

IN THE HIGH COURT OF JUDICATURE AT PATNA

Appeals against the judgment and orders dated 30.12.2005 passed by Income Tax Appellate Tribunal, Patna Bench, Patna in I.T.A. Nos. 349 (Pat)/2001,373(Pat)/2001, 375(Pat)/2001, 376(Pat)/2001, 348(Pat)/2001,372(Pat)/2001,347(Pat)/2001,374(Pat)/2001,350(Pat)/2001 and 346(Pat)/2001.

Miscellaneous Appeal No.120 of 2006

Mallik Enterprises, 158, Gali Bagichi Wali, Punja Sharif, Kashmiri Gate, Delhi-110 006 through its partner Vijay Kumar Mallik

.... Appellant/s

Versus

Dy. Commissioner Of Income Tax, Spl. Inv. Circle-1, Central Revenue Building, Patna-800 001.... Respondent/s

with

Miscellaneous Appeal No. 134 of 2006

Mallik Enterprises, 158, Gali Bagichi Wali, Punja Sharif, Kashmiri Gate, Delhi-110 006 through its partner Vijay Kumar Mallik

.... Appellant/s

Versus

Dy. Commissioner Of Income Tax, Spl. Inv. Circle-1, Central Revenue Building, Patna-800 001

.... Respondent/s

with

Miscellaneous Appeal No. 138 of 2006

Vijay Kumar Mallik, son of late Indu Lal Mallik. R/O 158, Gali Bagichi Wali, Punja Sharif, Kashmiri Gate, Delhi- 110 006

.... Appellant/s

Versus

Dy. Commissioner Of Income Tax, Spl. Inv. Circle-1, Central Revenue Building, Patna-800 001

.... Respondent/s

with

Miscellaneous Appeal No. 139 of 2006

Vijay Kumar Mallik, 158, Gali Bagichi Wali, Punja Sharif, Kashmiri Gate, Delhi-110 006

.... Appellant/s

Versus

Dy. Commissioner Of Income Tax, Spl. Inv. Circle-1, Central Revenue Building,

Patna-800 001

.... Respondent/s

with

Miscellaneous Appeal No. 140 of 2006

Vijay Kumar Mallik, 158, Gali Bagichi Wali, Punja Sharif, Kashmiri Gate, Delhi-110 006

.... Appellant/s

Versus

Dy.Commissioner Of Income Tax, Spl. Inv. Circle-1, Central Revenue Building, Patna-800 001

.... Respondent/s

with

Miscellaneous Appeal No. 141 of 2006

Mallik Enterprises, 158, Gali Bagichi Wali, Punja Sharif, Kashmiri Gate, Delhi-110 006, through its partner Vijay Kumar Mallik

.... Appellant/s

Versus

Dy.Commissioner Of Income Tax, Spl. Inv. Circle-1, Central Revenue Building, Patna-800 001

.... Respondent/s

with

Miscellaneous Appeal No. 142 of 2006

Vijay Kumar Mallik, son of late Indu Lal Mallik. R/O 158, Gali Bagichi Wali, Punja Sharif, Kashmiri Gate, Delhi- 110 006

.... Appellant/s

Versus

Dy.Commissioner Of Income Tax, Spl. Inv. Circle-1, Central Revenue Building, Patna-800 001

.... Respondent/s

with

Miscellaneous Appeal No. 143 of 2006

Vijay Kumar Mallik, son of late Indu Lal Mallik. R/O 158, Gali Bagichi Wali, Punja Sharif, Kashmiri Gate, Delhi- 110 006

.... Appellant/s

Versus

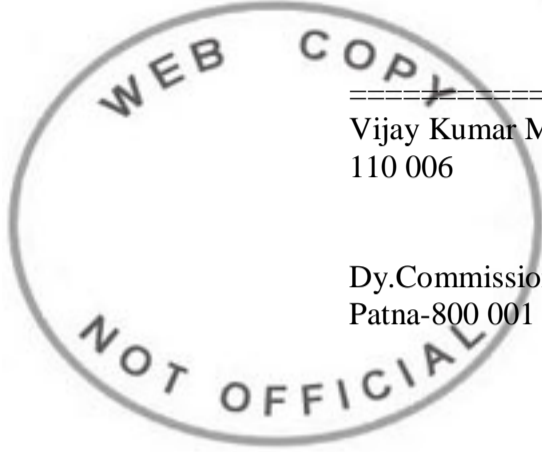
Dy.Commissioner Of Income Tax, Spl. Inv. Circle-1, Central Revenue Building, Patna-800 001

.... Respondent/s

with

Miscellaneous Appeal No. 144 of 2006

Mallik Enterprises, 158, Gali Bagichi Wali, Punja Sharif, Kashmiri Gate, Delhi-110 006



.... Appellant/s

Versus

Dy.Commissioner Of Income Tax, Spl. Inv. Circle-1, Central Revenue Building,
Patna-800 001

.... Respondent/s

with

Miscellaneous Appeal No. 137 of 2006Vijay Kumar Mallik, son of late Indu Lal Mallik. R/O 158, Gali Bagichi Wali,
Punja Sharif, Kashmiri Gate, Delhi- 110 006

.... Appellant/s

Versus

Dy.Commissioner Of Income Tax, Spl. Inv. Circle-1, Central Revenue Building,
Patna-800 001

.... Respondent/s

Appearance :**(In MA No. 120 of 2006)**

For the Appellant/s : Mr. DR.KRISHNA NANDAN SINGH
Mr. Dr.Kamal Deo Sharma

For the Respondent/s : Mr. Harshwardhan Prasad, SCC.
Mr. Rishi Raj Singh, JSC.

(In MA No. 134 of 2006)

For the Appellant/s : Mr. DR. KRISHNA NANDAN SINGH
Mr. Dr.Kamal Deo Sharma

For the Respondent/s : Mr. Harshwardhan Prasad, SCC.
Mr. Rishi Raj Singh, JSC.

(In MA No. 138 of 2006)

For the Appellant/s : Mr. DR. KRISHNA NANDAN SINGH
Mr. Dr.Kamal Deo Sharma

For the Respondent/s : Mr. Harshwardhan Prasad, SCC.
Mr. Rishi Raj Singh, JSC.

(In MA No. 139 of 2006)

For the Appellant/s : Mr. DR.KRISHNA NANDAN SINGH
Mr. Dr.Kamal Deo Sharma

For the Respondent/s : Mr. Mr. Harshwardhan Prasad, SCC.
Mr. Rishi Raj Singh, JSC.

(In MA No. 140 of 2006)

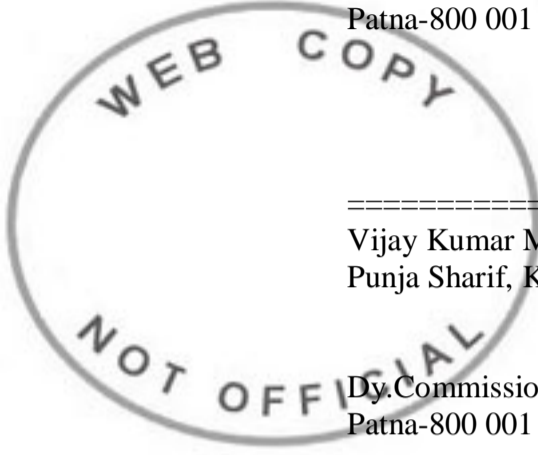
For the Appellant/s : Mr. DR.KRISHNA NANDAN SINGH
Mr. Dr.Kamal Deo Sharma

For the Respondent/s : Mr. Harshwardhan Prasad, SCC.
Mr. Rishi Raj Singh, JSC.

(In MA No. 141 of 2006)

For the Appellant/s : Mr. DR.KRISHNA NANDAN SINGH
Mr. Dr.Kamal Deo Sharma

For the Respondent/s : Mr. Harshwardhan Prasad, SCC.
Mr. Rishi Raj Singh, JSC.



(In MA No. 142 of 2006)

For the Appellant/s : Mr. DR.KRISHNA NANDAN SINGH
Mr. Dr.Kamal Deo Sharma
For the Respondent/s : Mr. Harshwardhan Prasad, SCC.
Mr. Rishi Raj Singh, JSC.

(In MA No. 143 of 2006)

For the Appellant/s : Mr. DR.KRISHNA NANDAN SINGH
Mr. Dr.Kamal Deo Sharma
For the Respondent/s : Mr. Harshwardhan Prasad, SCC.
Mr. Rishi Raj Singh, JSC.

(In MA No. 144 of 2006)

For the Appellant/s : Mr. DR.KRISHNA NANDAN SINGH
Mr. Dr.Kamal Deo Sharma
For the Respondent/s : Mr. Harshwardhan Prasad, SCC.
Mr. Rishi Raj Singh, JSC.

(In MA No. 137 of 2006)

For the Appellant/s : Mr. DR. KRISHNA NANDAN SINGH
Mr. Dr.Kamal Deo Sharma
For the Respondent/s : Mr. Harshwardhan Prasad, SCC.
Mr. Rishi Raj Singh, JSC.

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CORAM: HONOURABLE MR. JUSTICE SHIVA KIRTI SINGH
and
HONOURABLE MR. JUSTICE SHIVAJI PANDEY
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE SHIVAJI PANDEY)
Date: 9.5.2012

All the cases were heard together and are being disposed of by this common judgment as the points involved in all appeals are common.

2. The appeals have been filed under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') against the common judgment and order dated 30.12.2005 passed by the Income Tax Appellate Tribunal, Patna Bench, Patna in

I.T.A. No.349 (Pat)/2001 and analogous appeals.


3. The primary question that has been raised in the present case is whether re-assessment proceedings can be sustained under law when the order of transfer of cases under Section 127 of the Act from New Delhi to Patna vide order dated 31.10.1986 was passed without notice to the appellants and whether it is a substantial question of law in view of the fact that after receipt of the file at Patna, the appellants have appeared and participated in the proceeding without demur. The second question of law that has been raised in the present appeal is that notices issued under Section 148 of the Act have wrongly been treated as served upon the appellants and whether it can be a substantial question of law in view of the fact that appellants actually participated in the proceedings and never raised any such grievance till filing of rectification application under Section 154 of the Act.

4. In Misc. Appeal No. 120 of 2006, 141, 2006, 144 of 2006, 124 of 2006, 138 of 2006, 142 of 2006, 137 of 2006 and 143 of 2006 the common question of law has been raised in connection with non-service of notice under Section 127 of the act as well as under Section 148 of the Act, whereas Misc. Appeal Nos. 139 and 140 of 2006 are confined only to non-service of notice under Section 127 of the Act. Filtering unnecessary facts,

for the purpose of disposal of these appeals, primarily the facts of Misc. Appeal No. 120 of 2006 are taken into consideration for the purpose of deciding questions of law involved in this appeal which cover, by and large, the questions raised in the rest of the appeals.


5. The appellant is a registered partnership firm and was regular assessee dealing in cattle feed and till 12.5.1990 had only two partners having equal share, namely, Smt. Leelawanti and Smt. Sheela Girothra. However, Smt. Leelawanti retired from partnership on 12.5.1990 and Sri Vijay Kumar Mallik joined as equal partner on 13.5.1990 and from 13.5.1990 Smt. Sheela Girothra and Vijay Kumar Mallik were partners till 1.10.1991 when Smt. Sheela Girothra retired from the partnership and ultimately Sri Vijay Kumar Mallik became proprietor of the firm.

6. It appears from the record that the appellant filed return for assessment year 1991-92 showing the taxable income of Rs. 96, 850/- under Section 143 (1)(a) of the Act. On 1/2.2.1993 search and seizure operations took place under Section 132 of the Act. Thereafter a notice under Section 143(2) of the Act was issued to this appellant for furnishing relevant details and papers asked for which were duly complied with. The book of accounts




with supporting vouchers, receipts and other relevant papers were produced before the Assistant Commissioner, Income Tax-ACIT(Inv.), Circle 10(1), New Delhi, the then Assessing Officer. The learned ACIT after going through the accounts, making test checks and verifications of transaction and such other enquiry as he deemed fit and proper, assessed the total income of appellant to the tune of Rs. 1,15,030/- under Section 143(3) of the Act vide order dated 28.3.1994.

7. During the period 1995-96 it came to light that in the Department of Animal Husbandry, Government of Bihar, there was a scam involving allegation of graft and huge money had been swindled by large number of persons who obtained payments without making supply. This came to be commonly known as A.H.D. scam. Later on First Information Report was also lodged by the State of Bihar and on investigation being handed over to the Central Bureau of Investigation, several cases were registered against large number of persons including the proprietor of this firm. As the name of the appellant figured in the A.H.D. scam, he was taken into custody and remained there till 18.8.1997 and thereafter he was released on bail. According to the appellant, Vijay Kumar Mallik was in jail and he had no information of what was going on outside with regard to his




business or other affairs including the legal matters as well as the tax matter connected with the present firm and only later, after release from the jail custody he could know about the pendency of the present proceeding and thereafter representative of the appellant could know about the records relating to the present case. According to the appellant the cases were transferred from New Delhi to Patna Assistant Commissioner of Income Tax, Special Inv. Circle-III, Patna, under Section 127 of the Act without any notice to the appellant vide order dated 31.10.1996.

8. This present case relates to re-assessment proceeding under Section 143(3) read with Section 147 of the Act. The earlier assessment was re-opened due to information about criminal cases by C.B.I. that there was bogus purchase by and non-existent supply to Animal Husbandry Department. It is not in dispute that after the transfer of cases under Section 127 of the Act, a notice dated 21.3.1997 under section 148 of the Act was issued to the appellant. It appears from the record that a further notice dated 8.10.1997 under Section 142 (1) was issued along with questionnaire and date of hearing was fixed for 22.10.1997. There was no compliance on 22.10.1997. A letter was again issued fixing the date of hearing on 16.1.1998. Sri Vijay Kumar Mallik attended the proceeding personally on 15.1.1998. He was asked to



furnish the details as per questionnaire vide letter no.2032 dated 8.10.1997. However, the assessee did not make any compliance. On 29.1.1999 a letter was again issued fixing the date of hearing on 5.2.1999. In the meantime since there had been absolutely no compliance made by the assessee Sri S.C. Sannigrahi representative of assessee appellant was asked to show-cause in view of non-compliance on the part of the assessee in terms of notice dated 8.10.1997 under Section 142(1) of the Act, as to why it should not be held that actually no supply had been made to AHD, Bihar, Patna against the payment received from it and why whole amount of receipt should not be treated as income and also why assessment should not be completed on best judgment under Section 144 of the Act. On 12.2.1999 a written submission was filed in which it has been stated that the show-cause notice was based on a charge-sheet of the Central Bureau of Investigation which is yet to be proved. It had been further stated that nothing was proved against the assessee and as such the opinion regarding the purchase could not be a basis for assessment or re-assessment.


9. In this proceeding before the Assessing Officer the appellant did not raise an issue about non-receipt of notice as provided either under section 127 or section 148 of the Act which provides that the Assessing Officer shall serve notice on the



assessee requiring him to furnish the details within a specified period as per the notice. It is relevant to notice that the appellant assessee on the first day appeared himself. Later on his representative Shri S.C. Sannigrahi represented his case before the Assessing Officer. After consideration of the materials on record and relevant facts, the Assessing Officer made an assessment for total income of Rs.96,71,302 /-.

10. Against the assessment order passed by the Deputy Commissioner of Income Tax as Assessing Officer, an appeal was filed before the Commissioner of Income Tax. The Commissioner of Income Tax held that the entire receipts from AHD have been treated as an income of the appellant by Assessing Officer relying upon various statements and documents without confronting the same to the appellant. This was against the principles of natural justice. The appellate authority partly allowed the appeal but in the matter of issue of notice, the appellate court has held that the reasons have been properly recorded before issuance of notice under Section 148 of the Act and accordingly that point was rejected but the order of assessment was set aside.


11. Being aggrieved by the order of the Commissioner of Income Tax in appeal, the Assessing Officer filed an appeal before the Income Tax Appellate Tribunal, Patna raising the point




that first appellate court had fallen in error in setting aside the order of assessment including charging of interest. It was further challenged that the appellate authority has wrongly held that the charging interest under sections 134A and 134B of the Act as provided under Section 147 of the Act was not regular and the appellate court was not justified in setting aside the assessment on the ground that the assessee failed to comply with notice under Section 142(1) of the Act.

12. While the matter was pending before Appellate Tribunal the Assessing Officer on remand proceeded in the matter and issued notices under Section 142(1) of the Act again on 8.10.2001 on the direction of the Appellate Authority and made assessment vide order dated 31.3.2003, made total assessment of income as Rs.98,98,296/- and raised a total demand of Rs.1,03,68,829.

13. The appellant being aggrieved by the order dated 31.3.2003 moved before the Commissioner of Income Tax Patna. The records disclose the following:- The appellant on 29.12.2004 filed an application under Section 154 of the Act for rectification of the appellate order dated 31.5.2001 alleging that it was silent on some of the points raised. The Commissioner of Income Tax (Appeals)¹ called for comments from the Assessing Officer vide letter dated 28.12.2004 and 10.1.2005. The letter dated



28/31.12.2004 was replied by letter dated 5.1.2005. Through a letter dated 10.1.2005 it was directed to produce the proof of service of notice under section 148 of the Act dated 31.3.1997 (it should be 21.3.1997) and also to produce the order passed under Section 127 of the Act. The commissioner of Income Tax at Patna dismissed the petition holding that there was no mistake apparent from the records. In the proceeding under section 154 of the Act, for the first time the assessee raised a question about the jurisdiction of Assessing Officer, on the plea of violation of the provisions of Sections 127 and 148 of the Act claiming that the aforesaid provisions are mandatory in nature. Altogether 11 appeals were filed before the Tribunal either from the side of the appellant or revenue and by a common order the appeals filed by the assessee-appellant were dismissed whereas the appeals filed by the revenue were allowed. Before the Tribunal the appellant raised the point of notice under sections 127 and 148 of the Act. Standing Counsel of Revenue drew the attention of the Tribunal that notice under sections 127 and 148 of the Act were issued and served upon the appellant. In that context he quoted the paragraph of the letter dated 12.2.1999 written by appellant assessee to Assessing Officer which shows that appellant had full knowledge of notices issued under section 148 of the Act. The appellate



tribunal after analysis of evidence brought on record, gave a finding of fact that notice issued under section 148 of the Act was served upon the appellant assessee. In the background of aforesaid finding of fact this Court has to examine as to whether there is any substantial question of law involved in the present case.

14. In view of the aforesaid facts and circumstances the appellant has raised the point that the whole re-assessment proceeding initiated by the revenue is completely illegal as no notice was served as provided under section 127 of the Act for transfer the cases from Delhi to Patna. Further submission is that it was mandatory for the department not only to issue the notice under Section 148 of the Act but to prove that notices were served upon the assessee and as per submissions, these two flaws go to the root of the matter and on that account the whole proceeding stands vitiated from the stage of re-assessment proceeding under Section 147 of the Act upto the order passed by the Appellate Tribunal.

15. The appeal has been filed under Section 260A of the Act before this Hon'ble Court which runs as follows:

“ 260A. Appeal to High Court.- (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal [before the date of establishment of the National Tax Tribunal], if the High Court is satisfied that

the case involves a substantial question of law.

(2) The Chief Commissioner or the Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be-

(a) filed within one hundred and twenty days from the date on which the order appealed against is [received by the assessee or the Chief Commissioner or Commissioner]

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involved such question.

5. The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which-

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1)]


(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of



appeals under this section]”

16. It appears from sub-section (3) and sub section (4) of Section 260A of the Act that this Court will admit the memo of appeal subject to the condition that a substantial question of law has arisen. Every question of law can not be treated as a substantial question of law. It can take the shape of substantial question of law when it relates to a material issue and will affect the outcomes. Section 260A of the Act is pari materia with Section 100 of the Code of Civil Procedure. In terms of section 260A of the Act or 100 of the Civil Procedure Code this Court will accept an appeal only when substantial question of law has arisen. Substantial question of law has not been defined under the Act or the Civil Procedure Code but there are large number of judgments of Hon'ble Supreme Court which have defined and categorized as to when a question of law can be treated as a substantial question of law.


17. The Hon'ble Supreme Court has in several cases considered the parameters as to when a question of law will take the shape of substantial question of law. In the case of **Santosh Hazari V. Purushottam Tiwari, reported in (2001) 251 I.T.R. 84**, the Hon'ble Supreme Court has held that where a question of law is involved and such question of law is substantial one, it will



qualify to be a substantial question of law in given circumstances. “Substantial” means having a substance, essential, real, of sound worth, important or considerable. It has been further held that it is to be understood as something in contradiction with technical, of no substance or consequence or merely academic. The Hon’ble Supreme Court has further held that it does not mean substantial question of law of general importance, but a substantial question of law which was involved in the case between the parties. Their Lordships have relied on different judgments and have approved the judgment of Madras High Court in the case of **Rimmalapudi Subba Rao Vs. Noony Veeraju [1951] AIR 1951 Mad 969; ILR 1952 Mad 264 (FB)** and quoted some parts in extenso which are as follows:

“..... When a question of law is fairly arguable, where there is room for difference of opinion on it or where the court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand, if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law.” And laid down the following test as proper test, for determining whether a question of law raised in the case is substantial (page 1318):


“ The proper test for determining whether a question of law raised in the case is substantial



would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the right of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.”

18. While dealing with what is a “substantial question of law” their Lordships have held that a point of law which admits of no two opinions may be a proposition of law but can not be a substantial question of law and dealing with this question quoted in affirmance the judgment of **Dy. Commissioner Hardoi Vs. Rama Krishna Narain and others, A.I.R. 1953 SC 521** which has held as follows:

“ A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be “substantial”, a question of law must be debatable, nor previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law “involved in the case” there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High



Court is not a question involved in the case unless it goes to the root of the matter, it will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.”

From the analysis of the aforesaid judgments it is apparent that every question of law can not be a substantial question of law. The question of law will take shape of a substantial question of law only when it is a substantial one. In this case the Court has made a distinction amongst question of law, substantial question of law and substantial question of general importance.

19. Another judgment of apex Court dealing with Section 260A of the Act, in the case of **M. Janardhana Rao Vs. Joint Commissioner of Income-Tax, reported in (2005) 273 I.T.R. 50** has also considered as to under what circumstances a question of law will be treated as a substantial question of law. The Court has held that while admitting the appeal the High Court shall have to formulate the question and under Section 260(A) (4) of the Act, the appeal is to be heard on the question formulated under Section 260A (3) of the Act. The Court has further held that the appeal to the High Court lies only when a substantial question of law is

involved and has laid down the test to determine whether a substantial question of law is involved and categorized the test in the following terms:

“An appeal under section 260A can be only in respect of a ‘substantial question of law’. The expression ‘substantial question of law’ has not been defined anywhere in the statute. But it has acquired a definite connotation through various judicial pronouncements. In *Sir Chunilal V. Mehta and Sons Ltd. v Century Spinning and Manufacturing Co. Ltd.*, AIR 1962 SC 1314 this court laid down the following tests to determine whether a substantial question of law is involved. The tests are ; (1) whether directly or indirectly it affects substantial rights of the parties, or (2) the question is of general public importance, or (3) whether it is an open question in the sense that the issue is not settled by pronouncement of this court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, and (5) it calls for a discussion of alternative view. There is no scope for interference by the High Court with a finding recorded when such finding could be treated to be a finding of fact.”

20. In the case of **Panchugopal Barua and others V. Umesh Chandra Goswami and others**, reported in AIR 1997 SC 1041, the Supreme Court has considered the scope of Section 100 of the Code of Civil Procedure to hold that the scope for the High Court to entertain a second appeal after 1976 Amendment is confined only to such appeal which involves a substantial question of law, specifically set out in the memo of appeal. Of course proviso of section shows that nothing shall be deemed to

have been taken away or vary power of the High Court to hear, for the reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if the court is satisfied that such question of law is a substantial question of law.

21. In another judgment of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax V. Dr. Ashok Jain, reported in (2005) 275 I.T.R. 350** the court refused to admit the appeal on the ground that the question of law set forth did not satisfy the test of substantial question of law within the meaning of Section 260A of the Act.

22. In view of the aforesaid settled proposition of law, it is very much clear that this Court has to admit this appeal only in the circumstance when it will be found that substantial question of law has been raised in terms of section 260A of the Act. As explained hereinabove the test of substantial question of law has been given by different judgments of the Hon'ble Supreme Court and on that touch stone this court will have to examine the scope of this case vis-à-vis the requirement of substantial question of law.

23. In the present case primarily the appellant has raised the point that before passing the order of transfer under Section 127 of the Act the appellant was not given notice, the order does

not contain any reason whatsoever for such transfer and as such the transfer order which led to re-assessment proceeding is completely illegal.

24. Further the appellant has raised a grievance that in view of the language used, Section 148 of the Act requires that not only notice will be issued but it must be served on the appellant. In order to appreciate the para meter of Sections 127 and 148 of the Act it is better to quote the same:

“127. Power to transfer cases.- (1) The Director General or Chief Commissioner or Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more Assessing Officers subordinate to him (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) also subordinate to him.

2. Where the Assessing Officers or Assessing Officers from whom the case is to be transferred and the Assessing Officer or Assessing Officers to whom the case is to be transferred are not subordinate to the same Director-General or Chief Commissioner or Commissioner.-

(a) where the Directors-General or Chief Commissioners or Commissioners to whom such Assessing Officers are subordinate are in agreement, then the Director-General or Chief Commissioner or Commissioner from whose jurisdiction the case is to be transferred may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, pass the order;

(b) where the Directors-General or Chief Commissioners or Commissioners aforesaid are not in agreement, the order transferring the case may,

similarly, be passed by the Board or any such Director-General or Chief Commissioner or Commissioner as the Board, may, by notification in the Official Gazette, authorize in this behalf.

(3) Nothing in sub-section (1) or Sub-section (2) shall be deemed to require any such opportunity to be given where the transfer is from any Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) and the officers are situated in the same city, locality or place.

(4) The transfer of a case under sub-section (1) or sub-section (2) may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Assessing Officers or Assessing Officers from whom the case is transferred.

Explanation.- In section 120 and this section, the word "case" in relation to any person whose name is specified in any order or direction issued thereunder, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commenced after the date of such order or direction in respect of any year.]

148. Issue of notice where income has escaped assessment.- (1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed, and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

Provided that in a case-

(a) where a return has been furnished during

the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and

(b) subsequently a notice has been served under sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to sub-section (2) of section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, reassessment or re-computation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice:


Provided further that in a case- (a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to clause (ii) of Section (2) of section 143, but before the expiry of the time limit for making the assessment, re-assessment or re-computation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.

(Explanation.- For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section)

The Assessing Officer, shall, before issuing any notice under this section, record his reasons for doing so.


25. It is apparent from the provisions of Section 127 of the Act that before passing the order under section 127 of the Act, the Director General or Chief Commissioner or Commissioner was required to give the appellant a reasonable opportunity of



being heard in the matter. Similarly Section 148 of the Act provides that the Assessing Officer shall serve a notice on assessee. The contention that has been raised by the appellant is that admittedly no hearing was given as provided under section 127 of the Act and there is no evidence on record to show that a notice under Section 148 of the Act has been actually served upon the appellant.

26. In support of his contention, learned counsel for the appellant has relied on the judgment in the case of **Y. Narayana Chetty and another V. Income-Tax Officer, Nellore and others, reported in (1959) 35 I.T.R. 388**. In this case the Court has held that notice prescribed under Section 34 of the Indian Income-Tax Act, 1922 (Old Act) for the purpose of initiating re-assessment proceeding is not a mere procedural requirement, the service of the prescribed notice on the assessee is a condition precedent to the validity of any re-assessment under Section 34 of the Old Act and has held in the following terms:

“ The argument is that the service of the requisite notice on the assessee is a condition precedent to the validity of any re-assessment made under section 34; and if a valid notice is not issued as required, proceedings taken by the Income-tax Officer in pursuance of an invalid notice and consequent orders of re-assessment passed by him would be void and inoperative. In our opinion, this contention is well-founded. The notice prescribed by section 34 cannot be




regarded as a mere procedural requirement; it is only if the said notice is served on the assessee as required that the Income-tax Officer would be justified in taking proceedings against him. If no notice is issued or if the notice issued is shown to be invalid then the validity of the proceedings taken by the Income-tax Officer without a notice or in pursuance of an invalid notice would be illegal and void. That is the view taken by the Bombay and Calcutta High Courts in *Commissioner of Income-tax v. Ramsukh Motilal and R.K. Das & Co. vs. Commissioner of Income-tax* and we think that that view is right.”

In this case notices were issued to assessee under section 34 of the Act and they participated in the proceeding. The Hon’ble Supreme Court rejected the contentions in the following term:


“Besides, in the present case, the main appellant has in fact been served personally and the other partners who may not have been served have made no grievance in the matter. We are, therefore, satisfied that it is not open to appellants to contend that the proceeding taken by the Income Tax Officer under Section 34(1) (A) are invalid in that notices of these proceedings have not been served on the other alleged partners of firms.”

27. So the Hon’ble Supreme Court rejected a similar plea, as one assessee appeared in the proceeding and other partners did not raise any grievance. The Hon’ble Supreme Court in the case of **Ajantha Industries and others V. Central Board of Direct Taxes and others, reported in (1976) 102 I.T.R. 281** has




considered the requirement of Section 127(1) of the Act. The Hon'ble Supreme Court has further held that non-communication of the reason in the order passed under section 127(1) of the Act is a serious infirmity, the order was invalid and the Court has held that requirement of recording reasons under Section 127(1) of the Act is mandatory under the law and non-communication thereof to the assessee is not saved by showing that the reasons exist in the file although not communicated to the assessee and accordingly held that the order passed under section 127(1) of the Act suffers from serious infirmity and accordingly the order of transfer was quashed. It is apparent from this judgment that the order of transfer was challenged at the initial stage before submitting to the jurisdiction of the assessing authority and in that context the Hon'ble Supreme Court quashed the order of transfer.

28. Learned counsel for the appellant has further relied on another judgment in the case of **R.K. Upadhyaya v. Shanabhai P. Patel, reported in (1987)166 I.T.R. 163**. There the Court was considering the scope of Sections 148, 149 and 34 of the Act. In this case the appellant has challenged the service of notice under section 148, claiming that it was issued but there is no proof of its service. While dealing with the matter the Court has made a distinction between the issue of notice and service of




notice. The Court has held that once notice has been issued within the period of limitation, jurisdiction becomes vested in the Income-tax Officer to proceed to reassess. Section 148(1) provides for service of notice as a condition precedent for initiating the process of reassessment. The initial requirement of issue of notice is satisfied when the notice is actually issued. In the present case, as noted earlier, the appellant has never challenged the issuance of notice rather he appeared and submitted to the jurisdiction of the assessing authority without any demur and he has taken chance not only before the assessing authority rather also before the appellate authority. Objection to jurisdiction must be taken at the earliest which was not done in this case. There is not only a valid presumption of service of notice in this case but also a positive finding made by the Tribunal. In the facts of the case, such finding can not be ignored in exercise of powers under Section 260A of the Act.

29. The appellant has relied on the judgment of Allahabad High Court in the case of **Vinay Kumar Jaiswal and others V. Commissioner of Income-Tax and others, reported in (1996) 221 I.T.R. 568**. In this case the scope of Section 127(2) of the Act was under consideration. The Hon'bel Supreme Court has held that a notice has to be given under Section 127 of the Act



whenever it is proposed to transfer a case from one officer to another and it must briefly indicate the reasons for the proposed transfer, since otherwise the assessee would not know on what basis it is proposed to be transferred and would not be able to meet the said notice. The mere filing of objections by the assessee can not meet the requirement of Section 127 of the Act and the order passed under section 127 of the Act was liable to be set aside. In the present case the fact is different. In that case only objection was filed but in the present case there is a assessment order and the order of the appellate authority and as such the facts of the judgment of the Allahabad High Court are different to the present case. In this case a simple contention was raised that there was no order passed under Section 127 of the Act, as noted by the Tribunal in paragraph 7 of the order under appeal. In reply the Revenue succeeded in showing the existence of such order. It is then that point of no notice was perhaps sought to be raised in rectification application under Section 154 of the Act.

30. This Bench has decided similar issue of jurisdiction of Assessing Officer on transfer of case. Similar issue (in the case of ITC Limited Vs. State of Bihar & others in Miscellaneous Appeal No. 592 of 2007 decided on 18th January, 2012) was raised in which also case was transferred from one Assessing Officer to



another Assessing Officer under Bihar Finance Act, 1981. The ground of challenge to the jurisdiction was alleged vagueness and omnibus nature of order of transfer. In that case the case was transferred under Section 9 (5) of the Bihar Finance Act and the point was raised that the Commissioner had a power to direct transfer of case from one authority to another authority but it must relate to a specific proceeding and that if the transfer was omnibus transfer without any specification, the whole order of transfer was bad. This Court considered the judgment in the case of **Pannalal Binjraj Vrs. Union of India, reported in AIR 1957 SC 397** in which the Hon'ble Supreme Court has held that at a belated stage the issue of jurisdiction can not be allowed to be raised. This Court refused to entertain the objection and rejected the same by holding that the jurisdictional point should be raised at the earliest opportunity and can not be allowed to be raised after decision by final court of facts or even before the appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and accordingly the appeal was dismissed.

31. A case of no order under Section 127 or no issue of notice under Section 148 will stand at a different footing. In such cases there will be total lack of jurisdiction. But in the present

case the facts are different. Defects in order or in service of notice require scrutiny of facts on the basis of objections raised at the appropriate stage. Appellant avoided to do the needful. Now only questions of law can be looked into.

32. In the present case also as explained hereinabove the appellant has taken point of notice not before the assessing officer or appellate authority but at a belated stage by filing application under Section 154 of the Act which has a very narrow scope. The assessee himself participated all through without any demur and did not invite required scrutiny of evidence/materials as they might have existed then. This Court does not find the points raised by the appellant to involve any substantial question of law.

33. Hence all these appeals are dismissed at the stage of hearing under Order 41 Rule 11 of the Code of Civil Procedure.

(Shivaji Pandey, J)

Shiva Kirti Singh, J. I agree.

9th May, 2012.

(Shiva Kirti Singh, J)

Vinay/-