order u/s 143(3) vis-a-vis 153A

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH : INDORE
BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER AND
SHRI V.K. GUPTA, ACCOUNTANT MEMBER

PAN NO. : AAEFG9741L

I.T.(SS)A.No.133/Ind/2008 to 135/Ind/2008
A.Ys. : 2003-04, 2004-05 & 2005-06

ACIT 1(2), Bhopal	vs	M/s. G.M. Infrastructure, E-5, Arera Colony, Bhopal
Appellant		Respondent

PAN NO. : AAEFG9741L

C.O.Nos.91 to 93/Ind/2008
(Arising out of I.T(SS).A.Nos. 133 to 135/Ind/2008
A.Ys. : 2003-04, 2004-05 & 2005-06

M/s. G.M. Infrastructure, E-5, Arera Colony, Bhopal	vs	ACIT 1(2), Bhopal
Cross Objector		Respondent

PAN NO. : AEXPG-5741G.

I.T.(SS)A.No.136/Ind/2008 to 140/Ind/2008
A.Ys. : 2000-01 to 2004-05

ACIT 1(2), Bhopal	vs	Shri S.N. Goel, E-4/73, Arera Colony, Bhopal
Appellant		Respondent

C.O.Nos.84 to 88/Ind/2008
(Arising out of I.T(SS).A.Nos. 136 to 140/Ind/2008
A.Ys. : 2000-01 to 2004-05

M/s. G.M. Infrastructure, E-5, Arera Colony, Bhopal	vs	ACIT 1(2), Bhopal
Cross Objector		Respondent

PAN NO. : AAEFR1758B

I.T.(SS)A.No.163/Ind/2008 to 169/Ind/2008
A.Ys. : 2000-01 to 2004-05

ACIT 1(2), Bhopal	vs	M/s. Raksha Builders, E-5/16, Arera Colony, Bhopal
Appellant		Respondent

PAN NO. : AAEFR1758B

C.O.Nos.74 to 80/Ind/2008
(Arising out of I.T(SS).A.Nos. 163 to 169/Ind/2008
A.Ys. : 2000-01 to 2004-05

M/s. Raksha Builders, E-5/16,Arera Colony, Bhopal.	vs	ACIT 1(2), Bhopal
Cross Objector		Respondent

I.T.(SS)A.No.161 & 162/Ind/2008
A.Ys. : 2005-06 & 2006-07

ACIT 1(2), Bhopal		Shri Vipin Goel, E-4/73, Arera Colony, Bhopal.

I(2), Bhopal	vs	I
Appellant		Respondent

C.O.Nos.109 & 110//Ind/2008
(Arising out of I.T(SS).A.Nos. 161 & 162/Ind/2008
A.Ys. : 2005-06 & 2006-07

Shri Vipin Goel, E-4/73, Arera Colony, Bhopal	vs	ACIT 1(2) Bhopal.
Cross Objector		Respondent

Department by : Shri K.K.Singh, CIT DR
Assessee by : Shri S.S.Deshpande, C.A. and Shri Rajendra Shrama, C. A.

Date of Hearing	:	20/01/2010

ORDER

PER BENCH

This bunch of 34 appeals belong to the same assessee group and involve common issues. These appeals were heard together and these are being disposed of through this consolidated order for the sake of convenience.

2. First, we shall take up appeals in I.T.A.Nos. 133 to 135/Ind/2008 and cross objection Nos. 91 to 93/Ind/2008. In these cross objections, the common issue involved is as under :-

"On the facts and in the circumstances of the case, the Ld. CIT(A) was not correct in holding that assessment proceedings were validly initiated and further holding that the assessment order was not illegal and invalid."

3. The Learned counsel at the very beginning submitted that in all the cross objections, this identical issue was involved. Similarly, in all the Revenue's appeals, the issue of suppressed undisclosed sale consideration was involved. Hence, on the basis of all these appeals, all other appeals could be disposed of.

4. The facts, in brief, are that search u/s 132(1) and survey operation u/s 133A were carried out on 16.9.2005. Certain documents related to assessee firm were found during the course of said search, hence, notice u/s 153C read with section 153A was issued in this case on 22.3.2006, whereby the assessee was required to file the return within 30 days from the date of service of such notice. However, no return was filed within 30 days so stipulated. Subsequently, the assessee vide its letter Dated 21.8.2006 submitted that returns filed earlier u/s 139 for various years could be considered as filed in compliance to said notice. The A.O., however, rejected this plea of the assessee and required the assessee to file separate return. Subsequently, notice u/s 142(1) Dated 31st August,

2007, was issued requiring the assessee to produce the accounts or documents specified in Annexure to this letter before the A.O. on 13.9.2007. Notice u/s 143(2) was also issued alongwith such notice issued u/s 142(1). The assessee, however, filed return of income on 15.10.2007 declaring income of Rs. 1,15,840/-. The A.O., thereafter, noticing the fact of deliberate action of the assessee not to give an adequate opportunity to the A.O. completed the assessment proceedings on 31.12.2007, by making addition on account of undisclosed sale consideration and other minor additions. Aggrieved by this, the assessee carried the matter into appeal before the ld. CIT(A), wherein it was contended that the A.O. issued notice u/s 143(2) on 31.8.2007 prior to the filing of return, hence, it was illegal and invalid, because notice u/s 143(2) could be issued only when the assessee had filed the return and, accordingly, the order passed by the Assessing Officer was void ab initio. The Ld. CIT(A), however, held that though there was irregularity in the issue of notice u/s 143(2), however, merely for that reason the assessment proceedings could not be declared as void, particularly when such failure had not caused any prejudice to the assessee. Aggrieved by this, the assessee has filed this cross objection.

5. The Learned counsel for the assessee narrated the facts and contended that existence of a valid reason was a sine qua non for issuance

of a valid notice u/s 143(2) and in the present case, it was an admitted fact that the assessee filed return of income only on 15.10.2007, hence, notice issued u/s 143(2) on 31.8.2007 was non est in law. Thereafter, he contended that the issuance of notice u/s 143(2) after filing of return was also a mandatory condition for making a valid assessment u/s 143(3) or u/s 15 of the Act. hence, assessment order passed without issuing a valid notice u/s 143(2) was an illegal order, and, therefore, a nullity. He further contended that the Ld. CIT(A) also admitted that there was some irregularity in issuing notice u/s 143(2), however, he treated such irregularity as a curable one, which was not a correct position in law, hence, the order of the Ld. CIT(A) was not correct in this regard. He further contended that the provisions of section 292BB were brought on statute with effect from 1.4.2008 and were of prospective nature, hence, the same could not also be of any help to the cause of Revenue.

6. The ld. Departmental Representative, first of all, pointed out the approach of the assessee in adopting the dilly delaying tactics. Thereafter, he contended that notice issued u/s 143(2) on 31.8.2007, was valid notice and referred to page 91 of the paper book. The Bench, on reading the contents of said notice, required the Department to clarify on the aspect whether the assessee had filed any return of income prior to issue of such notice as in para 1 of the said notice, the A.O. had stated that there were

certain points in connection with the return of income submitted by you for the assessment year 2005-06, on which the A.O. required some further information, the ld. CIT DR admitted that it was an incorrect fact as the assessee had filed return of income only on 15.10.2007. This fact was also corroborated by the Learned counsel for the assessee. The ld. CIT(A), thereafter, contended that in Notice issued u/s 153A read with section 153C time of 30 days had been given to the assessee to file the return of income. However, the assessee did not file the return separately and instead submitted that returns filed u/s 139 originally could be treated as filed in response thereto, hence such letter of the assessee was to be deemed as a return filed u/s 153A read with section 153C, and, therefore, notice u/s 143(2) issued on 31.8.2007 was valid. He further contended that such notice was also served within 12 months, hence, for this reason also, there existed no infirmity. He further contended that there were two aspects u/s 142(1) of the Act i.e. the A.O. could require the assessee to file a return of income in case the assessee had not filed the return within the time allowed u/s 139(1) or before the end of relevant assessment year and secondly, the A.O. could require the assessee to produce said accounts or documents or information as the A.O. might require and, in this case, the notice u/s 142(1), had been issued on the second aspect and not for calling a return. Hence, the action of the A.O. in issuing notice u/s

143(2) on 31.8.2007 could not be considered as irregular or faulty. He further contended that in the original notice, the assessee was given 30 days period to file the return, which the assessee did not comply and the assessee intentionally chose to file the return as late as possible and, therefore, such action of the assessee was highly objectionable, because if such action of the assessee was upheld, then every assessee would file return of income on the last date for passing the assessment order and ,in that case, the A.O. would not get any opportunity to examine the claims of the assessee. He further contended that the assessee appeared and participated in the proceedings before and after filing of return, hence, for this reasons also, the assessment proceedings could not be declared null and void.

7. The Learned counsel, in the rejoinder, contended that return filed by the assessee was u/s 153C read with section 153A on 15.10.2007 and notice u/s 143(2) was issued before that date, hence, assessment proceedings were not valid. He further contended that Department had several options for enforcing the assessee to file the return before the time limitation for passing the assessment and also had powers within law to make a best judgment assessment u/s 144 on the basis of material available on record and, therefore, the action of the assessee in filing return in October, 2007, could not result into an adverse inference against

the assessee. He further contended that, in this case, the return had been filed nearly one and a half months before the time barring period and not on the last date for passing assessment order. Hence, the relevant the contentions of the ld. CIT DR had to be rejected.

8. The ld. CIT DR, at this stage, submitted that matter could be heard on merits as well. Accordingly, he took up the issue of deletion of addition of Rs. 32,73,930/- made by the Assessing Officer on account of undisclosed sale proceeds. The ld. CIT DR, thereafter narrated the facts and took us through the assessment order as well as seized documents to support the order of the A.O.

9. The Learned counsel, on the other hand, submitted that the seized documents were only of planning nature and the interpretation of the same made by the Assessing Officer was a case of suspicion or presumption only. He further referred to pages 64 to 87 of the paper book containing detailed submissions made before the Revenue authorities, wherein the various aspects of the issue involved had been clarified. On a query from the Bench, as to on what basis, the A.O. made addition only @ 25 % to arrive at quantum of undisclosed sale proceeds. The Learned counsel for the assessee submitted that it was purely an ad hoc decision without any material/basis. The ld. Departmental Representative, in the rejoinder, contended that Kachchi cash book was found wherein the

transactions of receipt of On money had been recorded by the partners of the firm, hence, the same should have been explained. However, the assessee gave evasive replies. The ld. CIT DR also drew our attention to page 60 to 63 of the paper book to show the contents of the seized papers and the basis adopted by the Assessing Officer for making such addition. The Ld.Authorized Representative with the permission contended that the entries pertained to different entities of the assessee group, which were duly explained in the respective cases, hence, it was not a case of evasive replies or non-furnishing of explanation. He further placed strong reliance on the order of the Ld. CIT(A).

10. We have considered the submissions made by both the sides, material on record and the orders of the authorities below.

11. Firstly, we would take up the legal issue.

12. It is an admitted fact that notice u/s 153A read with section 153C was issued on 22nd March, 2006, whereby the assessee was required to file the return of income within 30 days from the date of receipt of such notice. However, the assessee did not file a separate return but filed a letter on 21.8.2006 stating that the returns filed u/s 139 earlier should be treated as return filed in response to such notice. As per the assessment order, it is evident that the A.O. has not accepted this letter of the assessee, as he has himself observed that the assessee's such plea was

rejected and the assessee was made aware of the fact that return in response to notice issued u/s 153-A read with section 153C was to be filed separately. Accordingly, once the A.O. has taken a view in the matter, then such letter filed by the assessee has got no legal consequence, especially when the assessee had filed separate return, though subsequently, which has been acted upon by the Assessing Officer. Accordingly, we reject this contention of the Revenue that such letter should be treated as deemed return. Before deciding the core issue involved in this ground, we state that the Revenue Authorities have been given ample powers to compel the assessee to file the returns and in case the assessee does not comply with the notices issued by the Assessing Officer, in this regard, then penal provision exists, which can be invoked to penalize the assessee. The assessee can also be made liable to pay interest for the period of failure. Apart from that Assessing Authorities can make an assessment u/s 144 read with section 142(1). Hence, we do not find any merit in the contention of the Revenue that the assessee by not filing the return in accordance with the notice issued by the Assessing Officer can cause prejudice to the interests of the revenue. In this regard, it is further noteworthy that the A.O. issued notice u/s 153A read with section 153C on 22.3.2006 and, thereafter, till 31.8.2007 he has not bothered to take other measures as provided in the statute to get the return

of income filed. It is further noted that even in the notice issued u/s 142(1), he has required the assessee to produce the accounts or documents and not the return of income. Similarly, in the notice issued u/s 142(1) on 3.10.2007, he has called certain information only. In the background of these facts, this contention of the Revenue, in our opinion, lacks substance because if the assessee has not filed the return, the A.O. is more responsible for not taking a timely action and at this stage, the assessee cannot be solely held responsible for such a situation. Our this view further finds strong support from the decision of Hon'ble Delhi High Court in the case of CIT vs. Divine and Finance Limited & Others, (2008) 298 ITR 268. The Hon'ble Court observed as under :-

> *"No question of law, far less any substantial question of law arises for our consideration. We may, however, briefly reflect upon a submission made by learned counsel for the respondent to the effect that the assessee had, by its letter Dated March, 8, 1999, requested the Assessing Officer to examine the assessment records of the share applicants whose GR Nos. had been supplied. It is not controverted that action was not taken by the A.O., but it has justifiably been contended that this inaction was due to paucity of time left at that stage since the assessment had to be framed by March 31,1999. It has been pointed out that several adjournments*

had been granted by the Assessing Officer on the asking of the assessee. The timing of the assessee's said letter is most suspect. Generally speaking, it is incumbent on the A.O. to manage his schedule, while granting adjournments, in such a manner that he does not run out of time for discharging the duties cast on him by the statute. In the present case, the details had been furnished to the A.O. much before march, 1999, but he failed to react to the shifting of the burden to investigate into the creditworthiness of the share applicants. Therefore, the appeal is dismissed."

13. Now, coming to the core issue, we find that provisions of section 143(1) and 143(2) come into play, only when a return has been furnished u/s 139 or in response to notice issued u/s 142(1) of the Act. Hence, we find sufficient force in the contention of the assessee that notice issued prior to filing of return, is non-est in law. In this regard, we are further of the view that provisions of section 143(2), not only a case of procedural provision but these also give jurisdiction to the A.O. to compute the total income in a particular manner and, thus, not an empty formality. Therefore, failure to comply with such provisions cannot be taken lightly and the action of the A.O. cannot be justified, merely because no prejudice has been caused to the assessee as held by the Ld. CIT(A). We also find that provisions of section 292BB, are of prospective nature, particularly having regard to the proviso thereto,

hence, do not come to the rescue of the Revenue. On the contrary, in our view, the very enactment of this provision makes it clear that legislature does not treat such nature and scope of section 143 merely as a formality and that is why the assessee has been given an opportunity even u/s 292BB to raise such plea before the completion of assessment.

14. It is also noteworthy that prior to such new procedure of assessment in search cases, the undisclosed income found as a consequence of search had to be assessed in accordance with the provisions of sections 158BC/158BD under Chapter XIVB of the Act. The provisions of section 153A serve the same purpose. Rather, if we take note of Explanation 1 to Section 153A, then it becomes apparent that provisions of section 143(2) have to be applied in its fullest scope in respect of assessment or reassessment to be made u/s 153A. Having stated so, we find that in the case of block assessment proceedings under Chapter XIV, the provisions thereof, being similar, in this regard, there was a controversy regarding no requirement of service of notice u/s 143(2) or non-applicability of time limit of service of notice u/s 143(2). However, recently, the Hon'ble Delhi High Court in the case of CIT vs. Pawan Gupta as reported in 318 ITR 322, after considering the decision of the Hon'ble Supreme Court in the case of R.Dalmia as reported in 236 ITR 480 and the decision of the Hon'ble Gauhati High Court in the case

of Vandana Gogoi, as reported in 289 ITR 28 has held that service of notice u/s 143(2) was mandatory even in case of block assessment and, non-service of such notice would make the assessment order void. In that case also, pleas of participation by the assessee in the assessment proceedings and no prejudice to the interests of assessee were taken like the present case, however, the same did not find favour with the Hon'ble High Court. The provisions of section 143(2) are undisputedly applicable to the provisions of section 153A, hence, ratio of this decision is equally applicable here. Accordingly, in our opinion, the notice u/s 143(2) must be served in the manner as specified in law, which has not been done in the present case, as it is evident that no notice under this section has been served on the assessee after the filing of return on 15.10.2007. Consequently, we quash the assessment proceedings for all these years as null and void.

15. Before parting, we may also add that compliance of the provisions of section 143(2), having regard to nature and scope of these provisions and language employed therein, can happen only after the receipt of return or documents as specified u/s 142(1)(ii), hence, issue of notice u/s 143(2) prior to such stage does not serve any purpose, hence, redundant. We may also add that total non-compliance or part compliance of notice issued u/s 143(2) may also result into framing of assessment u/s

144, hence, for this reason also the compliance of provisions of section 143(2), in the manner as prescribed by law, is necessary.

16. Now, we shall dispose of ground no.1 of Revenue's appeal in I.T.A.No. 133/Ind/2008, in respect of which facts and contentions of both the parties have already been narrated herein before.

17. We have considered the submissions made by both the sides, material on record and the orders of the authorities below.

18. It is noted that in the course of search, certain documents were found as regard to the construction of certain commercial/residential projects. The A.O. from the notings made therein inferred that the assessee was indulged in receiving on money, which was not disclosed in the books of account. However, from the perusal of such seized documents and the assessment order, it is evident that the A.O. has reached to this conclusion on his own without making necessary enquiries in regard to actual consideration of similar properties of other builders nor he has made any inquiry from the buyers of such properties. It is further noted that the A.O. has not given total effect to the seized documents by adding only 25 % of the quantum of undisclosed sales consideration arrived by him and no basis for adoption of such rate is evident in the assessment order. We further find that the Ld. CIT(A) has also examined this issue in detail and we are in agreement with such

findings of the Ld. CIT(A). For the sake of ready reference, we reproduce the same as under :-

> "I have considered the submissions of the AR, the assessment order and the copy of seized paper and other documents furnished before the A.O. during assessment proceedings. It is found that the assessee had submitted before the A.O. that the construction appearing in such paper was not made. Copy of approved map was produced before the A.O. and the A.O. was also informed that he could physically verify the same. The A.O. has disregarded the submissions of the assessee without mentioning any reasons for not accepting the said explanation. It is obvious from the approved map that the shops mentioned in the seized paper are different than the shops mentioned in the approved map. Thus, it cannot be held that the said loose paper could have formed basis of calculating the sale of the assessee. It is further observed that the paper contains mention of " @5 " etc. in front of the areas mentioned in the loose paper which has been inferred by the Assessing Officer as mention of sale

rate @ Rs. 5,000/- per sq.ft. However, there is no indication in the paper that the said figure relates to possible sale rate or that the figures are in code. The same could have been related to possible rent or to some other activity, it is further observed that the A.O. has not brought on record any specific case where the assessee has been found to make any unrecorded sales. The A.O. was not justified in treating the figures mentioned as sale rates in code without bringing any collaborative evidence or at least comparable case on record specifically when the properties are claimed to have been sold at rates equal to or more than the rates fixed by the registering authorities.

For the reasons mentioned above the additions made as unrecorded sales in all the years under appeal are hereby deleted and thus these grounds of the appellant are allowed."

19. Both the parties have stated that the major issue involved in all these appeals is regarding undisclosed sales consideration and the facts are identical, hence, this issue in all the appeals filed by the assessee is

decided in favour of the assessee. Consequently, all the grounds of the Revenue in this regard are dismissed.

20. Though some minor issues are also involved in various appeals in respect of which both the parties have reiterated their respective stand, but in view of our decision in respect of assessee's cross objections, we do not consider it necessary to deal with such minor issues.

21. In the result, all the cross objections filed by the assessees are allowed and all the Revenue's appeals are dismissed.

This order has been pronounced in the open court on 27th January, 2010.

Sd/-	Sd/-
(JOGINDER SINGH)	(V. K. GUPTA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated : 27th January, 2010.

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