

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****TAX APPEAL NO. 243 of 2007****With****TAX APPEAL NO. 244 of 2007****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE KS JHAVERI****and****HONOURABLE MR.JUSTICE G.R.UDHWANI**

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 or any order made thereunder ?	

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COMMISSIONER OF INCOME TAX....Appellant(s)

Versus

AMIT K. JAIN ALIAS ANIL K.JAIN....Opponent(s)

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Appearance:

MR. M.R. BHATT, SR. ADVOCATE WITH MRS MAUNA M BHATT, SR.  
STANDING COUNSEL for the Appellant(s) No. 1

MR. HARDIK V VORA, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**  
and  
**HONOURABLE MR.JUSTICE G.R.UDHWANI**

Date : 11/08/2016

**ORAL JUDGMENT**

**(PER : HONOURABLE MR.JUSTICE KS JHAVERI)**

By way of these appeals under section 260A of the Income-tax Act, 1961, the appellant-revenue has challenged the order of the Income-tax Appellate Tribunal (hereinafter referred to as "the Tribunal") whereby the Tribunal has allowed the appeal of the assessee by reversing the finding of the Commissioner of Income-tax (Appeals) who has partly allowed the appeal of the assessee and dismissed the appeal preferred by the revenue.

2. While admitting the appeals, this court has framed the following substantial questions of law:

- “(A) Whether the Appellate Tribunal is right in law and on facts in canceling the assessment order framed by the Assessing Officer, without going into the merits, on the ground that the Assessing Officer had issued notice u/s. 158BC to the assessee to file the return within 15 days from the date of service of notice?
- (B) Whether the Appellate Tribunal is right in law and on facts in canceling the assessment order despite the fact that the word `within 15 days' in the notice u/s. 158 BC issued by Assessing Officer is a mere typographical error and even otherwise,

the notice and proceedings thereafter is in substance and effect in conformity with the intent and purpose of the act as has been provided in section 292B of the I.T. Act?"

3. The facts of the case are that search and seizure proceedings were carried out on 11.12.1997 and 12.12.1997 at the residence of the assessee in which certain assets and documents were found and seized. Thereafter, the Assessing Officer issued notice under section 158BC read with section 158BD of the Income-tax Act on 21.12.1998 which was served on 1.1.1999 requesting the assessee to file the return within 15 days of the service of notice. The assessee filed return of income declaring nil income for the block period 2.11.1986 to 11.12.1997. The Assessing Officer assessed income of the assessee by making certain additions. In appeal, the Commissioner of Income-tax (Appeals) partly allowed the appeal of the assessee. In further appeal, the Tribunal cancelled the assessment order framed by the Assessing Officer without going into the merits of the case, on the ground that requirement of section 158BC has not been complied with. Hence the revenue is in appeal before us.

4. The learned counsel for the revenue Mr. Bhatt has contended that the decision of the Tribunal is erroneous as the word `within 15 days' in the notice under 158BC issued by the Assessing Officer is a mere typographical error and the notice as well as the proceedings, in substance and effect, is in conformity with provisions of the Act. Sections 158 BC and 292B of the I.T. Act read as under:

“158BC - Where any search has been conducted under section 132 or books of account, other documents or assets are requisitioned under section 132A, in the case of any person, then,-

(a) the Assessing Officer shall:

(i) in respect of search initiated or books of account or other documents or any assets requisitioned after the 30<sup>th</sup> day of June, 1995, but before the 1<sup>st</sup> day of January, 1997, serve a notice to such person requiring him to furnish within such time, not being less than fifteen days;

(ii) in respect of search initiated or books of account or other documents or any assets requisitioned on or after the 1<sup>st</sup> day of January, 1997, serve a notice to such person requiring him to furnish within such time not being less than fifteen days but not more than forty-five days,

as may be specified in the notice a return in the prescribed form and verified in the same manner as a return under clause (i) of subsection (1) of section 142, setting forth his total income including the undisclosed income for the block period:

Provided that no notice under section 148 is required to be issued for the purposes of proceeding under this Chapter;

(b) 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, subsections (2) and (3) of section 143 and section [section 144 and section 145] shall, so far as may be, apply;

(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;

(d) the assets seized under section 132 or requisitioned under section 132A shall be dealt with in accordance with the provisions of section 132B.”

Sec. 292B – No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issue or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.”

4.1 The learned counsel for the revenue has further contended that the notice which is contemplated within fifteen days from the date of service is to be construed keeping in mind the decisions which are rendered by different High Courts . He contended that the notice was issued which the assessee has received and no contention was raised against the same before the Assessing Officer. The assessee filed return of income on 13.1.1999 for the relevant assessment year and thereafter, the assessee has raised the contention before the Tribunal that the Assessing Officer has not given sufficient time

to the assessee to file the return of income and therefore, the notice issued by the Assessing Officer is invalid. He has further contended that in view of section 292B read with section 158BC of the Act, the Tribunal has committed serious error in reversing the decision of the Commissioner of Income-tax (Appeals) and the Assessing Officer. He has relied on the following decisions:

(1) **Shirish Madhukar Dalvi v. Assistant Commissioner of Income-tax and others** [2006] 287 ITR 242 (Bom)

where the Bombay High Court has observed as follows:

Before we deal with the aforesaid contentions raised on behalf of the rival parties in the light of the above extracted statutory provisions, it is appropriate to first consider the law laid down by the apex court with various other High Courts relevant to the facts of the case at hand.

In the case of *State of Karnataka v. Muniyalla*, AIR 1985 SC 470, it is held that merely because an order is purported to be made under a wrong provision of law, it does not become invalid so long as there is some other provision of law.

In the case of *Hukumchand Mills Ltd. v. State of Madhya Pradesh* (1964) 52 ITR 583 (SC); AIR 1964 SC 1329, the apex court has ruled that mere mistake in the opening part of the notification in reciting the wrong source of power does not affect the validity of the amendments made.

In the case of *State Bank of Patiala v. S.K. Sharma* (1996) 3 SCC 364, the apex court ruled that in the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined

from the standpoint of substantial compliance. The order passed in violation of such provision can be set aside only where such violation has occasioned prejudice to the subject. It further went on to observe that even a mandatory requirement can be waived by the person concerned, if such mandatory provision of law is conceived in his interest and not in the public interest. The conduct of the subject must be borne in mind while examining a complaint of non-observance of procedural rules governing such enquiries. As a rule, all such procedural rules are designed to afford a full and proper opportunity to the subject to defend himself.

In the case of *Dove Investments P. Ltd. v. Gujarat Industrial Investment Corporation* (2006) 129 Comp. Cas 929 (SC); (2006) 2 SCC 619 the apex court has observed that regard must be had to the context, the subject matter and object of the statutory provision in question in determining whether the same is mandatory or directory. No universal principle of law could be laid down in that behalf as to whether a particular provision or enactment shall be considered mandatory or directory. It is the duty of the court to try to get the real intention of the Legislature by carefully analysing the whole scope of the statute or section or a phrase under consideration.

In the case of *P.T. Rajan v. T.P.M. Sahir* (2003) 8 SCC 498, the apex court has said that whether a statute would be directory or mandatory will depend upon the scheme thereof. Ordinarily, a procedural provision would not be mandatory even if the word 'shall' is employed therein unless a prejudice is caused.

In Chandrakant Uttam Chodankar v. Dayanand Rayu Mandrakar (2005) 2 SCC 188, the apex court has observed as under (page 212):

`74. In this case, it is not necessary for us to go into the question as to whether section 83 is imperative in character or not inasmuch as it is settled law that even where the expression `shall' is used, the same may not be held to be mandatory. Even a mandatory provision having regard to the text and context of the statute may not call for strict construction.

75. In U.P. State Electricity Board v. Shiv Mohan Singh (2004) 8 SCC 402, this court stated the law in the following terms: ( SCC p. 440, paras 96-97)

`96. Ordinarily, although word `shall' is considered to be imperative in nature it has to be interpreted as directory if the context or the intention otherwise demands. (see: Sainik Motors v. State of Rajasthan, AIR 1961 SC 1480, para 12).

97. It is important to that in Crawford on Statutory Construction at page 539, it is stated:

`271. Miscellaneous implied exceptions from the requirements of mandatory rules, in general – Even where statute is clearly mandatory or prohibitory, yet, in many instances, the courts will regard certain conduct beyond the prohibition of the statute through the use of various devices or principles. Most, if not all of these devices find their jurisdiction in considerations of justice. It is a well-known fact that often to enforce the law to its letter produces manifest injustice, for frequently equitable and humane considerations, and other considerations of a closely related nature, would seem to

be of a sufficient calibre to execute or justify a technical violation of the law.’ “

In the case of *Balchand v. ITO* (1969) 72 ITR 197, the apex court ruled that merely because of a defect in service of notice, the assessment order does not become invalid. Similarly, the apex court in the case of *Jai Prakash Singh* (1996) 219 ITR 737 went on to hold that non-service of notice under section 143(2) of the Income-tax Act, 1961 to 9 out of 10 representatives of the deceased did not invalidate the order of the Assessing Officer relating to the assessment year in question. “

2. **Venad Properties Private Limited v. Commissioner of Income-tax** (2012) 340 ITR 463 (Delhi), particularly, paragraph Nos. 11, 12 and 18 which are reproduced as under:

“11. In *Sardar Amarjit Singh Kalra v. Smt. Pramod Gupta* (2003) 3 SCC 272, a Constitution Bench of the Supreme Court has held:

‘26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on the merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice’.

12. Similar views are also expressed by the Supreme Court in *State of Punjab v. Shamlal Murari* (1976) 1 SCC 719, where it was held as under:

‘8. We must always remember that processual law is not

to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, tho' procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end product on technicalities.'

18. In view of our findings on the second contention, which are against the appellant-assessee and in favour of the revenue, the third contention loses its relevance and is not required to be decided. However, we may notice that the Tribunal in this regard has followed the judgement of the Bombay High Court in Shirish Madhukar Dalvi (2006) 287 ITR 242 (Bom.), wherein a distinction has been made between service of notice under sections 147 and 158BC of the Act. It has been held that section 158 BC is a procedural section and not a substantive section and, therefore, the ratio and the decision in State Bank of Patiala v. S.K. Sharma (1996) 3 SCC 364 applies. In the said case, the Supreme Court held that in the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. An order passed in violation of such provision can be set aside only when such violation has occasioned prejudice to the subject. Even mandatory

requirement can be waived by the person concerned, if the mandatory provision is conceived in his interest and not in the public interest. The conduct of the subject is required to be examined and kept in mind. Procedural rules are assigned to afford a full and proper opportunity to the person concerned to defend himself.”

3. **Commissioner of Income-tax v. Jagat Novel Exhibitors P. Ltd.** (2013) 356 ITR 559 where at paragraph Nos. 41 and 45, it was observed as follows:
- “41. The aforesaid observations are significant. In the present case, the Tribunal has not held that the jurisdictional preconditions were missing or not satisfied. Reasons to believe have been recorded. Notice has also been issued within the limitation period. The question whether the notice was addressed to the correct person has been examined and dealt with by us above. Service of notice is not the jurisdictional precondition but a matter pertaining to making of the order of assessment. Before an assessment order is passed, the notice must be served. As noticed above, on February 21, 2002, Vijay Narain Seth, director of the respondent company appeared before the Assessing Officer. The respondent had also filed some details before the Assessing Officer who passed the assessment order.”
- “45. We may note, the observations of the Supreme Court in *Balchand v. ITO* (1969) 72 ITR 197 (SC) wherein it was held that in construing a statutory notice, extraneous evidence may be looked into to find out whether the technical defects or lacuna had any effect on the validity of the notice. The facts had revealed that

though there were defects in drafting the preamble of the notice, it did not affect its validity as the notice itself clearly informed the assessee that he had to file a return of income for the relevant year.”

**4. K. Sakthivel v. Assistant Commissioner of Income-tax, Central Circle 1, Coimbatore** (2012) 26 taxmann. 35 (Madras), particularly, paragraph Nos. 14, 16 and 17 where it is observed as under:

“14 - Even though learned counsel appearing for the assessee reiterated the contentions in the grounds as had been taken before the Tribunal and contended that when the issuance of notice under section 158 BD is the very foundation to initiate proceedings against the assessee, the non-mentioning of the block period in the notice would cut at the very root of the assessment proceedings. Learned standing counsel for the revenue placed before us the decision in *Shirish Madhukar Dalvi v. Asstt. CIT* (2006) 287 ITR 242 / 156 Taxman 79 (Bom.), *Smt. Mahesh Kumari Batra v. Jt. CIT* (2005) 146 Taxman 67/95 ITD 152 (Asr.) (SB) as well as *Sakthivel Bankers case* (supra) (255 ITR 144) and submitted that when the assessee had acted on the notice and filed the return knowing fully well the period of block assessment, yet considering the fact the notice issued under section 158BD is only procedural and not related to assumption of jurisdiction, it is not open to the assessee to contend that the assessment was not valid.”

“16. As far as the non mentioning of the block period in the notice issued under section 158BD is concerned, in the decision relied on by learned Standing Counsel for

the revenue in Shirish Madhukar Dalvi's (supra) the Bombay High Court considered the nature of the proceedings contained in section 158BD. On going through the provisions contained under sections 147, 148 and 158BC, the Bombay High Court held that section 158BA refers to jurisdiction of the Assessing Officer to assess undisclosed income in accordance with Chapter XIV-B, whereas Section 158BA(2) is the charging section, section 158BB provides for computation of undisclosed income for the block period, whereas section 158BC provides the procedure for block assessment. In the decision in Sakthivel Bankers (supra) this court held that failure to mention the provision in the notice was not a circumstance which could be said to vitiate the ultimate order. The said decision relates to the assessment made consequent on the search conducted in assessee's place and notice was issued thereon to eight firms and to the wife of the assessee. Referring to Section 158BD, this court held that non mentioning of the purpose for which the notice was issued or the source of the authority of the Officer issuing the notice per se would not defeat the aspect of the persons against whom the notice issued were fully aware of the purpose of issuing notice."

"17. In the light of the above said decision of this court as well as in view of the Bombay High Court cited supra, we reject the contention of the assessee that the non mentioning of the block period would defeat the very assessment. Quite apart from this, the assessee participated in the inquiry conducted under section 131 of the Income-tax Act and had also made a statement confirming the purchase of the land. Subsequent thereto,

the assessee had participated in the enquiry and on 15.5.2002, in response to the notice under section 142(1) the assessee expressed his inability to file the return on or before 15.5.2002 on account of liquidity problem, hence he sought for time to file return. Ultimately, when the assessee filed the return under Form No. 2 B, as already noted in the preceding paragraph, the assessee mentioned the block period as ascertained from the Income-tax Officer and said fact is stated by the assessee in the return filed by him. Thus, when the assessee received the notice issued on 5.8.99, the assessee had no doubt as to the nature of proceedings initiated, the purpose of the said proceedings and the block period for which proceedings were initiated. In the circumstances, it is too late for the assessee to contend that non mentioning of the block period would defeat the assessment proceedings. In the circumstances, we reject the assessee's contention."

4.2 Relying on the above decisions, learned counsel for the revenue has contended that the notice issued by the Assessing Officer is a valid notice and there is no lacuna in the notice issued by the Assessing Officer. In that view of the matter, he contended that the order of the Tribunal may be reversed and that of the Commissioner of Income-tax (Appeals) and the Assessing Officer may be restored.

5. Learned counsel appearing for the assessee Mr. Vora has supported the order of the Tribunal and contended that the Tribunal has not committed any error in cancelling the order of the Assessing Officer. He has relied on the decision of the Apex Court in the case of **Commissioner of Income-tax v. Braithwaite & Co. Ltd.**, reported in (1993) 201 ITR 343,

where at paragraph Nos. 6, 7, 8 and 9, the apex court has observed as under:

“6. The learned counsel for the appellant contended that no part of the term loan of rs. 50,00,000/- qualified for inclusion in the capital base because the provisions of rule 1(v) of the Second Schedule were not satisfied. According to him, under the term loan-agreement dated 1.8.1964 the last instalment was to be paid on 31.7.1971 and as such, the period of repayment was less than seven years. He further contended that in the context the expression ‘during a period of less than seven years’ means a period of more than seven years. The learned counsel for the respondent, on the other hand, argued that the term loan was payable within the period of seven years. According to him, the period of seven years is obviously a period which is ‘not less than seven years’.”

“7. We are of the view that on the plain reading of the proviso to rule 1(v), Second Schedule it is clear that in order to claim benefit of the said provision the borrowed money has to be repaid during the period of more than seven years. The only interpretation which can be given to the expression ‘during a period of not less than seven years’ is that the said period should go beyond seven years. The reasoning is simple. The period of seven years would not complete till the last ‘minute’ or even the last ‘second’ of the said period are counted. In other words, the the last minute of the seven years’ period is completed the period remains less than seven years. In the present

case, the agreement was entered on 1.8.1964. The last instalment was to be paid on 31.7.1971. The seven years were to complete at 12. A.M. (between the night of 31.7.1971 and 1.8.1971). Even if the loan was paid back at 11.59 P.M., on 31.7.1971 the period would be less than seven years by one minute. It is, therefore, obvious that the period of 'not less than seven years' can only mean till after the completion of seven years. We, therefore, hold that the repayment of borrowed amount during the period of seven years does not mean repayment 'during a period of not less than seven years'. To claim the benefit under rule 1(v) of the Second Schedule the repayment of the borrowed money must be during a period which is more than seven years."

"8. We find support in the view taken by us in the following cases. In *Ramanasari v. Muthusami Naik* ILR 30 Mad. 248, section 18 of the Madras Rent Recovery Act VIII of 1865 required that, in fixing the day of sale, not less than seven days must be allowed 'from the time of the public notice and not less than 30 days from the date of distraint'. The sale was held on the 13<sup>th</sup> February, but the notice was published on 6<sup>th</sup> February. It was held that 'not less than' means the same as 'clear' and seven whole days must elapse between the day of the notice and the day fixed for sale. In *Re Railway Sleepers Supply Company* LJ 1885 54 Ch 720, the expression 'not less' than given number of days means 'clear days'. It was held that the expression 'not less' indicates a 'minimum'."

"9. In the present case the whole of the term was

payable within the period of seven years and as such, the loan of Rs. 50 lakhs taken by the respondent-company from National Grindlays Bank was not qualified for inclusion in the capital base under rule 1(v) of the Second Schedule to the Act. The Tribunal in part and the High Court were not justified in deciding the issue in favour of the respondent-company. Since the order of the Tribunal, granting relief to the respondent-company to the extent of Rs. 16 lakhs, has become final, no interference is called for to that extent.”

5.1 He has further relied on the decision of the Karnataka High Court in the case of **Commissioner of Income-tax v. Micro Labs Ltd.** reported in (2012) 348 ITR 75 (Karnataka) to submit that calling upon the assessee to file the return of income within a period of 15 days is in violation of mandatory period of time as stipulated under section 158BC of the Income-tax Act. He has contended that the Karnataka High Court after considering the decision of Bombay High Court in the case of **Shrish Madhukar Dalvi v. Asst. CIT** (2006) 287 ITR 242, has observed that the defect in the notice is vital and held that notice under section 158BC is mandatory. In paragraph No. 26 of the said judgement, the Karnataka High Court has observed as under:

“The contention is unacceptable. The time to be granted in terms of section 158BC is mandatory. Having failed to comply with the same, granting another opportunity to the revenue is highly improper. If that were to be so, then each and every violation of law by the revenue would stand rectified by orders of remand. That is not the intent and

purport of the Act. The period as specified in the Act requires to be strictly complied with. Therefore, the plea of the revenue for a direction to pass fresh orders of assessment after complying with the provisions of section 158BC requires to be rejected. Consequently, question No. 5 is answered in favour of the assessee and against the revenue.”

5.2 He has further relied on the decision of the Supreme Court in the case of **Assistant Commissioner of Income-tax and another v. Hotel Blue Moon** reported in (2010) 321 ITR 362, more particularly, paragraph No. 14, which reads as under:

“Section 158BC (b) is a procedural provision for making regular assessment applicable to block assessment as well. Section 158BC(c) would require the Assessing Officer to compute the income as well as tax on completion of the proceedings to be made. Section 158BC(d) would authorise the Assessing Officer to apply the assets seized in the same manner as are applied under section 132B.

5.3 The learned counsel for the assessee has relied on the decision of this court in the case of **New India Industries Ltd. v. Commissioner of Income-tax** reported in 108 ITR 181 where the words “within seven years” have been interpreted by this court which has been subsequently approved by the Supreme Court in the case of **Commissioner of Income-tax v. New India Industries Ltd.** reported in 212 ITR 653.

6. We have heard learned counsel for the parties. We are aware of the decision of the Apex Court which has been

referred by the Bombay High Court. Nonetheless, while block assessment is to be made, the Assessing Officer is having knowledge about the statutory provision and while issuing notice he should have mentioned in it about his source of power and should have referred to time which is required to be given for the purpose of filing of return under section 158BC of the Act. The words mentioned in the notice are `within fifteen days' whereas the provision mandates the time of "not less than fifteen days". In view of the decisions of the Supreme Court referred more particularly **New India Industries Ltd.** (supra), we are of the opinion, fifteen days means, clear fifteen days which is the requirement under law. In that view of the matter, we are of the view that the notice which was issued by the authority asking the assessee to file the return within fifteen days is not in accordance with the provisions of the Income-tax Act and therefore it is invalid. In our view, the authority who is issuing the notice must be aware of the Act and must construe the provision strictly. The words `not less than fifteen days' have to be interpreted correctly. In that view of the matter, since the Assessing Officer asked the assessee to file the return within fifteen days of the service of the notice, the notice issued by the Assessing Officer is invalid. We are, therefore, of the opinion that the Tribunal has rightly cancelled the order of the Assessing Officer. The questions referred to us are, therefore, answered in favour of the assessee and against the revenue.

7. In the result, the appeal is dismissed. No order as to costs.

**(K.S.JHAVERI, J.)**

(G.R.UDHWANI, J.)

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