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TAXAP/386/1999 11/11 JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 386 of 1999

with

TAX APPEAL NO.387 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DY. C.I.T. - Appellant(s)

Versus

MAXIMA SYSTEMS LIMITED - Opponent(s)

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Appearance :
MRS MAUNA M BHATT for Appellant
MR SN SOPARKAR for Respondent

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 13/04/2010

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. Both these appeals arise out of common order dated 5th May 1999 made by the Income Tax Appellate Tribunal (the Tribunal) and the parties are also common. Hence, the same were taken up for hearing and are disposed of by this common order.
2. While admitting these appeals under section 260A of the Income Tax Act, 1961 (the Act) on 7th August 2000, following substantial question of law had been formulated in both the appeals :

   Was the unsigned notice under section 143(2) of the Act deemed to have been served on the assessee because it was posted within the prescribed period, though received by the assessee thereafter?

3. The assessment year is 1995-96. The respondent had filed return of income declaring nil income on 29th November 1995 which was processed under section 143(1)(a) of the Act on 27.11.1996 by making prima facie adjustments of Rs.40,79,353/- in relation to relief under section 80-HHC of the Act. Subsequently, notice under section 143(2) of the Act came to be issued on 29th November 1996. It appears that the said notice did not bear the signature of the Assessing Officer having jurisdiction

over the case of the assessee, although it bore his rubber stamp. The said notice was served upon the assessee on 2nd December 1996.

4. Pursuant to the said notice, the assessee appeared before the Assessing Officer and vide order dated 26.2.1998, assessment came to be framed under section 143(3) of the Act at a total income of Rs.1,64,81,302/-. It appears that the assessee moved an application under section 154 of the Act seeking deletion of income of Rs.1,56,77,325/-. The said application came to be decided vide order dated 23.06.1998 whereby the Assessing Officer reduced a sum of Rs.48,66,867/- and made an addition of Rs.10,57,708/- on account of bogus purchases.

5. The assessee carried both the orders made by way of separate appeals before Commissioner (Appeals). The validity of the assessment framed by the Assessing Officer under section 143(3) was challenged mainly on two counts viz., (1) the notice issued under section 143(2) having not been signed by the Assessing Officer, and (2) the notice being served on the assessee after the period prescribed under section 143(2) of the Act. The Commissioner (Appeals) partly allowed the appeals. However, both the aforesaid grounds raised by the assessee came to be rejected. The assessee carried the matter in second appeal before the Tribunal and succeeded.

6. Mrs. M .M. Bhatt, learned Senior Standing Counsel for the appellant-revenue submitted that in view of the decision in ***Madanlal Mathurdas v. Chunilal, Income Tax Officer***, [1962] , 44 ITR 325, since the notice had been issued within the prescribed period of limitation, the Tribunal ought to have held

that the service is valid. It is submitted that the Tribunal had failed to appreciate that pursuant to the notice under section 143(2) of the Act, the assessee had put in appearance and had not taken any objection as regards the notice not having been signed by the Assessing Officer; or that the notice had been served after the period of limitation prescribed under section 143(2) of the Act. It is submitted that in the circumstances, the respondent assessee is deemed to have waived his right to object to the delay in effecting service.

7. The learned counsel has also submitted that the Tribunal has held that the notice under section 142(2) was invalid as the same had not been signed by the Assessing Officer and that as such, the question as to whether the Tribunal was justified in holding that the unsigned notice was not a valid notice, does arise from the impugned order of the Tribunal.

8. Mrs. Swati Soparkar, learned advocate for the respondent-assessee has submitted that the issue involved in the present case is no longer *res integra* inasmuch as the same stands decided in favour of the assessee by a decision of this Court in *Deputy Commissioner of Income Tax v. Mahi Valley Hotels and Resorts*, [2006] 287 ITR 360 (Guj) as well as a decision of the Supreme Court in *Assistant Commissioner of Income Tax and another v. Hotel Blue Moon,* [2010] 321 ITR 362 (SC). It is submitted that in the circumstances, the question is required to be answered in favour of the assessee.

9. The facts are not in dispute. Admittedly, the return of income was filed by the assessee on 29th November 1995 and was processed

under section 143(1)(a) of the Act on 27th November 1996. The notice under section 143(2) was issued on 29th November 1996 and served upon the assessee on 2nd December 1996, that is, after a period of twelve months from the end of the month in which the return was furnished.

10. In the impugned order, the Tribunal has recorded a finding of fact that the notice under section 143(2) of the Act was served on the assessee on 2.12.1996. According to the Tribunal, as per the proviso to section 143(2), no notice under section 143(2) can be served on the assessee after the expiry of 12 months from the end of the month in which the return is furnished. That from the language used in the proviso, it is clear that the jurisdiction to frame the assessment under section 143(3) pursuant to notice under section 143(2) can be assumed only if the notice is served on the assessee within 12 months of the month in which the return was filed. The Tribunal held that it is clear that the notice under section 143(2) which is the foundation for assuming jurisdiction to make an assessment in the case of an assessee under section 143(3), had been assumed by the Assessing Officer on the basis of a notice which though issued on 29.11.1996 fixing the date of hearing on 19.12.1996, was in fact sent by Registered Post A.D. and was served on the assessee on 2.12.1996, which was not permissible in law. The Tribunal, accordingly, held that the assessment framed by the Assessing Officer under section 143(3) of the Act pursuant to the notice under section 143(2) which was served beyond the period of limitation prescribed by the proviso to section 143(2) of the Act was not a valid assessment and quashed the same.

11. In ***Deputy Commissioner of Income Tax v. Mahi Valley Hotels and Resorts*** (supra), this Court was considering as to whether an assessment framed under section 143(3) of the Act by issuing statutory notice beyond the prescribed time limit is bad in law, wherein it was held thus:

[4] The second contention regarding there being acquiescence and/or waiver on part of the assessee by participating in the proceedings also does not merit acceptance. It is an admitted position that the return of income was filed on 30/03/1997 for Assessment Year 1997-98 and the notice under section 143(2) of the Act came to be issued for the first time only on 20/08/1998. Therefore, the notice was admittedly beyond the period of 12 months which is the statutory period of limitation prescribed under the Proviso to sub-section (2) of Section 143 of the Act.

[5] The Scheme of the Act broadly permits the assessment in three formats; (i) acceptance of the returned income; (ii) acceptance of returned income subject to permissible adjustments u/s.143(1) of the Act by issuance of intimation; and (iii) scrutiny assessment under section 143(3) of the Act. This Scheme was originally introduced by Direct Tax Laws (Amendment) Act, 1989 with effect from 1.4.1989. The issuance of notice under section 143(2) of the Act is in the course of assessment in the third mode, namely, scrutiny assessment.

[6] Section 143(2) of the Act requires that where return has been made by an assessee, if the Assessing Officer considers it necessary or expedient to ensure that the assessee has not understated the income, or has not computed excessive loss, or has not under-paid tax in any manner, he shall serve on the assessee a notice requiring him either to attend his office, or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return. Therefore, the language of the main provision requires Assessing Officer to prima facie arrive at satisfaction of existence of any one of the three conditions. Proviso under the said sub-section states: provided that no notice under this sub-section shall be served on

the language in which the proviso is couched it is apparent that the limitation prescribed therein is mandatory, the format of provision being in negative terms. The position in law is well settled that if the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, such requirements are, in all cases absolute and neglect to attend to such requirement will invalidate the whole proceeding.

[7] When the provision was first introduced in the statute the Central Board of Direct Taxes issued departmental Circular No. 549 dated 31/10/1989 and the necessity of the proviso as well as the consequences flowing on failure to issue notice within the limitation have been explained in the following words :

5.13 A proviso to sub-section (2) provides that a notice under the sub-section can be served on the assessee only during the financial year in which the return is furnished or within six months from the end of the month in which the return is furnished, whichever is later. This means that the Department must serve the said notice on the assessee within this period, if a case is picked up for scrutiny. It follows that if an assessee, after furnishing the return of income does not receive a notice under section 143(2) from the Department within the aforesaid period, he can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return.

(Ref:CBDT Circular No.549, dated 31st October,1989, Chaturvedi & Pithisaria's Income Tax Law, Fifth Edition, Vol.3, Pg.4737 at Pg.4742).

[8] Originally the period of limitation was provided as during the financial year in which the return is furnished or within six months from the end of the month in which the return is furnished. By Finance (No.2) Act, 1991 the proviso was substituted by the present proviso extending the period of limitation to twelve months and vide departmental circular No.621 dated 19/12/1991, it was stated in paragraph No.49.1 of the circular that: The aforesaid period of limitation for the service of a notice under sub-section (2) of Section 143 of the Act does not allow sufficient

that the notice can be served within twelve months from the end of the month in which the return is furnished.(Ref:CBDT Circular No.621, dated 19th December,1991 Chaturvedi & Pithisaria's Income Tax Law, Fifth Edition, Vol.3, Pg.4747 at Pg.4748).

[9] It goes without saying that the departmental authorities are bound by the circulars issued by the Central Board of Direct Taxes. In the circumstances, it is not open to the revenue to contend otherwise. These Circulars are explanatory. They give contemporaneous exposition of legal position. Even otherwise, on a plain reading of the section and the proviso it is more than abundantly clear that the proviso prescribes a mandatory period of limitation in light of the scheme of assessment wherein majority of returns are required to be accepted without scrutiny and only certain returns are taken up for scrutiny.

12. **Thus, the controversy in issue in the present case stands concluded by the above cited decision and all the contentions raised by appellant-revenue stand answered against the revenue and in favour of the assessee. The said view also finds support in the decision of the Supreme Court in *Assistant Commissioner of Income Tax and another v. Hotel Blue Moon* (supra) wherein the Court held that if an assessment is to be completed under section 143(3) read with section 158BC, notice under section 143(2) should be issued within one year from the date of filing of the block return. Omission on the part of the assessing authority in issuing notice under section 143(2) cannot be a procedural irregularity and is not curable and, therefore, the requirement of notice under section 143(2) cannot be dispensed with.**

13. The decision of this Court in ***Madanlal Mathurdas v. Chunilal, Income Tax Officer*** (supra) does not in any manner support the case of the appellant-revenue inasmuch as the said decision was

rendered in a totally different set of facts, in relation to the provisions of section 34 of the said Act and the question as to whether notice was required to be served within the prescribed period did not arise in the said case.

14. The decision of the Apex Court in ***Commissioner of Income-tax, Shillong v. Jai Prakash***, (1996) 3 SCC 525 on which reliance has been placed by the learned advocate for the appellant-revenue, also does not carry the case of the revenue any further inasmuch in the facts of the said case pursuant to the death of the assessee, his eldest son Jai Prakash filed returns. Returns filed by Jai Prakash were scrutinized by the Income-tax officer and notices under sections 142(1) and 143(2) was served upon the said Jai Prakash. The deceased had, in all, ten legal heirs. During the course of assessment proceedings no objection was raised by Jai Prakash as regards non-service of notice to the other heirs till the assessment order was passed. It was only at the stage of appeal, that the said Jai Prakash contended that the assessment stood vitiated on the ground that the other heirs were not served with notice under section 143(2). Thus, the facts of the said case were totally different and as such the said decision has no relevance insofar as the present case is concerned.

15. Insofar as the issue regarding the notice under section 143(2) of the Act not being a valid notice, the same does not arise out of the question formulated by the Court at the time of admission of the appeal, nor does the same arise out of the question proposed by the revenue in the memo of appeal. In the circumstances, it is not necessary to go into the merits of the said issue.

16. **In view of the above discussion, it is abundantly clear that the view taken by the Tribunal is in consonance with the above referred decisions of the Supreme Court as well as this Court. In the circumstances, it cannot be stated that the impugned order of the Tribunal suffers from any legal infirmity so as to warrant interference. The question is accordingly answered in the negative i.e. in favour of the assessee and against the revenue.**

17. The appeals are, accordingly, dismissed with no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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