* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.271/2011**

% **Date of Reserve: July 05, 2011**
Date of Decision: July 27,2011

ASHOK CHADDHA **… APPELLANT**

Through: Ms. Shashi M. Kapila Mr. Siddhartha Kapila and Mr. Pravesh Sharma, Advocates

Versus

INCOME TAX OFFICER **… RESPONDENT**

Through: Mr. Kiran Babu, Senior Standing Counsel, Advocate for Income Tax Department

CORAM:
HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE M.L.MEHTA

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

2. To be referred to Reporter or not? Yes

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

M.L.MEHTA, J.

1. This is an appeal under Section 260A of the Income Tax Act (hereinafter referred to as 'the Act') directed against the order dated 17.09.2010 of the Income Tax Appellate Tribunal (hereinafter, 'the Tribunal' for short) pertaining to assessment year 2004-05. The following issues arise for our consideration:

"*(a) Whether the issue of notice under Section 143(2) of the Income Tax Act is mandatory for finalization of assessment under Section 153A?*

(b) Whether the findings of the authorities below upholding addition of Rs.10 lac of cash seized from Mr. D.S. Rawat in the hands of the Assessee was perverse and required to be set aside? "

2. A search under section 132(1) of the Act was carried out in the residential premises of the assessee as well as his locker with Union Bank of India. In the course of search, cash amounting to Rs.22,500/- and jewellery of the value of Rs. 4,15,879/- was found at the residence and jewellery of the value of Rs. 2,77,703/- was found in the locker. A notice under section 153A was issued to the assessee, in response to which he filed a return declaring total income of Rs. 90,080/-. Two questionnaire dated 07.12.2007 and 27.12.2007 were issued to the assessee which were duly complied by him. After hearing the assessee, the total income was computed at Rs.23,31,760/-.

3. Aggrieved by the order, the assessee preferred appeal before the CIT (A). An additional ground taken before the CIT (A) was non issue of notice u/s 143 (2). It was contended that since the issuance of notice u/s 143 (2) is a mandatory requirement, the assessment made was bad in law and void ab-initio and required to be cancelled. The CIT (A) did not agree with the contention of the assessee and upheld the assessment as framed by the Assessing Officer.

4. Another ground taken before the CIT (A) was against the addition of Rs.10 lakh u/s 69A of the Act in the hands of assessee in respect of cash seized from Shri Dalbar Singh Rawat, an employee of the assessee, at Bhopal Railway Station. The assessee contended that the amount belonged to his nephew Shri Sudhir Chadha, who had sent the money for some property transaction and Rawat was acting only as a carrier. To support this contention, he filed a copy of recovery suit filed by Shri Sudhir Chadha. The CIT (A) did not accept the explanation of the assessee observing as under:

> *"The AO has drawn adverse inference against the Appellant on the ground that Rawat who was his employee was found to be in possession of cash and at the time of his first interrogation by the police, he said that the cash belonged to Shri Ashok Chadha. Although the Appellant has denied the ownership of this cash, and his nephew has admitted that the cash belonged to him, the matter is still pending adjudication before the Railway Magistrate Bhopal. On his part the Appellant has not been able to give acceptable explanation as to why his employee was found to be in possession of the cash. He has merely denied that it belonged to him and that it belonged to his nephew. There is no supporting evidence for this explanation. Since the matter is still pending adjudication before the Railway Magistrate, Bhopal, it is not possible to hold that Shri Sudhir Chadha is the real owner. It is no possible to hold that the cash belonged to Sri Sudhir Chadha and not to the Appellant. The addition of Rs.10,000/- made by the AO u/s. 69A of the I.T. Act is confirmed".*

5. Aggrieved from the order of CIT(A), the assessee preferred an appeal before the Tribunal. The Tribunal did not find any fault in the

findings recorded by CIT(A) regarding framing of assessment under Section 153A on the alleged ground of non-issuance of notice under Section 143(2) of the Act. With regard to the addition of Rs. 10 lakh also, the tribunal rejected the plea of assessee and observed as under:

> "...*It beco*mes *clear from this conduct of the Thana Prabhari that Shri Rawat held out before him that the money belongs to the assessee. Thereafter, the money was taken over by the Income Tax Department under section 132A. The assessee or Shri Sudhir Chadha did not do anything further in the matter till the passing of the assessment order on 31.12.2007. After this date, Shri Sudhir Chadha submitted a claim that the money belongs to him and it was sent through Shri Rawat for purchase of some land, the details of which have not been mentioned. Shri Sudhir Chadha has not been produced for examination before the Assessing Officer. No proposal to have been made for his production before the ld. CIT (Appeals). No such suggestion has been made even before us. Therefore, evidence on record suggests that the claim is an afterthought made by the nephew to accommodate the assessee. If the money really belonged to the nephew, action to claim the money would have been taken soon after its seizure by the police. Therefore, the evidence arising very much belatedly lacks the ring of truth in it. Any person of normal prudence, while seeing such an evidence, will come to a conclusion that it is only an accommodating claim. Therefore, we agree with the*

learned\ CIT(A) and hold that this amount has been rightly included in the total income of the assessee."

6. It is against this order of the Tribunal that the assessee has preferred appeal before us. Learned counsel for the assessee contends before us that to examine or verify any return filed under Section 153A, the issuance of notice under section 143 (2) of the Act is a mandatory requirement. He submits that it cannot be construed as an empty formality or a procedural defect which can be cured, but goes to the root of the matter and fatal to the validity of the assessment. He contends that the law laid down by the Hon'ble Supreme Court in ***Hotel Blue Moon v. DCIT***, 321 ITR 362 is equally applicable to the cases where return has been filed under section 153A of the Act. He also relies upon the judgments of ***R. Dalmia v. CIT***, 236 ITR 480 (SC), ***CIT v. Pawan Gupta***, 318 ITR 322, ***CIT v. Lunar Diamond Ltd.*** 281 ITR 1 (Del), ***CIT v. Vardhman Estates*** 287 ITR 368, ***CIT v. Bhan Textiles*** 287 ITR 370 and ***Raj Kumar Chawla v. ITO***, 277 ITR (AT) 225.

7. On the other hand, learned counsel for the revenue argues that the assessment being under Section 153A, there is no requirement of issue of notice under section 143(2) of the Act. He submits that in any case, there is no prescribed proforma for issuing the notice. The notice is usually issued in the proforma marked as "ITNS-33". It is a communication by the AO to the assessee giving him the opportunity

as required under section 143 (2). Therefore, once the assessee has been put to notice and given opportunity to attend the office, the requirement of section 143 (2) is complete whether notice is issued in proforma “ITNS-33” or in any other format. In the present case, the AO had communicated his intention to scrutinize the return by way of two letters and afforded opportunity to the assessee to produce necessary accounts, documents or evidence. Therefore, the requirement, if any, of section 143 (2) has been satisfied.

8. Admittedly, the assessee was issued a notice under section 153A of the Act, in response to which he had filed a return of income. Thereafter, two detailed questionnaires were issued to the assessee before the completion of assessment. Section 153 A of the Act provides procedure for assessment in case where a search is initiated or documents are requisitioned. The relevant portion of Section 153A is reproduced here under:

> *“Section 153A - Assessment in case of search or requisition*
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> *[1] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall -*
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> *(a**) **issue notice** to such person requiring him to furnish within such period, as may be specified in the notice, the*

return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed[3] form and verified in the prescribed manner and setting forth such other particulars as may be prescribed[3] and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 ;

....."

9. There is no specific provision in the Act requiring the assessment made under section 153A to be after issue of notice under section 143(2) of the Act. Learned counsel for the assessee places heavy reliance on the judgment of the Hon'ble Supreme Court in ***Hotel Blue Moon v. DCIT***, (Supra) wherein it was held that the where an assessment has to be completed under section 143(3) read with section 158BC, notice under section 143 (2) must be issued and omission to do so cannot be a procedural irregularity and the same is not curable. It is to be noted that the above said judgment was in the context of Section 158BC. Clause (b) of Section 158BC expressly provides that "the AO shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB 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. This is not the position under section 153A. The law laid down in ***Hotel Blue Moon***, is thus not applicable to the facts of the present case.

10. The decision of ***Lunar Diamond Ltd.*** (supra), ***Vardhman Estates*** (supra) and ***Bhan Testiles*** (supra) relied upon by learned counsel for the assessee related to the requirement of service of notice upon the assessee within a prescribed time and thus not applicable to the present case. The case of ***Pawan Gupta*** (supra) related to mandatory issue of notice under Section 143(2) of the Act in the case of regular assessment as also on block assessment. This being not a case of assessment based on search under Section 153(A), the same is not applicable to the present case. In the case of ***Raj Kumar Chawla*** (supra) relied upon by learned counsel for the assessee was that of the Tribunal, wherein, a view was taken that if a return filed under Section 148 of the Act is sought to be scrutinized, the compliance of provision contained in proviso under Section 143(2) of the Act is mandatory. The issue of requirement of notice under section 143(2) for an assessment under section 147 came up for consideration before this court recently in ***CIT v. Madhya Bharat Energy Corpn.***, ITA No. 950/08 decided on 11-07-2011. In that case also, this court has held that in the absence of any specific provision under Section 147 of the Act, the issuance of notice under Section 143 (2) cannot be held to be a mandatory requirement.

11. It is also to be noted that Section 153A provides for the procedure for assessment in case of search or requisition. Sub section (1) starts with non-obstante clause stating that it was 'notwithstanding' anything contained in sections 147, 148 and 149, etc. Clause(a)

thereof provides for issuance of notice to the person searched under Section 132 or where documents etc are requisitioned under Section 132(A), to furnish a return of income. This clause nowhere prescribes for issuance of notice under Section 143(2). Learned counsel for the assessee/ appellant sought to contend that the words, "so far as may be applicable" made it mandatory for issuance of notice under Section 143(2) since the return filed in response to notice under Section 153A was to be treated as one under Section 139. Learned counsel relies upon ***R. Dalmia* v *CIT*** (supra) wherein the question of issue of notice under Section 143(2) was examined with reference to Section 148 by the Supreme Court in the context of Section 147. The Apex Court held as under:

> *"As to the argument based upon Sections 144-A, 246 and 263, we do not doubt that assessments under Section 143 and assessments and reassessments under Section 147 are different, but in making assessment and re-assessments under Section 147 the procedure laid down in Sections subsequent to Section 139, including that laid down by Section 144B, has to be followed."*

12. *The case of* ***R. Dalmia* v *CIT*** (supra) primarily was with regard to applicability of section 144B and Section 153 (since omitted with effect from 01.04.1989) to the assessment made under section 147

and 148 and thus cannot be said to be the decision laying down the law regarding mandatory issue of notice under Section 143(2).

13. The words ”so far as may be” in clause (a) of sub section (1) of Section 153A could not be interpreted that the issue of notice under Section 143(2) was mandatory in case of assessment under Section 153A. The use of the words, “so far as may be” cannot be stretched to the extent of mandatory issue of notice under Section 143(2). As is noted, a specific notice was required to be issued under Clause (a) of sub-section (1) of Section 153A calling upon the persons searched or requisitioned to file return. That being so, no further notice under Section 143(2) could be contemplated for assessment under Section 153A.

14. No specific notice was required under section 143(2) of the Act when the notice in the present case as required under Section 153 (A) (1) (a) of the Act was already given. In addition, the two questionnaires issued to the assessee were sufficient so as to give notice to the assessee, asking him to attend the office of the AO in person or through a representative duly authorized in writing or produce or cause to be produced at the given time any documents, accounts, and any other evidence on which he may rely in support of the return filed by him.

15. Learned counsel for the assessee further assails the order of the Tribunal and contends that it has erroneously upheld the addition of

Rs.10,00,000/- found by the Railway police in the possession of Dilbar Singh Rawat despite evidences being filed to demonstrate that the assessee's nephew has claimed ownership of the monies and filed an application of claim before Railway Magistrate, Bhopal. He contends that the matter is sub–judice before the Railway Magistrate and in the absence of any findings by the Magistrate, the findings given by the Tribunal are un-warranted and unjustified.

16. In this regard, learned counsel for the revenue argues that no doubt an application dated 23.01.2008 has been filed by Shri Sudhir Chadha whereby he has claimed ownership of the seized money. However, it is noted that the amount was seized on 20.04.2003 as seen from the telegram sent by Thana Prabhari, GRP, Bhopal, whereas the claim of ownership was made on 23.01.2008, much after the date of seizure. No steps were taken by the assessee or Shri Sudhir Chadha for almost 5 years. It was only when the assessment order came to be passed on 31.12.2007, that Shri Sudhir Chadha submitted a claim that the money belongs to him. Also, there is no plausible explanation given by the assessee as to why his employee was found in possession of cash. No detail has been filed about the land sought to be purchased by him. In these circumstances, the Tribunal was right in holding that the claim made by Shri Sudhir Chadha is an afterthought to accommodate the assessee. Had the money really belonged to him, he would have made the claim soon after its seizure. Consequently, we

are in agreement with the concurrent finding of both CIT (A) and the Tribunal.

17. In view of our above discussion, we decide both the issues in favour of the Revenue and against the assessee. The appeal is hereby dismissed.

M.L.MEHTA
(JUDGE)

A.K.SIKRI
(JUDGE)

July 27, 2011
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