were already on record before the AO as well as before the CIT(A) and such other evidence as the assessee may file in the course of hearing before him. The AO shall give his findings based on the materials produced.

7. In the result, the appeals filed by the Revenue are dismissed, and the cross objections filed by the assessee are allowed to this extent, stated above.”

Could this be called a cancellation or set aside of the assessment as contemplated by sec. 153(2A), is the question. That is, whether the assessment orders dated 05/3/2010 would be governed by sec. 153(2A), in which case they are clearly time barred, or under the residual provision of s. 153(3)(ii), saving the time limitation.

6.2 The controversy before us is whether a limited set aside or remand, inasmuch as it may technically qualify as a ‘set-aside’, even if to a limited extent, would therefore be subject to the time limitation u/s. 153(2A), or be governed by sec.153(3)(ii), for which no time limit stands specified by law. That is, whether the assessment/s dated 05/3/2010 can be regarded as a fresh assessment/s by the assessing authority consequent to a set aside of an earlier assessment/s and, consequently, subject to the time limitation u/s. 153(2A). Or, on the contrary, is liable to be construed as a case of a limited review consequent to a direction or finding by an appellate authority (*qua* some aspects of the assessment warranting being

re-examined by the assessing authority), which is issue-specific, in which case it would lead to, at the highest, a modification of an order in pursuance of a direction or finding by the appellate/revisional authority. And could, accordingly, be at best regarded as a partial set aside of the assessment order, i.e., as against a total set aside or cancellation of the assessment for framing assessment afresh. There is reference to the concept of a partial set aside of an assessment in the case of *CIT v. Sun Engineering (P.) Ltd.* [1992] 198 ITR 297 (SC) inasmuch as the AO, on a valid reopening of an assessment assumes the jurisdiction to bring to tax the escaped assessment income, where the matter is not concluded by the earlier assessment.

6.3 In our preliminary view, it cannot be said to be cancellation or set aside of assessment for fresh assessment falling under the time limitation per sec. 153(2A). On the contrary, to the extent modified by the first appellate authority and the Tribunal, the second appellate authority, vide their orders dated 30.12.2002 and 30.11.2006 respectively, the assessment orders dated 07/3/2002 stand merged with their orders, which part of the assessment continues to obtain and remains undisturbed. Further, inasmuch as the AO had already considered the assessee's objections per the assessment order/s as well as the remand report/s, which were further duly considered by the first appellate authority, perhaps, the same ought to have been decided by the Tribunal, which, as apparent its' order dated 30/11/2006, did not do so only inadvertently, regarding the same as infructuous. Be that as it may, the limited issue before us – the Tribunals' order dated 07/3/2007 having attained finality, is whether the captioned direction by the Tribunal (refer para 6.1)

tantamounts to a cancellation or set aside of the assessment/s, so as to attract the time limitation u/s. 153(2A), or is a case to which the open time limit per s.153(3)(ii) applies. It is, to our mind, a clear case of limited set aside attracting sec. 153(3)(ii), which does not provide any time limitation, so that the direction could be complied with at any time by passing an order u/s. 143(3) r/w s. 254(1).

6.4 While the assessee has toward this relied on the decision in *W.C. Shaw Pvt. Ltd. v. Asst. CIT* [2005] 276 ITR 153(AT)(Kol), the Revenue does on the decision in *Krishna Devi (Lt.)*(supra). Surprisingly, even as the former relies on the latter, the two decisions, relying on judicial precedents, take opposite views. In *Krishna Devi (Lt.)* (supra) the Tribunal holds that sec. 153(2A) would apply to a case where a fresh assessment is to be made after the set aside of the assessment as a whole, and not where the matter is restored to the AO to pass an order in pursuance to a finding or direction by the appellate/revisonal authority. The decision in *W.C. Shaw Pvt. Ltd.* (supra), on the other hand, states that for the applicability of s.153(2A) it is not necessary that the whole of the assessment should be set aside to complete the same *de novo*. Even if the fresh assessment is made in respect of one issue pursuant to an order u/s. 250/254/263/264, the provision would become applicable, as a matter has been set aside for fresh adjudication (page 162). The decision in *CIT v. Bhan Textiles Pvt. Ltd.* [2008] 300 ITR 176 (Del), also relied upon by the assessee, is not directly on the point. In the facts of that case, the Hon'ble Court, upon reading the appellate order found it to be a case of set aside or cancellation of the assessment for framing an assessment afresh, as no opportunity to place evidence had been provided to the assessee. The same, thus, is a clear case of application of s. 153(2A), and would therefore not be

of much help to the assessee, being, as afore-stated, not directly on the point. As both the decisions by the Tribunal, relied upon by either side, take diametrically opposite views, the matter requires, and it becomes incumbent on us to examine the matter from the stand-point of whether the issue arising is *res integra* or at least unsettled, or has been the subject matter of consideration/decisions by the higher courts of law.

6.5 Our examination reveals the issue to be well-settled, with a series of decisions, including by the Apex Court and Hon'ble jurisdictional High Court, having elucidated the matter. To begin with, the Hon'ble High Court in *CIT v. Ratan Bhai N.K Dubhash* [1998] 230 ITR 495 (Bom) explained (at pg. 503) that where the order of assessment is set aside, it is open for the AO to make fresh assessment in accordance with law. That is, it would imply setting aside an assessment for framing assessment afresh. The Hon'ble Court was dealing with the said words in the context of s. 251, i.e., as it stood prior to its amendment by the Finance Act, 2001 w.e.f. 01.6.2001. The said understanding would obtain even in the context of s. 153(2A). Much earlier, the Apex Court in *Late Rangalal Jajodia v. CIT* [1971] 79 ITR 505 (SC), dealing with the case of setting aside of assessment, directing the assessing authority to make fresh assessment after giving notice to the heirs/executrix, held that the fresh assessments were not barred by time in view of second *proviso* to s. 34(3) of the 1922 Act (corresponding to s. 153(3)(ii) of the Act) as the issue of notice to the heir/executrix was consequent to a finding/direction contemplated by the said provision. The Apex Court was dealing with a case where the assessment had in the first instance been completed without issue of notice u/ss. 22(3) and 23(2) (corresponding to ss. 142(1) and 143(2) of the Act) on one of the heirs of the Late Rangalal Jajodia. The words 'finding and direction' have found clear enunciation by the Apex Court in *ITO v.*

Muralidhar Bhagavandas [1964] 52 ITR 335 (SC) and *Rajendranath v. CIT* [1979] 120 ITR 14 (SC), both relied upon in *Krishna Devi (Lt.)* (supra). The Andhra Pradesh High Court in *Mohammadi Begum & Anr. v. CIT* [1986] 158 ITR 662 (AP) dealt with a case where the assessments were set aside u/s. 264, directing the ITO to make fresh assessments in accordance with law inasmuch as the income of the assessee's minor children, by reason of their admission to the benefits of a partnership, was includible in the total income of the assessee. The Hon'ble Court held that the assessments required to be made thus fell u/s. 153(3)(ii), and were accordingly not barred by time. The decision in *Rikhabdas Jhaverchand v. CIT* [2001] 249 ITR 774 (Bom) is directly on the point; the issue involved being as to which of the two provisions, i.e., s. 153(2A) or 153(3)(ii), would apply in the facts and circumstances of the case. It held as under:

'4. We do not find any merit in the said contention. Section 153(2A) refers to an order of fresh assessment being passed pursuant to the assessment order being set aside by the Tribunal under section 254. On the facts, the revisional authority rightly came to the conclusion that the Tribunal in its order dated January 10, 1989, had only directed the Assessing Officer to verify 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 Income-tax Officer, who assessed the debtors. In the circumstances, it cannot be said that the Tribunal had directed the Assessing Officer to pass a fresh order of assessment as contemplated by section 153(2A). On the facts, section 153(3) clearly stood attracted. Section 153(3), inter alia, lays down that the provisions of sub-sections (1) and (2) of section 153 shall not apply to assessments, reassessments and recomputations made on the assessee in order to give effect to any direction contained in an order under section 254 of the Act. This provision is, however, subject to the provisions of section 153(2A). In other words, if a matter falls under section 153(2A) then, the fresh order of assessment shall be passed within the prescribed period of two years from the end of the financial year in which the order is passed by the Tribunal under section 254. However, on the facts, section 153(2A) is not attracted. The case falls under section 153(3). Hence, the revisional authority was right in passing the impugned order.'

(pg. 776)

The Hon'ble Court in *Basu Distributors Pvt. Ltd. v. ITO* [2007] 292 ITR 29 (Del), on being confronted with a similar argument, i.e., the applicability of s. 153(2A) vis-à-vis s. 153(3)(ii), held in favour of the applicability of the latter, dismissing the assessee's petition. The assessee had in the quantum proceedings claimed that it was not hit by the provision of s. 40A(3) as no expenditure exceeding Rs. 20,000/- had been incurred in cash, but by effecting entries in the books of account toward issue of account payee cheques/bank drafts. The assessment made consequent to the set aside by the Tribunal directing verification of facts, was assailed as being time barred in view of s. 153(2A). In the view of the Hon'ble Court, the Tribunal had remanded the case to the AO on this restricted aspect of the assessment only. The entire assessment exercise was not required to be undertaken *de novo* and, hence, s. 153(2A) was not attracted in the facts of the case; no period of limitation having been prescribed u/s. 153(3)(ii). The Hon'ble Court undertook an extensive review of judicial precedents, concluding thus:

'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.’

(page 47)

The decision in *CIT v. Kamla Devi* [1996] 217 ITR 330 (All), relied upon by the Tribunal in *W.C. Shaw Pvt. Ltd.* (supra), was a case of set aside of assessment pursuant to sec. 263 order and, therefore, is not applicable; the provision of sec. 153(2A) being clearly applicable, and stands accordingly rightly distinguished by the Tribunal in *Krishna Devi (Lt.)* (supra). The decision in *Gulabchand Motilal v. CIT* [1988] 174 ITR 117 (MP), also relied upon in *W.C. Shaw Pvt. Ltd.* (supra), is again in-applicable, as pointed out by the Tribunal in *Krishna Devi (Lt.)* (supra), inasmuch as the same has been rendered by applying the provision of *Explanation 2* to section 153, which does not apply to s. 153(2A), but only to case falling u/s. 153(3)(ii). This is apparent from the fact that reference to orders u/ss. 250/254/260/262/263/264 in the said *Explanation 2* was substituted by reference to s.153(3)(ii) by Direct Taxes (Amendment) Act, 1964, w.e.f. 06.10.1964. The decision in *Kaliannan (M) v. CIT* [2003] 261 ITR 466 (Mad), the third decision relied upon in *W.C. Shaw Pvt. Ltd.* (supra), has, as its reading shows, no bearing in the matter, having been rendered on a different set of facts and a different issue, not concerning the point in issue.

In other words, we observe a complete unanimity of judicial opinion in the matter and, besides, the matter being covered by binding judicial precedents. Further still, the law would in our view apply with even more force in the facts and circumstances of the present case. The reason is simple. The non-adjudication by the Tribunal in the first instance, as afore-noted, was admittedly on the mistaken notion of the assessee’s COs obtaining no longer, i.e., in view of the dismissal of the Revenues’ appeals by it (vide order dated 30/11/2006). On being revisited per

the order u/s. 254(2) dated 07/3/2007, it was specifically contended by the assessee (refer written submissions dated 07/02/2019, on record) that it had nothing further to furnish or state as far as the merits of the quantum addition/s are concerned, and it sought resolution of the legal issues by the Tribunal. The same were pleaded for being decided by it inasmuch as the same had not been properly considered by the Revenue authorities. The Tribunal, however, restored the matter back to the AO. We state this, we may hasten to add, not in the least with a view to criticize the Tribunal's order dated 07/3/2007 – for which we have even otherwise no right or competence, but only with a view to emphasize that the 'set aside' in the instant case, even if it qualifies to be so called, is case of a remand with a limited scope, made by the Tribunal as a matter of abundant caution, in the interest of the assessee, and not a case of the assessment/s being cancelled or set aside for being made afresh or *de novo*, as indeed was the case in respect of the assessments pursuant to the first appellate order/s dated 25.02.2000.

7. We, therefore, i.e., in view of the foregoing reasons, have no hesitation in upholding the applicability of s. 153(3)(ii) in the facts and circumstances of the instant case and, thus, the legal validity of the impugned assessments. The assessee fails on this ground as well.

8. In the result, both the assessee's appeals are dismissed.

This Order is pronounced in Open Court on 21.8.2020

(as per separate, concurring order)
(Vikas Awasthy)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Mumbai, Dated 21/8/2020
KRK, PS

ITA No. 4924 & 4925/Mum/2014
Nandlal L. Kondnaney v. ITO, Mumbai

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. Concerned CIT
5. DR, ITAT, Mumbai
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asst. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Mumbai

Per Vikas Awasthy, JM:

I have carefully gone through the draft order authored by Id.Brother Sh. Sanjay Arora, Hon'ble Accountant Member. In principle, I concur with his findings on the issues raised in this appeal by the assessee. This case has been oscillating between the Assessing Officer and the Appellate Authorities for the last 20 years. To bring more clarity to the facts narrated by my Id.Brother in the order, I am writing this concurring order on the issue raised by the assessee in grounds of appeal No.1 & 2.

2. The assessee in revised grounds of appeal No.1 & 2 has assailed validity of assessment proceedings on the ground that the statutory notice under section 143(2) of the Income Tax Act 1961 (herein after referred to as 'the Act') was not issued within the period mandated under the Act. The issue in present appeal is a mixed question of facts and law. To appreciate the facts, it would be necessary to refer to the events in sequence.

First Round:

2.1. The original assessment for assessment year 1992-93 was framed on 31/03/1999. Aggrieved against the said assessment order, the assessee filed appeal before the Commissioner of Income Tax (Appeals) (in short 'the CIT(A)') challenging the validity of assessment on jurisdictional issue, as well as additions on merit. The assessee assailed the validity of assessment on the legal ground that the statutory notice under section 143(2) of the Act was belatedly issued on 21/07/1998 and hence, notice is invalid. The said date of notice is mentioned in the assessment order itself. The First Appellate authority sought comments of the Assessing Officer on the submissions made by the assessee. The Assessing Officer furnished his comments/report on 17/11/1999 giving details of the notice and placed on record office copy of the

notice issued u/s 142(3) dated 26/11/1997. A perusal of the order dated 25/02/2000 passed by the CIT(A) reveals that the assessee was confronted with the report of the Assessing Officer. The assessee could not rebut the same. The CIT(A) rejected the legal ground raised by the assessee challenging validity of assessment. However, on merit of the additions, the CIT(A) observed that there were shortcomings/defects in the assessment and hence, set-aside the assessment order and directed the Assessing Officer to frame de-novo assessment in the light of the directions given.

The assessee accepted the order of the CIT(A) and did not prefer further appeal challenging the finding of CIT(A) - upholding the validity of notice issued u/s 143(2) and the assessment order.

Second Round:

2.2. In compliance of the directions by CIT(A), the Assessing Officer made fresh assessment vide order dated 07/03/2002. Fresh notice under section 143(2) of the Act was issued before making assessment. The assessee filed appeal before the CIT(A) against the said assessment order challenging the additions on merit and also raising legal issues assailing validity of notices issued u/s 148 and 143(2) of the Act in the second proceedings. It is pertinent to mention here that in appeal before the CIT(A), the assessee did not challenge validity of notice issued u/s 143(2) of the Act in original assessment proceedings. The CIT(A) vide order dated 30/12/2002 dismissed legal grounds raised by the assessee. On merits of the addition, the CIT(A) granted part relief to the assessee.

The Department filed appeal before the Tribunal in ITA No.4060/Mum/2003 for the assessment year 1992-93, assailing the findings of First Appellate Authority granting part relief to the assessee. The assessee filed

Cross Objections in C.O No.230/Mum/2004 raising legal ground assailing validity of assessment. The assessee re-agitated validity of notice dated 21/7/1998 under section 143(2) of the Act allegedly issued beyond period of limitation in the original assessment proceedings. Apart from raising legal issue, the assessee impugned the additions sustained by the CIT(A).

2.3. The Tribunal vide order dated 30/11/2006 dismissed the appeal of Revenue, as well as Cross Objections of the assessee. The operating part of the Tribunal order read as under:-

“ 6. Since we uphold the order of the CIT(A) on the issues raised by the Revenue for the assessment years 1992-93 and 1993-94, the cross objections raised by the assessee will not survive.

7. In the result, the appeals of the revenue as also the cross objections of the assessee are dismissed.”

The assessee filed miscellaneous application i.e. M.A. No.18/Mum/2007 pointing that the assessee in cross objections had raised legal issue, as well as had impugned additions on merit, that remain to be adjudicated. The Tribunal in MA order dated 07/03/2007 modified para -6 and 7 of its order dated 30/11/2006. The extract of the order modified by the Tribunal is reproduced as under:-

“6. As regards the cross objections filed by the assessee for the assessment years 1992-93 and 1993-94, the same are restored to the file of the Assessing Officer with direction to decide the same in the light of the material that were already on record before the Assessing Officer as well the CIT(A) and such other evidence as the assessee may file in the course of hearing before him. The Assessing Officer shall give his findings based on the material produced.

7. In the result the appeals filed by the revenue are dismissed and the cross objections filed by the assessee are allowed to the extent, stated above.”

Thus, with the modification in order, the Tribunal restored the issues raised by the assessee in cross objections to the Assessing Officer.

Third Round:

2.4 The Assessing Officer while giving effect to the order of Tribunal passed the assessment order dated 05/3/2010 sustaining the additions to the extent confirmed by the CIT(A). However, the Assessing Officer failed to decide the legal issue raised by the assessee in Cross Objections. The assessee appealed against the assessment order dated 05/03/2010. In appeal before the CIT(A), the assessee did not raise any ground challenging validity of original assessment, sans valid statutory notice under section 143(2) of the Act. The assessee has filed present appeal against the order of CIT(A) dated 13/05/2014 inter-alia raising legal grounds challenging the validity of original assessment dated 31/03/1999 on the ground that the statutory notice under section 143(2) of the Act was belatedly issued.

3. Shri. Mayur A. Shah, appearing on behalf of the assessee vehemently argued that the assessment made in the absence of valid notice under section 143(2) of the Act is void. However, no material was placed on record by the assessee to rebut the findings of CIT(A) vide order dated 25/02/2000.

4. The Hon'ble Supreme Court of India in the case of CIT vs. Hotel Blue Moon, 321 ITR 362 (SC) has settled the law that valid statutory notice under section 143(2) of the Act is mandatory before passing assessment order. The CIT(A) in appellate proceedings arising from original assessment order, after considering the evidence furnished by the Assessing Officer i.e. notice dated 26/10/1997 issued under section 143(2), upheld the validity of assessment proceedings. In other words, the legal ground raised by the assessee was rejected by the CIT(A), as statutory notice u/s 143(2) of the Act was found to be issued within limitation. The assessee accepted the findings of CIT(A) and

did not file any further appeal. Hence, the issue attained finality after culmination of first appellate proceedings.

5. Though, the issue of validity of notice dated 21/7/1998 issued u/s 143(2) attained finality in the first round itself, the assessee re-agitated the issue in second round of litigation for the first time before the Tribunal in Cross Objections. The Tribunal restored the grounds raised by the assessee in Cross Objections to the Assessing Officer. The Assessing Officer failed to return any finding on the legal issue.

6. Now to avoid protracted litigation on the legal issue, instead of restoring the issue to Assessing Officer, we deem it appropriate to decide the same after considering submission made on behalf of assessee and the material available on record. It is pertinent to mention here that the assessee has failed to rebut the evidence furnished by the Department in this regard. In the back drop of extensive facts discussed above, I concur with the detailed findings of Id. Accountant Member dismissing ground No.1 & 2 of the appeal.

7. As regards other grounds raised in the appeal by the assessee, the facts have been elaborately explained and I am in agreement with the findings of Id. Accountant Member.

8. The grounds of appeal and the facts in ITA No. 4925/Mum/2014 for AY 1993-94 are pari materia, therefore, the above narrated facts would mutatis mutandis hold good for AY 1993-94 as well.

9. I place on record the facts supplementing and concurring the facts and findings recorded by Id. Accountant Member. Sd/-

Dated: August 21, 2020
Mumbai

(Vikas Awasthy)
Judicial member