

---

**(2016) 07 AHC CK 0259**  
**In the Allahabad High Court**  
**Case No : Income Tax Appeal No. 11 of 2015**

|                                   |    |            |
|-----------------------------------|----|------------|
| U.P. State Industrial Development | Vs | APPELLANT  |
| Commissioner of Income Tax-II     |    | RESPONDENT |

---

**Date of Decision :** 11-07-2016

**Acts Referred:**

Income Tax Act, 1961 — Section 143(2), Section 148

**Citation :** (2017) 2 ADJ 138

**Hon'ble Judges :** Sudhir Agarwal and Kaushal Jayendra Thaker, JJ.

**Bench :** Division Bench

**Advocate :** S.K. Garg, Ashish Bansal, Advocates, for the Appellant; C.S.C, for the Respondent

**Final Decision :** Allowed

---

## Judgement

Heard Shri Ashish Bansal learned counsel for appellant and learned Standing Counsel for respondent.

2. This is an appeal at the instance of Assessee preferred under section 260-A of Income Tax Act, 1961 (hereinafter referred to as "Act 1961"). Dispute relates to Assessment Year 2003-2004. Appeal has arisen from judgment and order dated 24.7.2014, passed by Income Tax Appellate Tribunal, Lucknow Bench "A" Lucknow (hereinafter referred to as "Tribunal") in ITA No.382/LKW/2011 whereby the aforesaid appeal of Assessee has been partly allowed. Though, in the memo of this appeal, several substantial questions of law have been formulated by appellant but learned counsel for appellant at the outset stated that he propose to press only one substantial question of law relating to notice under section 143(2) of Act, 1961 since, if that question is decided in his favour, entire matter will be open to appellant to be raised before Assessing Authority.

3. With consent of learned counsel for parties, we proceed to hear this appeal finally on the following substantial question of law:

"Whether Tribunal was justified in holding that non issue of notice under section

143(2) would not vitiate assessment, made by Assessing Authority, since Assessee filed return under section 148 after expiry of the period prescribed in law."

4. It is not a disputed fact that before making assessment in question, no notice under section 143(2) was issued to the appellant by Assessing Authority.

5. Brief facts necessary to understand the dispute in question and for effective adjudication of the issues raised in this appeal are stated as under.

6. Appellant filed return for Assessment Year 2003-2004 on 2.5.2005 showing an income of Rs.12,64,32,143/-.

7. Since return was filed after period prescribed for filing return under section 139 of Act 1961, Assessing Authority treated return as nonest and proceeded under section 148 by issuing notice under the said provision on 25.5.2007. However, before so proceeding, no notice under section 143(2) was issued to appellant.

8. Assessing Officer passed Assessment Order on 31.12.2008 where against appellant preferred appeal under section 246-A of Act 1961 which was decided on 31.3.2011, where against Assessee and Revenue both preferred appeal before Tribunal, Assessee's appeal for Assessment Year 2003-2004 has been partly allowed but issue raised by appellant with regard to patent illegality in the entire assessment proceedings for want of notice under section 143(2) has been negated by Tribunal observing that absence of notice would not vitiate assessment since assessee filed return after expiry of the period prescribed. Tribunal following Patna Bench Tribunal's decision in Chand Bihari Agrawal v. ACIT in IT(SS)A No.05/PAT/2010 held, return of income must be filed within the statutory time limit. If Assessee file return after expiry of time, the return would be treated as not filed in conformity with law and therefore, absence of notice under section 143(2) would be of no consequence. This is clear from paragraph-10 of impugned judgment of Tribunal, up for consideration before us.

9. Tribunal has further held that notice under section 148 was issued to appellant on 25.5.2007. Assessee did not file any return as per aforesaid notice and instead submitted reply that he has already filed return on 2.5.2005 and the same should be accepted as return filed in compliance to the notice under section 148. Thereafter, a notice under section 142(1) was issued on 14.11.2008. Another notice under section 142(1) was issued on 4.12.2008. Earlier notice dated 4.11.2008 remained un-complied but pursuant to notice dated 4.12.2008, Shri Rajesh Kanodia appeared before Assessing Authority on 11.12.2008. Neither, Assessee nor Revenue could give the date on which Assessee submitted reply to notice dated 25.5.2007 requesting Assessing Authority to treat return filed on 2.5.2005 as return in compliance to notice under section 148. In these circumstances, Tribunal treated the date of filing of said letter on 11.12.2008.

10. We find that the above view of Tribunal is erroneous. In Chand Bihari Agarwal

(Supra), search and seizure operations were carried out by Department under section 132 of Act, 1961 at residential cum business premises of Assessee on 27.2.2003. A notice under 158BC of Act 1961 was issued on 9/10.12.2003 and served on Assessee on 10.12.2003 requiring him to file his block return within a month of service of said notice. No such block return was filed within the statutory period under section 158BC. Block return was filed on 22.11.2004 declaring undisclosed income. Assessing Officer completed assessment under section 158BC of Act 1961 on 24.2.2005 adding income where against Assessee preferred appeal which was partly allowed. To the extent Assessee failed before Commissioner, he preferred further appeal before Tribunal. The questions formulated by Tribunal are:

"1. CIT(Appeal) has erred in rejecting contention of appellant that Assessment Order framed under section 158BC/158BB is wrong, illegal, without jurisdiction as well as void ab-initio for want of Notice u/s 143(2) which is a mandatory requirement under I.T Act, 1961 to be served on appellant before passing order, if the A.O proceeds to assess undisclosed income. Reliance is placed on Hon"ble Supreme Court decision in case of Asstt. CIT & Anr. v. Hotel Blue Moon reported in (2010) 229 CTR 219.

2. For that, as a matter of fact and law Return u/s 158BC of Act 1961 was filed on 22.11.2004 and Assessment Order was passed on 24.02.2005. In between the period no Notice u/s 143(2) was issued and served upon appellant which was a mandatory requirement u/s 158BC(b) of I.T Act, 1961. Hon"ble S.C in the above case has held that omission on part of Assessing Authority to issue notice u/s 143(2) cannot be a mere procedural irregularity and the same is not curable. The matter has taken at rest."

11. Under section 158BC, in respect to search carried out on or after 1.1.1995, statutory time limit of filing block return was 45 days.

12. Tribunal in Chand Behari (Supra) read the judgment in ACIT & another v. Hotel Blue Moon (2010) 321 ITR 362 (SC) in the manner that notice under section 143 if not issued, it would not be fatal unless it is shown that block return was filed under section 158BC within statutory period prescribed therein.

13. In our view, this way of reading of judgment of Supreme Court in ACIT v. Hotel Blue Moon (Supra) by Tribunal is not correct. Therein, Court did not say, that a regular return under section 139 if not filed within time, Assessing Officer shall have jurisdiction to proceed to make assessment without issuing notice under section 143(2) of Act 1961. Once an assessment is filed within time or thereafter, it is always open to Assessing Officer to accept the same or to reject it for any valid reason. Assessment filed after expiry of time, can be rejected on the ground that it has been filed after expiry of statutory period, and is not acceptable but that itself would not give jurisdiction to Assessing Officer to proceed to make assessment either under section 143(3) or a block assessment under section 158BC unless a notice is issued under section 143(2). Court said

that an omission on the part of Assessing Officer to issue notice under section 143(2) is not a mere procedural irregularity and improper. It is a jurisdictional error. In other words, notice under section 143(2) authorizes Assessing Officer to complete assessment under section 143(3) and same would apply in respect to block assessment also under section 158BC.

14. It is true that in Hotel Blue Moon(Supra), Court was considering applicability and effect of Section 143(2) in the context of Chapter XIV B of Act 1961 which includes Section 158BC but it has very categorically held that it is mandatory and omission on the part of Assessing Officer to issue notice under section 143(2) is incurable since it is not a mere procedural irregularity but a jurisdictional error.

15. Whatever may be the reason available to Assessing Officer to repudiate return filed by Assessee, but if it proceeds to make assessment, a notice under section 143(2) is mandatory. Some relevant observations from judgment in ACIT & another v. Hotel Blue Moon (Supra) may be reproduced as under:

"An analysis of this sub-section indicates that, after the return is filed, this clause enables the Assessing Officer to complete the assessment by following the procedure like issue of notice under section 143(2)/142 and complete the assessment under section 143(3). This section does not provide for accepting the return as provided under section 143(1)(a). The Assessing Officer has to complete the assessment under section 143(3) only. In case of default in not filing the return or not complying with the notice under section 143(2)/142, the Assessing Officer is authorized to complete the assessment ex parte under section 144. Clause (b) of section 158BC by referring to section 143(2) and (3) would appear to imply that the provisions of section 143(1) are excluded. But section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under section 143(2). However, 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 block return. Omission on the part of the assessing authority to issue notice under section 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, requirement of notice under section 143(2) cannot be dispensed with."

(emphasis added)

16. The view we have taken above, is fortified from some other authoritative pronouncements of this Court also. In Commissioner of Income Tax v. Rajeev Sharma (2011) 336 ITR 678 (Allahabad), Lucknow Bench, this Court has held that provision contained in sub section (2) of Section 143 of Act 1961 is mandatory. It further says that Legislature in their wisdom by using the words, "reason to believe" had cast a duty on Assessing Officer to apply his mind to the material on record and after being satisfied with regard to escaped liability, shall serve notice specifying particulars of such claim.

17. In view of above, in absence of any notice issued under sub-section(2) of section 143, after receipt of fresh return, submitted by Assessee in response to notice under section 148, the entire procedure adopted for escaped assessment, shall not be valid.

18. In CIT v. Rajeev Sharma (Supra), Court also held that even if an assessment is treated to have been filed under section 148, in response to a notice issued there under, Assessing Officer shall not proceed to make assessment without giving notice under section 143(2) and this is evident from the observations made in Paragraph 30, 32 and 45 of judgment.

"30. Notice under Section 148 of the Act for assessment year 1994-1995 was issued on 29.3.2001 whereas for the assessment year 1995- 96, it was issued on 26.12.2000. In response to the notice, the assessee sent letter dated 7.5.2001 to drop the proceeding. Therefore, vide letter dated 18.12.2001, the Deputy Commissioner informed that proceeding may not be dropped and given last opportunity to file return. Along with letter dated 18.12.2001, notices under Section 143 (2) and 142 (1) were also sent. In consequence thereof, the assessee filed return on 7.2.2002 for both the assessment years. After filing of return, the Assessing Officer should have applied mind and after considering the material on record on "reason to believe", notice under Section 143 (2) of the Act should have been issued afresh.

32. Since return was filed on 7.2.2002, in response to notice under Section 148 of the Act, earlier notice dated 29.03.2001 may not be treated as valid for the purpose of escaped assessment. The Legislature to their wisdom had categorically provided that after receipt of notice under Section 148 of the Act a fresh return may be filed and in consequence thereof, the Assessing Officer has to apply his mind to the contents of fresh return and then issue a notice under Section 143 (2) of the Act. The satisfaction under reason to believe, must be recorded by the Assessing Officer after applying mind to the contents of fresh return before issuing a notice under Section 143 (2) of the Act.

It is a settled law that taxing statute should be construed strictly without subtraction or addition of words, in the statutory provisions. Accordingly, the provisions contained in Section 148 of the Act with regard to escaped assessment, must be construed strictly with regard to procedure prescribed for escaped assessment.

45. In view of the above, the provision contained in Section 143 (2) of the Act is mandatory in nature and it shall be obligatory for the Assessing Officer to apply mind to the contents of the return filed in response to notice under Section 148 of the Act and record reasons and thereafter, issue notice under Section 143 (2) of the Act before proceeding to decide the controversy with regard to escaped assessment."

(emphasis added)

19. This decision in CIT v. Rajiv Sharma(Supra) has been followed in ITA No.69 of 2006 Hindalco Industries Ltd. v. Commissioner of Income Tax, Lucknow decided on 25.7.2011 wherein Court has also relied on the decisions of Delhi Court in Director of Income-tax v. Society for Worldwide Interbank Financial Telecommunication (2010) 40 DTR (Del) 17 and Bombay High Court in Allana Cold Storage Ltd. v. Income-tax Officer and other (2006) 287 ITR 1(Bom.)

20. Therefore, question that return filed was within or beyond time prescribed under section 139 or has been filed after notice issued under section 148 or filed earlier after expiry of period under section 139 is not relevant to determine the question whether Assessing Officer can proceed to make assessment under section 143(3) without issuing notice under section 143(2). The provision being mandatory, Assessing Officer cannot proceed to make assessment without issuing notice under section 143(2) of Act, 1961.

21. In view of above, question formulated above is answered in favour of appellant and against Revenue.

22. Appeal is allowed. Impugned order dated 24.7.2014 passed by Tribunal as also assessment order in respect to Assessment Year 2003-2004 are hereby quashed.

23. This judgment shall not preclude Assessing Authority from proceeding further in accordance with law with regard to assessment of Assessee under section 143(3)/148 for Assessment Year 2003-2004, after giving notice under section 143(2) of Act, 1961.