
(2010) 07 DEL CK 0288

In the Delhi High Court

Case No : ITA 884 of 2009

Rajan Gupta

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 05-07-2010

Acts Referred:

Income Tax Act, 1961 — Section 129, 132, 132A, 139, 142

Citation : (2010) 233 CTR 230 : (2010) 194 TAXMAN 287

Hon'ble Judges : V.K. Jain, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : M.P. Rastogi, R. Kumar and K.N. Ahuja, for the Appellant; Prem Lata Bansal, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—This is an appeal u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as "the said Act") and it arises out of the order dated 30.01.2009 passed by the Income Tax Appellate Tribunal in ITA 385/Del/05 in respect of the block period 01.04.1990 to 18.01.2001. The following substantial questions of law arise for consideration in this appeal:

1. Whether, in the facts and circumstances of the case, the notice u/s 143(2) of the Income Tax Act, 1961 was issued beyond the prescribed period of limitation and as a consequence thereof the block assessment order under 158 BC(c) of the said Act was bad in law ?

2. Whether, if the notice u/s 143(2) of the Income Tax Act, 1961 is held to have been issued within time, the block assessment order dated 30.07.2004 was barred by limitation?

2. To appreciate the pleas taken by the parties, it would be necessary to set down the factual position. A search was conducted on 18.01.2001 and it was said to have been completed in March 2001. The notice u/s 158BC of the said Act was served on the assessee on 03.12.2001 and the assessee filed the return on

31.12.2002. According to the learned Counsel for the assessee/appellant, the notice u/s 143(2) of the said Act read with the provisions of Section 158BC(b) could have been issued by 31.12.2003, i.e., within the period of twelve months from the end of the month in which the return was filed. The return having been filed on 31.12.2002, according to the learned Counsel for the appellant, the notice u/s 143(2) ought to have been issued by 31.12.2003. The learned Counsel further submitted that the notice u/s 143(2) was, in fact, issued much later, i.e., on 05.07.2004. The block assessment order u/s 158BC(c) was also passed later, on 30.07.2004, when, in fact, according to the provisions of Section 158BE, the order should have been passed by 31.01.2003.

3. The learned Counsel for the appellant/assessee referred to a decision of this Court in the case of Commissioner of Income Tax Vs. Pawan Gupta, and submitted that the issuance of a notice u/s 143(2) was mandatory even in respect of the proceedings u/s 158BC. He also referred to the recent decision of the Supreme Court in the case of Assistant Commissioner of Income Tax and Another Vs. Hotel Blue Moon, which held that the notice u/s 143(2) of the said Act was a mandatory requirement in case the Assessing Officer disagreed with the return filed by the assessee pursuant to the notice u/s 158BC. The Supreme Court also held that it was not merely a procedural requirement, but it was mandatory that the notice u/s 143(2) ought to be issued within the period of limitation. In case it is not so done, then the assessment following such notice would be bad in law. The learned Counsel for the appellant/assessee, therefore, contended that since the notice u/s 143(2) had been issued beyond the time prescribed under the said Act, the block assessment order dated 30.07.2004 was bad in law. He also submitted that, in any event, the block assessment order was beyond time in itself inasmuch as the last date for framing the assessment u/s 158BC(c) was 31.03.2003 in view of the provisions of Section 158BE.

4. Ms Bansal, appearing on behalf of the revenue, contended that an important circumstance has been left out by the learned Counsel for the appellant/assessee and that is the filing of an application by the assessee before the Settlement Commission u/s 245C of the said Act. Such an application had been filed by the appellant/assessee on 10.01.2003 and the same had been rejected by the Settlement Commission by passing an order u/s 245D(1) of the said Act on 25.05.2004 which was received by the Commissioner of Income Tax on 03.06.2004. Consequently, she placed reliance on Clause (iv) of Explanation 1 to Section 158BE to submit that the period between 10.01.2003 and 03.06.2004 has to be excluded in computing the period of limitation for completion of the assessment proceedings. She submitted that if this exclusion is granted, then the revenue would, in the minimum, have at least 60 days time to complete the same after the order u/s 245D(1) is received by the Commissioner. The assessment proceedings were completed on 30.07.2004 and, therefore, in view of the said provisions with regard to exclusion of time, the block assessment had been completed within time. She also submitted with reference to the decision of the Supreme Court in the case of Auto and Metal Engineers and Others Vs. Union

of India (UOI) and Others, that the notice u/s 143(2) was an integral part of the assessment itself and once there is exclusion of time for making an assessment order and completing the assessment, the exclusion of time would also be applicable to the issuance of a notice u/s 143(2).

5. That learned Counsel for the appellant/assessee, in rejoinder, drew our attention to the Supreme Court decision in the case of Commissioner of Income Tax Vs. Hindustan Bulk Carriers, wherein the Supreme Court held that the mere filing of an application by the assessee before the Settlement Commission would have no adverse effect on the proceedings of assessment or recovery pending or initiated against the assessee under the regular procedure for assessment and recovery of dues under the said Act. Relying upon these observations of the Supreme Court, the learned Counsel for the appellant/assessee submitted that the filing of the settlement application on 10.01.2003 did not mean that there was any bar imposed on the Assessing Officer to proceed with the assessment proceedings. It was not a case akin to the grant of a stay by a court of law which was the case before the Supreme Court in Auto & Metal Engineers (supra). He further submitted that the decision of the Supreme Court in Auto & Metal Engineers (supra) was distinguishable also for the reason that it related to the assessment years 1967-68, 1968-69 and 1969-70 when the proviso to Section 143(2) was not in the statute book. It is only in the proviso to the said Sub-section (2) that the period of limitation for issuance of notice u/s 143(2) has been prescribed. The amendment to Section 143(2) would make a world of a difference, according to the learned Counsel for the appellant/assessee, inasmuch as the specific time period for the stage of Section 143(2) does not get subsumed in the time period for the completion of the assessment proceedings. The learned Counsel for the appellant/assessee also placed reliance on a decision of this Court in the case of Deen Dayal Didwania Vs. Union of India and others, to submit that the filing of an application before the Settlement Commission does not amount to an automatic stay of the assessment proceedings during the period when the Settlement Commission is deciding whether or not to proceed with the settlement application. He also placed reliance on a decision of the Supreme Court in the case of Commissioner of Income Tax Vs. Damani Brothers, wherein a similar view has been expressed that the Income Tax authorities are free to proceed in the prescribed manner till the Settlement Commission decides to proceed with the settlement application.

6. Relying on the aforesaid decision, the learned Counsel appearing on behalf of the appellant/assessee, submitted that, first of all, the decision in Auto & Metal Engineers (supra), which was cited by the learned Counsel for the revenue is distinguishable and would not be applicable to the facts and circumstances of the present case. Secondly, he submitted that since there was no bar to the Assessing Officer proceeding with the assessment proceedings and which meant that he could have issued the notice u/s 143(2), the fact that he did not issue the notice u/s 143(2) within the time prescribed would be fatal to the assessment proceedings. He also submitted that the exclusion of time, which is

referred to in Section 158BE [Explanation 1, Clause (iv)] applies only to the passing of an order u/s 158BC and does not extend to the issuance of a notice u/s 143(2).

7. Let us examine the statutory provisions. Section 143(2), as applicable in the present case, to the extent relevant, is as under:

143. Assessment.-(1) xxxx xxxx xxxx xxxx

(2) Where a return has been furnished u/s 139, or in response to a notice under Sub-section (1) of Section 142, the Assessing Officer shall,-

(i) xxxx xxxx xxxx xxxx (ii) notwithstanding anything contained in Clause (i), if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not underpaid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return:

Provided that no notice under Clause (ii) shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished.

(emphasis supplied)

8. Section 153 of the said Act prescribes the time limit for completion of assessments and re-assessments. Explanation 1 at the end of the said provision is relevant for our purposes and, to the extent relevant for this case, reads as under:

153. Time limit for completion of assessments and reassessments-

xxxx xxxx xxxx xxxx xxxx Explanation 1.-In computing the period of limitation for the purposes of this section-

(i) the time taken in reopening the whole or any part of the proceeding or in giving an opportunity to the assessee to be re-heard under the proviso to Section 129, or

(ii) the period during which the assessment proceeding is stayed by an order or injunction of any court, or

xxxxxx xxxxxx xxxxxx xxxxxx (v) in a case where an application made before the Income Tax Settlement Commission u/s 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing from the date on which such application is made and ending with the date on which the order under Sub-section (1) of Section 245D is received by the Commissioner under Sub-section (2) of that section,

xxxxxx xxxxxx xxxxxx xxxxxx

shall be excluded:

Provided that where immediately after the exclusion of the aforesaid time or period, the period of limitation referred to in Sub-sections (1), [(1A), (1B),] [(2), (2A) and (4)] available to the Assessing Officer for making an order of assessment, reassessment or recomputation, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly.

The above provisions fall in Chapter XIV which deals with the procedure for assessment in the regular course. Chapter XIV-B provides the special procedure for assessment in search cases. Section 158-BC, which falls within this Chapter, lays down the procedure for block assessment. Section 158BC(b) requires that the Assessing Officer 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;

9. Section 158BC(c) stipulates as under:

158BC. Procedure for block assessment.-

xxxxx xxxxx xxxxx xxxxx (c) the Assessing Officer, on determination of the undisclosed income of the block period in accordance with this Chapter, shall pass an order of assessment and determine the tax payable by him on the basis of such assessment;

xxxxx xxxxx xxxxx xxxxx

The time limit for completion of block assessment is prescribed in Section 158BE. Sub-section (1) of the said Section 158BE and Explanation 1 thereto is relevant for our purposes. They are set out hereinbelow:

158BE. Time limit for completion of block assessment." (1) The order u/s 158BC shall be passed-

(a) within one year from the end of the month in which the last of the authorisations for search u/s 132 or for requisition u/s 132A, as the case may be, was executed in cases where a search is initiated or books of account or other documents or any assets are requisitioned after the 30th day of June, 1995, but before the 1st day of January, 1997;

(b) within two years from the end of the month in which the last of the authorisations for search u/s 132 or for requisition u/s 132A, as the case may be, was executed in cases where a search is initiated or books of account or other documents or any assets are requisitioned on or after the 1st day of January, 1997.

xxxxx xxxxx xxxxx xxxxx

Explanation 1. - In computing the period of limitation for the purposes of this section,-

(i) the period during which the assessment proceeding is stayed by an order or injunction of any court; or

(ii) the period commencing from the day on which the Assessing Officer directs the assessee to get his accounts audited under Sub-section (2A) of Section 142 and ending on the day on which the assessee is required to furnish a report of such audit under that Sub-section; or

(iii) the time taken in reopening the whole or any part of the proceeding or giving an opportunity to the assessee to be re-heard under the proviso to Section 129; or

(iv) in a case where an application made before the Settlement Commission u/s 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing on the date on which such application is made and ending with the date on which the order under Sub-section (1) of Section 245D is received by the Commissioner under Sub-section (2) of that section,

shall be excluded:

xxxxxx xxxxxx xxxxxx xxxxxx

10. Now we come to the provisions of Chapter XIX-A, which deals with the settlement of cases and comprises of Sections 245A to 245L. Section 245A, as applicable to the period of this appeal, gives the definitions of various words and expressions used in Chapter XIX-A. Section 245A(b) defines "case" as under:

245A. Definitions-In this Chapter, unless the context otherwise requires,-

(a) xxxxxx xxxxxx xxxxxx xxxxxx

(b) "case" means any proceeding under this Act for the assessment or reassessment of any person in respect of any year or years, or by way of appeal or revision in connection with such assessment or reassessment, which may be pending before an Income Tax authority on the date on which an application under Sub-section (1) of Section 245C is made.

xxxxxx xxxxxx xxxxxx xxxxxx

11. Section 245C provides that an assessee may, at any stage of a "case" relating to him, make an application in such form and in such manner as may be prescribed, and containing a full and true disclosure of his income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived, the additional amount of Income Tax payable on such income and such other particulars, as may be prescribed, to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner provided in the said Act. The procedure to be followed on receipt of an application u/s 245C is given in Section 245D, which, to the extent relevant and

as applicable in the present case, is set out hereinbelow:

245C. Procedure on receipt of an application u/s 245C.- (1) On receipt of an application u/s 245C, the Settlement Commission shall call for a report from the Commissioner and on the basis of the materials contained in such report and having regard to the nature and circumstances of the case or the complexity of the investigation involved therein, the Settlement Commission, shall, where it is possible, by order, reject the application or allow the application to be proceeded with within a period of one year from the end of the month in which such application was made u/s 245C:

Provided that an application shall not be rejected under this Sub-section unless an opportunity has been given to the applicant of being heard:

Provided further that the Commissioner shall furnish the report within a period of forty-five days of the receipt of communication from the Settlement Commission in case of all applications made u/s 245C on or after the 1st day of July, 1995 and if the Commissioner fails to furnish the report within the said period, the Settlement Commission may make the order without such report.

xxxxx xxxxx xxxxx xxxxx (2) A copy of every order under Sub-section (1) shall be sent to the applicant and to the Commissioner.

12. Section 245F makes provision for the powers and procedure of the Settlement Commission. Sub-sections (1) and (2) are relevant and they read as under:

245F. Powers and procedure of Settlement Commission.-(1) In addition to the powers conferred on the Settlement Commission under this Chapter, it shall have all the powers which are vested in an Income Tax authority under this Act.

(2) Where an application made u/s 245C has been allowed to be proceeded with u/s 245D, the Settlement Commission shall, until an order is passed under Sub-section (4) of Section 245D, have, subject to the provisions of Sub-section (3) of that section, exclusive jurisdiction to exercise the powers and perform the functions of an Income Tax authority under this Act in relation to the case:

xxxxx xxxxx xxxxx xxxxx

13. We may also point out that in case of applications made u/s 245C on or after 01.06.2007, two provisos have been made applicable by virtue of the Finance Act, 2007 with effect from 01.06.2007. The two provisos to Sub-section (2) read as under:

Provided that where an application has been made u/s 245C on or after the 1st day of June, 2007, the Settlement Commission shall have such exclusive jurisdiction from the date on which the application was made:

Provided further that where-

(i) an application made on or after the 1st day of June, 2007, is rejected under

Sub-section (1) of Section 245D; or

(ii) an application is not allowed to be proceeded with under Sub-section (2A) of Section 245D, or, as the case may be, is declared invalid under Sub-section (2C) of that section; or

(iii) an application is not allowed to be further proceeded with under Sub-section (2D) of Section 245D,

the Settlement Commission, in respect of such application shall have such exclusive jurisdiction upto the date on which the application is rejected, or, not allowed to be proceeded with, or, declared invalid, or, not allowed to be further proceeded with, as the case may be.

14. An analysis of the above provisions indicates that in the course of regular assessments under Chapter XIV of the said Act, if the Assessing Officer considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed the assessee's loss or has not underpaid the tax in any manner, serve on the assessee a notice u/s 143(2) of the said Act requiring the assessee, on a date to be specified therein, either to attend his office or to produce or cause to be produced any evidence on which the assessee may rely in support of the return. Importantly, the proviso to Section 143(2) stipulates that no such notice could be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished. Thus, a specific time period has been prescribed under the proviso to Section 143(2) for serving a notice under the said provision on the assessee. If such a notice is not served within the period of limitation prescribed, any assessment order passed in pursuance thereof, would be bad in law and would be liable to be set aside. This is a well-settled position in law. Apart from there being a specific limitation period prescribed for the issuance of a notice u/s 143(2), there is also a time limit for completion of assessments in general. And, that has been prescribed, as aforesaid, by Section 153 of the said Act. We have already referred to Explanation 1 to Section 153 which deals with certain periods of time, which are to be excluded while computing the period of limitation, inter alia, for making of an assessment order u/s 143. Clause (ii) of Explanation 1 to Section 153 stipulates that the period during which the "assessment proceeding" is stayed by an order or injunction of any court, shall be excluded in computing the period of limitation for the making of, inter alia, an assessment order u/s 143. Similarly, Clause (v) of Explanation 1 to Section 153 provides that the period commencing from the date on which an application is made u/s 245C and ending with the date on which an order under Sub-section (1) of Section 245D is received by the Commissioner under Sub-section (2) of that section, shall be excluded in computing the period of limitation for, inter alia, making an order of assessment u/s 143 of the said Act. This clause, will obviously apply in a case where an application is made before the Income Tax Settlement Commission u/s 245C and in the event such an application is rejected by the said Settlement Commission or is not allowed to be proceeded with by it. It is pertinent to note herein that

the exclusion of time consumed before the Settlement Commission is in respect of computing the period of limitation, for making an order of assessment u/s 143. It does not pertain to exclusion of time for the purposes of serving a notice on the assessee u/s 143(2) of the said Act. It is also important to keep in mind the expression "assessment proceeding" in Clause (2) to Explanation 1 of Section 153. We shall deal with this aspect while discussing the case law cited by the parties.

15. It is also clear from a plain reading of the provisions pertaining to the procedure for assessment in search cases to the extent set out above that the provisions of Section 143(2) are to apply to block assessment proceedings u/s 158BC by virtue of Section 158BC(b). At this juncture itself, it would be necessary to point out that this Court in CIT v. Pawan Gupta (supra) observed as under:

37. ...We are of the view that Section 143(2) is a mandatory provision whether we look at it from the standpoint of a regular assessment or from the standpoint of an assessment under chapter XIV B....

40. Thus, we are of the clear view that where the assessing officer is not inclined to accept the return of undisclosed assessment filed by the assessee issuance of a notice u/s 143(2) is a prerequisite for framing the block assessment order under chapter XIV B of the Income Tax Act, 1961. We are also of the view that if an assessment order is passed in such a situation without complying with Section 143(2), it would be invalid and not be merely irregular.

16. This view has been confirmed by the Supreme Court in the case of Hotel Blue Moon (supra). The question before the Supreme Court was whether service of notice on the assessee u/s 143(2) within the prescribed period of time was a pre-requisite for framing the block assessment under Chapter XIV-B of the Income Tax Act, 1961? The Supreme Court observed that Section 158BC(b) is a procedural provision for making a regular assessment applicable to block assessment as well. The court further observed that Section 143(2) would be applicable only where it becomes necessary to check the return as to whether it conforms to the undisclosed income inferred by the authorities. In case the Assessing Officer agrees with the block return, there is no reason why the authorities should issue a notice u/s 143(2). In this context, the Supreme Court observed as under:

14. ...However, if an assessment is to be completed u/s 143(3) read with Section 158BC, notice u/s 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice u/s 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice u/s 143(2) cannot be dispensed with.

xxxxx xxxxx xxxxx xxxxx ...A reading of the provision would clearly indicate, in our opinion, if the Assessing Officer, if for any reason, repudiates the return filed by the assessee in response to notice u/s 158BC(a), the Assessing Officer must

necessarily issue notice u/s 143(2) of the Act within the time prescribed in the proviso to Section 143(2) of the Act....

17. Thus, it is clear that not only is a notice u/s 143(2) mandatory in a case where the Assessing Officer does not agree with the block return filed by the assessee, it is also essential that such a notice must be served upon the assessee within the time prescribed in the proviso to Section 143(2) of the said Act. This requirement of serving the notice within the prescribed time is independent of the requirement of completion of the assessment proceedings within the time prescribed u/s 153 in the case of regular assessments under Chapter XIV and u/s 158BE in the case of the block assessment under Chapter XIV-B.

18. We may now examine the other three decisions cited by the learned Counsel for the petitioner, namely, the Supreme Court decisions in the cases of Hindustan Bulk Carriers (supra) and Damani Brothers (supra) as also the decision of this Court in the case of Deen Dayal Didwania (supra). Since the decision of this Court came prior in time, we shall examine it first. In Deen Dayal Didwania (supra), a Division Bench of this Court was confronted with two prayers made in a writ petition. The first prayer was to direct the Settlement Commission to proceed expeditiously with the application moved by the petitioners u/s 245C of the said Act. The second prayer was for a direction from this Court to the Income Tax Officer, not to proceed with the case. We are concerned more with the manner in which this Court dealt with the second prayer which essentially related to the question as to whether the Income Tax authorities could proceed with the assessment proceedings while the Settlement Commission was contemplating whether to proceed with an application u/s 245C or to reject the same. Since the case before the Division Bench of this Court in Deen Dayal Didwania (supra) related to regular assessment proceedings, the provisions of Explanation 1 to Section 153 were considered. Clause (v) of the said Explanation, which dealt with the cases where an application before the Settlement Commission is made, was specifically referred to. The Division Bench observed as under:

2. ...We have examined the provisions of the Act and do not find that there is any bar on the Income Tax Officer from proceeding with the assessment of any pending case....

The court further observed:

...We find that the circumstances would not justify a stay by us. Furthermore, the Act does not contemplate a stay of the assessment proceedings during the period when the Settlement Commission is deciding whether to proceed or not to proceed. If we grant a stay, we will be adding a provision to the statute which is not justified.

19. The main point emerging from the said decision is that when an assessee moves an application u/s 245C of the said Act before the Settlement Commission and the latter is contemplating whether to proceed with the application or to

reject it, there is no bar on the Assessing Officer from proceeding with the assessment in any pending case merely because such an application has been made.

20. The provisions of Section 245F were considered by Dharmadhikari, J in the case of Hindustan Bulk Carriers (supra). While construing the said provisions, Dharmadhikari, J, in his opinion, observed as under:

...It is only when the Settlement Commission formally allows the application for being considered for "settlement" that the regular assessment proceedings and recoveries initiated for tax, penalty or interest pursuant thereto, shall become subject to the powers of the Commission and not prior to the same. In other words, it means that mere filing of an application by the assessee for settlement and before the same is formally allowed for consideration would have no adverse effect on the proceeding of assessment or recovery pending or initiated against the assessee under the regular procedure for assessment and recovery of dues under the Income Tax Act.

21. The Supreme Court in Damani Brothers (supra) noted that the scheme of Chapter XIX-A shows that the filing of an application by an assessee u/s 245C is an unilateral act and the department may not be aware of the same. It was further observed that an application for settlement filed u/s 245C, is not automatically admitted and that Section 245D deals with the procedure to be followed by the Settlement Commission on receipt of such an application. Section 245D(1) provides that the Commission, after following the prescribed procedure, can allow the application to be proceeded with or reject the application and that it is only after the Settlement Commission allows the petition to be proceeded with that the said Commission exercises power of settlement. The Supreme Court observed as under:

Before the Commission decides to proceed with the petition, it cannot complete assessment in respect of a return which is pending before the Assessing Officer or even cannot act as an appellate or revisional authority....

xxxxxx xxxxxx xxxxxx xxxxxx ...That being the position, the Income Tax authorities are free to proceed in the prescribed manner till the Commission decides to proceed with the petition....

22. From the above discussion, it is clear that a notice u/s 143(2), where the Assessing Officer does not agree with the block return filed by an assessee in block proceedings, is a mandatory requirement of law and it must be served upon the assessee within the period stipulated in the proviso to Section 143(2) of the said Act. If that is not done, the block assessment order passed pursuant thereto would be invalid and would not be a mere irregularity. It is also clear that the filing of a settlement application u/s 245C of the said Act does not, by itself, amount to any stay of the assessment proceedings before an Assessing Officer. There is no bar on the Assessing Officer from proceeding further with the assessment by issuing the mandatory notice u/s 143(2) within the time

stipulated or even framing the assessment order.

23. We are now left to examine the decision of the Supreme Court in the case of *Auto & Metal Engineers* (supra) which was strongly relied upon by Ms Bansal, who appeared on behalf of the revenue. As noted in the said decision itself, the short question which fell for consideration by the Supreme Court related to the interpretation of the expression "assessment proceeding" in Explanation 1 to Section 153 of the said Act. It would be relevant to note that the appeals before the Supreme Court related to assessment years 1967-68, 1968-69 and 1969-70. In the appeals before the Supreme Court, the Delhi High Court had, in the writ petitions filed earlier, passed an interim order directing that the revenue may proceed in pursuance of the notice, but no final order be passed till the pendency of the writ petitions. That interim order was passed on 23.11.1971 and was continued till 12.08.1974, when the writ petitions were dismissed by this Court. Thereafter, the Income Tax officer issued notices to the assessee firm as well as its partners under Sections 142(1), 143(2) and 143(3) of the said Act in respect of the assessment years referred to above. The replies were filed to the said notices by the assessees on 21.11.1974 and soon thereafter, the writ petitions were filed before the Punjab & Haryana High Court. The plea taken by the assessees/petitioners therein was that under the interim order dated 23.11.1971 passed by the Delhi High Court, there was no stay of the assessment proceedings and, therefore, Explanation 1 to Section 153 of the said Act could not be invoked and that after the expiry of the period prescribed u/s 153, the Income Tax officer was not competent to issue the notice in the assessment proceedings against the assessees. The view taken by a learned single Judge of the Punjab & Haryana High Court was that the expression "assessment proceeding" in Explanation 1 to Section 153 would include the passing of the order of assessment and since the passing of the order of assessment had been stayed by the Delhi High Court, there was a stay of the assessment proceedings by the said High Court. The writ petitions were, therefore, dismissed by the learned single Judge of the Punjab & Haryana High Court and the Letters Patent Appeals preferred before a Division Bench of that High Court were also dismissed. It is against the said dismissal of the appeals by the Division Bench of the Punjab & Haryana High Court that the matter was taken further before the Supreme Court. The plea taken by the assessees before the Supreme Court was that only the passing of the final order of assessment had been stayed by virtue of the Delhi High Court's order dated 23.11.1971 and that the assessment proceedings as such had not been stayed and, therefore, it was open to the Income Tax officer to proceed with the Income Tax proceedings during the pendency of the writ petitions and since he failed to do so, he could not take any steps in the assessment proceedings by issuing notices under Sections 142 and 143 of the said Act after 31.03.1972, when the assessment became time barred. This plea was rejected by the Supreme Court. Explanation 1 to Section 153, as was applicable in respect of the assessment years 1967-68, 1968-69 and 1969-70, was as under:

Explanation 1. In computing the period of limitation for the purposes of this section, the time taken in reopening the whole or any part of the proceeding or in giving an opportunity to the assessee to be reheard under the proviso to Section 129 or any period during which the assessment proceeding is stayed by an order or injunction of any court, shall be excluded.

While considering the above Explanation, the Supreme Court observed that the object of the explanation seems to be that if the Assessing Officer was unable to complete the assessment on account of an order or injunction staying the assessment proceeding passed by a court, the period during which such order or injunction was in operation should be excluded for the purposes of computing the period of limitation for making the assessment order. While construing the expression "assessment proceeding" as appearing in the said Explanation 1, the Supreme Court examined various provisions dealing with the procedure for assessment as contained in Chapter-XIV and held:

...The process of assessment thus commences with the filing of the return or when the return is not filed by the issuance by the Assessing Officer of the notice to file the return u/s 142(1) and it culminates with the issuance of the notice of demand u/s 156. The making of the order of assessment is, therefore, an integral part of the process of assessment. Having regard to the fact that the object underlying the explanation is to extend the period prescribed for making the order of assessment, the expression "assessment proceeding" in the explanation must be construed to comprehend the entire process of assessment starting from the stage of filing of the return u/s 139 or issuance of notice u/s 142(1) till the making of the order of assessment u/s 143(3) or Section 144. Since the making of the order of assessment u/s 143(3) or Section 144 of the Act is an integral part of the assessment proceeding, it is not possible to split the assessment proceeding and confine it up to the stage of inquiry under Sections 142 and 143 and exclude the making of the order of assessment from its ambit. An order staying the passing of the final order of assessment is nothing but an order staying the assessment proceeding. Since the passing of the final order of assessment had been stayed by the Delhi High Court by its order dated 23-11-1971 in the writ petitions, it must be held that there was a stay of assessment proceedings for the purpose of Explanation I in Section 153. The High Court, in our opinion, was right in holding that the period during which the said stay order passed by the Delhi High Court was in operation has to be excluded for the purpose of computing the period of limitation for making the order of assessment and the appeals are liable to be dismissed.

24. As pointed out above, Ms Bansal had placed great reliance on the observations of the Supreme Court in the case of *Auto & Metal Engineers* (supra). She had argued that the assessment proceedings involve all the steps till the making of the assessment order and, therefore, when time has been specifically excluded in respect of the making of an assessment order u/s 158BC(c) by virtue of the Explanation 1 to Section 158BE, such exclusion of time

would also relate to any part of the assessment proceeding. Consequently, it was her submission that time would also get excluded for the purposes of not only making the assessment order, but also issuing the notice u/s 143(2).

25. We cannot agree with the submission made by the learned Counsel for the revenue. There are several reasons for this. First of all, the decision in *Auto & Metal Engineers* (supra) was in respect of the assessment years 1967-68, 1968-69 and 1969-70. As has been rightly pointed out by the learned Counsel for the petitioner, at that point of time, there was no stipulation as to limitation with regard to the issuance or service of a notice u/s 143(2), which, as applicable for those assessment years, was as under:

143. Assessment. - (1) xxxxx xxxxx xxxxx xxxx

(2) Where a return has been made u/s 139 but the Income Tax Officer is not satisfied without requiring the present the assessee or the production of evidence that the return is correct and complete, he shall serve on the assessee a notice requiring him, on a date to be therein specified, either to attend at the Income Tax Officer's office or to produce, or to cause to be there produced, any evidence on which the assessee may rely in support of the return.

xxxxx xxxxx xxxxx xxxxx

26. By way of subsequent amendments, a specific stipulation as to time within which a notice u/s 143(2) should be served on the assessee, has been introduced by virtue of the proviso to Section 143(2) as it now stands and which has been extracted in the earlier part of this judgment. For the assessment years 1967-68, 1968-69 and 1969-70, which were before the Supreme Court in *Auto & Metal Engineers* (supra), the only period of limitation was with regard to the making of an assessment order and the period there for was provided in Section 153(1) of the said Act. Obviously, in the situation prevailing then, the notice u/s 143(2) could be served on the assessee at any point of time prior to the terminal date for making the assessment order u/s 143(3). This is not the case any longer. Now, by virtue of the proviso to Section 143(2), it is mandatory that no such notice can be served on the assessee after the expiry of the stipulated time period. Such a requirement has been held to be mandatory by the Supreme Court, as mentioned above, and if such notice is not served within the prescribed time, it would not be a mere irregularity or a curable defect. The fact that such a notice is not served within the stipulated time, is fatal to the assessment proceedings whether they be in the regular course under Chapter XIV or block assessment proceedings under Chapter XIV-B. This much is abundantly clear from the decision of this Court in the case of *Pawan Gupta* (supra) and the decision of the Supreme Court in the case of *Hotel Blue Moon* (supra).

27. Secondly, because of the fact that no separate periods of limitation were prescribed for service of a notice u/s 143(2) and making of an assessment order u/s 143(2), the Supreme Court in the case of *Auto & Metal Engineers* (supra) was merely concerned with the limitation for the making of an assessment order

and the question of limitation for serving a notice u/s 143(2) of the said Act was not, at all, in the contemplation of the Supreme Court. Therefore, the decision of the Supreme Court in *Auto & Metal Engineers* (supra) would not apply to the facts and circumstances obtaining in the present case and, particularly when a specific time limit has been introduced subsequently for service of a notice u/s 143(2) of the said Act.

28. Thirdly, the decision in *Auto & Metal Engineers* (supra) is also distinguishable because it concerned itself with the interpretation of the expression "assessment proceeding" as appearing in Explanation 1 to Section 153 as it then stood. That expression was used then and continues to be used now in relation to an order of stay or injunction granted by any court. In the present case, there is no stay order or injunction passed by any court and, therefore, the expression "assessment proceeding" does not call for any interpretation or application in the present case.

29. Fourthly, Explanation 1 to Section 153, as it then stood, did not make any reference to Clause (v) as it now stands, which specifically deals with an application made before the Income Tax Settlement Commission u/s 245C. The *pari materia* provision of Clause (v) to Explanation 1 of Section 153 is Clause (iv) of Explanation 1 to Section 158BE. Both these provisions deal with the situations where an application has been made before the Settlement Commission u/s 245C. These provisions obviously relate to settlement of cases which fall under Chapter XIX-A, which was not on the statute book during the assessment years 1967-68, 1968-69 and 1969-70 and were introduced by the Taxation Laws (Amendment) Act, 1975 with effect from 01.04.1976. Explanation 1 to Section 158BE relates to the manner of computing the period of limitation for, inter alia, passing an order u/s 158BC(c) of the said Act, when an application has been made before the Settlement Commission u/s 245C and such an application is either rejected or is not allowed to be proceeded with by the Settlement Commission. In such an eventuality, the period commencing on the date on which the application is made and ending with the date on which the order u/s 245D(1) is received by the Commissioner under Sub-section (2) of Section 245D, is to be excluded. The exclusion of time is in relation to the computation of the period of limitation for the passing of an order of assessment u/s 158BC(c) and not with regard to computation of the period of limitation for the purposes of serving a notice on the assessee u/s 143(2) of the said Act. We have already noted the decisions of this Court as well as of the Supreme Court which clearly indicate that the filing of an application u/s 245C before the Settlement Commission does not create any bar on the Assessing Officer in proceeding with the assessment in the normal course. Therefore, there is no question of any exclusion of time when there was no impediment in proceeding with the assessment by issuing and serving upon the assessee a notice u/s 143(2) etc. In fact, there was no impediment in even passing an assessment order.

30. Consequently, no exclusion of time having been provided for issuance/service

of notice u/s 143(2) of the said Act in the Explanation 1 to Section 158BE, the notice u/s 143(2), which was issued on 05.07.2004, was clearly beyond time. It is also not a case where a stay order or an injunction had been passed by any court and, therefore, the question of construing the issuance of a notice as a part of an "assessment proceeding" does not arise at all in the present case. The mandatory requirement of law of service of a notice u/s 143(2), within time, not having been complied with, the block assessment order made pursuant thereto would be bad in law. The exclusion of time stipulated in Clause (v) of Explanation 1 to Section 158BC would not be applicable in respect of service of notice u/s 143(2) of the said Act inasmuch as it relates only to the computation of the period of limitation for passing an order u/s 158BC(c) of the said Act and not to the computation of limitation for serving a notice u/s 143(2).

31. The answer to question No. 1 is that since the notice u/s 143(2) was issued beyond the prescribed period of limitation, the block assessment order u/s 158BC(c) of the said Act made in pursuance of such a notice was bad in law. In view of this answer to question No. 1, it is not necessary for us to answer question No. 2. The impugned order is set aside. The appeal is allowed as aforesaid. There shall be no order as to costs.