Before M. M. Kumar & Ajay Kumar Mittal, JJ.

HIND SAMACHAR LIMITED THROUGH KULTAR KRISHAN,—*Petitioner*

versus

UNION OF INDIA AND OTHERS,—*Respondents*

C.W.P. No. 2715 of 2006
11th March, 2008

Income Tax Act, 1961—Ss. 139(9), 140(c) & 292—B—Constitution of India, 1950—Art. 226—Income Tax return of company signed by an authorized signatory—Authorized signatory neither M.D. nor Director of company as provided by S. 140(c)—Income Tax authorities declaring return as invalid and ordering to withdraw interest and refund—Company re-filing its return duly signed by Chairman-cum-M.D. which was acknowledged in income tax office—CIT (Appeals) reversing order holding non-signing of return by person mentioned in S. 140 a curable defect—Assessing Officer affording an opportunity to remove defect in return—Company already filing return duly signed by its M.D.—Claim for refund—Denial of—S. 239 provides that no claim for refund can be made after expiry of one year from last day of assessment year—Whether claim of company barred by provisions of S. 239 of 1961 Act—Held, no— Assessing Officer failing to raise any issue with regard to plea of S. 239 at appropriate stage— Having remanded the case by CIT(A) for purposes of getting defect cured and give effect to that order department could not raise a new plea inconsistent with remand order—Assessee removing the defect, thus, return could not be held to be non-est or invalid—Petition allowed directing respondent to refund amount to assessee in accordance with law.

Held, that a return of income filed by a Company which is signed and verified by a person other than the one authorized under the Act, the return in such circumstances shall be treated to be defective which shall be amendable to the provisions of Sections 292B and 139(9) of the Act. The Assessing authority in such circumstances shall provide an opportunity

under Section 139(9) before treating the same to be invalid and non-est. However, a different situation would arise where a return is not signed and verified at all. The question of removal of defect in such a situation does not arise as the defect goes to the very root and jurisdiction of the validity of the return.

(Para 32)

Further held, that the assessee was afforded an opportunity to remove the defect in the return under the provisions of the Act and the assessee having fulfilled the same, the return could not be held to be non-est or invalid. The return having been held to valid, the initiation of proceedings under Section 154 of the Act could not be taken recourse to.

Para (35)

Further held, that the Assessing Officer having failed to raise any issue with regard to the plea of Section 239 of the Act at appropriate stage and the CIT (A) having remanded the case for purposes of getting the defect cured and to give effect to that order, could not raise a new plea inconsistent with the remand order. Still further, in the present case, the provisions of Section 240 of the Act would be attracted where-under an obligation is cast upon the Revenue to refund the amount to the assessee without having to make any claim in that regard in cases of refund arising on account of appeal or other proceedings under the Act. The contention of the Revenue is thus rejected being meritless.

(Para 37)

Sanjay Bansal, Sr. Advocate with Parvesh Saini, Parshant Bansal and S. K. Mukhi, Advocates *for the petitioner.*

Sanjiv Bansal, Advocate, *for official respondents.*

Akshay Bhan, Advocate, *for the private respondents.*

AJAY KUMAR MITTAL, J.

(1) This order will dispose of three writ petitions and two Income-tax appeals, as the facts and the question of law involved is common in

all these matters. The controversy is between the Hind Samachar Limited, Jalandahr City, an assessee within the purview of the Income Tax Act, 1961 (for short "the Act") and the Income-tax Department. The writ petitions (CWP Nos. 2715, 2652 and 16063 of 2005 relating to the assessment years 2000-01, 2001-02 and 2002-03 respectively have been filed by the assessee whereas the appeals (ITA Nos. 534 and 535 of 2006) relating to assessment years 2000-01 and 2001-02 respectively have been preferred by the Income Tax Department.

(2) For the purpose of this order, the facts have been taken from C.W.P. No. 2715 of 2006 (assessment year 2000-01). As per averments made in the petition, the assessee filed its return of income on 30th November, 2000 (Annexure P-3) declaring an income of Rs. 31,71,87,310 wherein it made a claim for refund in the sum of Rs. 50,26, 733. The verification to this return was signed by one Kultar Krishan (who is neither the Managing Director nor the Director of the petitioner-company). According to the petitioner, Kultar Krishan signed the verification in the capacity of an authorized signatory which authority had been bestowed on him by virtue of a resolution passed by the Board of Directors of the petitioner company in its meeting held on 1st April, 1998. The assessing officer after processing the return under Section 143(1) of the Act, computed the refund payable to the petitioner in the sum of Rs. 60,54,511 (Rs. 49,83,144 + Rs. 10,71,367 on account of interest payable under Section 244A of the Act). The assessing authority wrote a letter dated 18th July, 2003 (Annexure P-6) to the petitioner company, addressed to Kultar Krishan pointing out that since he had signed the return as authorized signatory of the petitioner-company, he should furnish the said authorization for their record. Kultar Krishan was further required to specify the provision of the Act under which he had signed the return of income. The requisite information was required to be furnished on 23rd July, 2003 i.e. within four days of the date of the letter Annexure P-6. Just less than a fortnight, the assessing officer issued a notice dated 29th July, 2003 (Annexure P-7) under Section 154 of the Act on the petitioner-company requiring it to justify the genuineness/validity of the return. While doing so, it was stated with reference to the return that since the authorized signatory (Kultar Krishan) who signed the verification in the return did not fall in the category of persons authorized to sign the return of income under Section 140(c) of the Act, the return in question was not valid.

(3) The notice Annexure P-7 experienced a sharp reaction from the petitioner. In response to the above notice, the petitioner wrote three letters to the assessing officer, dated 8th August, 2003, 30th September, 2003 (both marked as Annexure P-8) and dated 7th October, 2003 (Annexure P-9). By communication Annexure P-8, it was conveyed by the petitioner that it was absolutely due to unavoidable circumstances that the return had to be signed by Kultar Krishan. It was mentioned that owing to an impasse going on in the Board of Directors of the company, a resolution dated 1st April, 1998 (Annexure P-5) was passed duly authorizing aforesaid Kultar Krishan to sign and file the return on behalf of the petitioner-company. It was further stated that the issue of the deadlock in the Board of Directors was pending before the Company Law Board in Company Petition No. 76 of 1999. With a view to make the controversy more explicit, all that was stated is reproduced here in verbatim :—

> "That the return was signed by Shri Kultar Krishan under the power and the authority given by the Board of the Company (supra) in view of the exceptional, unavoidable circumstances so as to comply with the necessary legal and statutory formalities and obligations. Shri Kultar Krishan has been authorized to sign and file on behalf of the company, *inter alia*, for taxation matters which as per legal advice, included signing and filing the return. There being a reasonable cause to do the same, there being a deadlock in the management, this was done to comply with the legal provisions. The return was duly processed and the assessee has received the refund order too.
>
> That the signing of the return by Shri Kultar Krishan is only a technical defect, if any, and in fact all efforts have been made for the necessary compliance of the legal requirements of filing the return with the Department and for paying the legitimate taxes on the basis of all the information available and to disclose all the affairs, the return was filed on time. Hence it is a case of signing and verifying and filing the return and making the necessary compliance and not the case of avoidable escapement of the process of law and the legal formalities as required by the Department. Thus there is no mistake apparent from record.

Further, since the return has been processed and even the refund has been received, the return not having been signed by the Managing Director but by Shri Kultar Krishan may be taken as a technical defect, if at all, under the above said circumstances and be construed liberally in the interest of justice. In case you feel that even this technical defect, if at all, should be removed, an opportunity may be allowed to us to rectify the same. For this purpose, the Director or even the Chairman-cum-Managing Director can attend to sign the return under question."

(4) In letter dated 30th September, 2003 (Annexure P-8), the petitioner while repeating the same stand, added further that due to deadlock in the Board of Directors and pendency of the matter before the Company Law Board, the petitioner company was advised in the manner noticed below.

> "In this connection, we were advised that given the extraordinary circumstances leading to unavoidable reasons wherein Managing Director or any other Director is unable to sign or verify the return, a person unanimously authorized by the Board of Directors to Act on behalf of the company may do the needful."

(5) In the above context, reference to certain judicial enunciations and the bare provisions of the Code of Civil Procedure on the subject was also made, which shall be referred to at the appropriate place, if so at all required. It was urged with vehemence that even if the issue being talked about in the instant matter is viewed by applying the para meters of the relevant provisions of the Code of Civil Procedure, the non-signing of the return by the Managing Director or any other Director is at best a curable defect. This defect is curable by the assessing officer by calling upon the assessee to rectify the defect in the signatures in the return. A prayer was thus made that in view of the aforesaid circumstances and in the light of the judicial verdicts including that of the Apex Court, no action be taken to hold that the return for the aforesaid assessment year was invalid. Further prayer was made that an opportunity may be afforded to the petitioner to rectify the aforesaid defect. Through yet another communication (Annexure P-9) the same prayer was re-iterated.

(6) Notwithstanding the above facts when the issue was yet pending, the petitioner-company re-filed its return for the same assessment year along

with letter dated 13th October, 2003 which was acknowledged in the income-tax office on 26th February, 2004, (Annexure P-10) which, according to it, had been duly signed by the Chairman-cum-Managing Director of the petitioner. With this, the petitioner pleaded that the defect as pointed out by the assessing officer in the return under reference stood rectified.

(7) The assessing officer did not pay any heed to the pleas made by the petitioner that the non-signing of the return of income by the Managing Director as provided by Section 140(c) of the Act was a technical and curable defect in view of the provisions of Section 139(9) of the Act. Following the judgments relatable to the controversy, the return earlier filed by the petitioner was declared as invalid being void-*ab initio* by order dated 27th July, 2004 (Annexure P-11) passed in exercise of its power under Section 154(6) and 244A(3) of the Act. Consequently, the interest paid in the sum of Rs. 10,71,367 and the refund of Rs. 49,83,144 were ordered to be withdrawn.

(8) Dissatisfied with the impugned action of the respondents (Annexure P-11), the petitioner preferred appeal. The Commissioner of Income Tax (Appeals) Jalandhar [hereinafter to be referred to as "CIT(A)"] after considering various legal aspects and the judgments on the point and by placing reliance on Section 292B of the Act held that if the return is not signed by the person mentioned in Section 140 of the Act, it is only a curable defect, reversed the order (Annexure P-11),—*vide* order dated 9th September, 2004 (Annexure P-12). The operative part of the appellate order deserves to be and is noticed hereunder.

> "I have considered all the decisions submitted by counsel in support of his view that the return filed was not invalid. After going through all the decisions and relevant record, I am of the considered opinion that after the introduction of section 292B, if the return of income is not signed by the person mentioned in section 140, it is only a curable defect and a notice for curing the defect has to be given and the return not be treated as invalid just like that. In the present case, the case is strongly in favour of the assessee as the action taken u/s 154 is beyond the provisions of law. Accordingly, the order u/s ..... sic. is quashed.

The order u/s 154 for the asstt. year 2000-01 having been passed on identical facts is also quashed.

In the result, the appeals for both the years i.e. 2000-01 and 2001-02 are allowed."

(9) The averments in the petition further proceed on the premise that in order to give effect to the appellate order (Annexure P-12), the assessing authority issued notice dated 25th November, 2004/1st December, 2004 (Annexure P-13) to the petitioner requesting as under :

"it is clear that the return filed by you is defective and as such you are requested to remove the defects for necessary action at this end."

(10) The petitioner in turn responded to letter Anexure P-13 and wrote a letter dated 8th December, 2004 (Annexure P-14) to the assessing authority that after the defect in the return had been held to be a curable defect, a notice was required to be issued to it by the assessing authority to remove the alleged defect. The petitioner, however, reminded the assessing officer that even though no such notice had been issued to it, a return form duly signed by its Managing Director had already been filed which stood acknowledged in the office of the assessing officer on 26th February, 2004 and by doing so, the defect stood cured. The assessing authority by another letter dated 1st February, 2005 (Annexure P-15) addressed to the Principal Officer of the petitioner-company complained on non-compliance of what was asked for,—*vide* letter Annexure P-13 and once again requested the petitioner to remove the defect in the return. *Vide* Annexure P-16, the petitioner re-iterated the same version as reflected in Annexure P-14.

(11) The assessing authority finally reject all pleas raised by the petitioner,—*vide* order dated 2nd May, 2005 (Annexure P-1) whereby the respondents refused to entertain the claim made by the petitioner for refund, on the ground of the same having not been in order, inasmuch as the same was held to be beyond the permissible time limit fixed under the Act. It was stated in the order Annexure P-1 that notwithstanding the fact that the CIT(A) had held that defect under reference was a curable defect, the claim for issue of refund could not be entertained. It was further observed that in the aforesaid facts and circumstances, the petitioner was not eligible for

refund even after the order under Section 154 of the Act (Annexure P-11) had been quashed by the CIT(A). The petitioner lodging strong protest against the order rejecting its claim, submitted,—*vide* letter dated 18th July, 2005 (Annexure P-2) that the order Annexure P-1 was contrary to law and violative of the appellate order passed by the CIT(A). It was further stated that the same had been issued in complete violation of the principles of natural justice. A prayer was thus made on behalf of the petitioner to withdraw order Anexure P-1 and for issue of relevant refund voucher.

(12) Thereafter a communication dated 25th August, 2005, Annexure P-17, was sent to the Principal Officer of the petitioner-company by the office of the Additional Commissioner of Income Tax, Range-III, Jalandhar pointing out some differences in figures against certain items contained in the return for the assessment year 2000-01 requesting him to produce relevant documents in his office. The petitioner responded the letter (Annexure P-17),—*vide* letter dated 29th August, 2005 (Annexure P-18). The petitioner attached with the petition a copy of resolution dated 1st April, 1998 (Annexure P-19) whereas another copy of the same resolution is also available on record as Annexure P-5.

(13) It is primarily this order (Annexure P-1) which has been sought to be quashed in the instant writ petition (CWP No. 2715 of 2006). Similar challenge has been made by the petitioner in the other two writ petitions pertaining to rest of the assessment years. Now it would be apt to notice the stand of the respondents in the written statement. In the written statement filed on behalf of the respondent all that has been stated is the repetition of the facts and the objection regarding petitioner's claim for refund being beyond the time mentioned in the Act. By referring to provisions of Section 239 of the Act, it was stated that no claim for refund can be made after the expiry of one year from the last day of the assessment year. An endeavour was made to justify the refusal of petitioner's claim on this court by stating that the claim for refund could validly be made up to 31st March, 2002 only but, since the verification on the return filed on 30th November, 2000 and signed by Kultar Krishan, was made by the Managing Director only on 8th March, 2005 the petitioner's claim for refund was beyond the time specified in Section 239 of the Act even though the pointed defect had been removed. In other words, it was plainly stated that notwithstanding the orders passed by the appellate authorities in favour of

the assessee, the return filed by the petitioner could not be considered to be a valid return in the eye of law. It was reiterated that the claim for refund was governed by a separate and independent provision of the Act (Section 239) and the assessee had failed to fulfil the conditions specified therein and, therefore, the refund was rightly declined to the petitioner.

(14) Adverting to appeals, it needs be mentioned that ITA No. 534 of 2006 filed under Section 260A of the Act by the Department, has arisen out of the order, dated 12th May, 2006 (Annexure P-III) passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (for short "ITAT"). It requires a specific reference that the Income Tax Department filed appeal against the order of the CIT(A). The ITAT concurred with the view taken by the CIT(A) and consequently dismissed the appeal by order Annexure P-III. The order impugned in ITA No. 535 of 2006 (relating to assessment year 2001-02) is also the same as in ITA No. 534 of 2006.

(15) Surprisingly, it deserves to be noticed that the appeals filed on behalf of the Revenue which were filed at a later point of time than the time during which written statements were filed by them to the writ petitions, there is not even a slightest whispering not to talk of a specific plea that the claim for refund was invalid being beyond the time specified in Section 239 of the Act, which, as stated already, provides that no claim for refund can be made after the expiry of one year from the last day of the assessment year. Challenge made by the Revenue to the orders passed by the appellate authorities including that of the assessing officer, in the appeals in hand is primarily on the ground that the whole approach adopted by the authorities under the Act that the defect in the return was a curable defect and the return could not be treated as invalid, was misconceived. It has been further stated that the view taken by the authorities is against the spirit of the observations made in various enunciations of this Court as well as the Apex Court.

(16) According to the contention raised on behalf of the Revenue (i.e. the appellant in the appeals), the order of the ITAT gives rise to the following substantial question of law and the appeals were admitted for the consideration of this substantial question of law by this Court.

> "Whether in the facts and circumstances of the case the Tribunal was right in law in dismissing the appeal of the Revenue thereby confirming the order of the Commissioner of Income Tax (A)

ignoring the provisions of section 140(c) of the Income Tax Act, 1961, and whether the Assessing Officer was justified in taking recourse to Section 154 of the Act ?"

(17) The above being the only primary question involved and in the facts and circumstances, referred to above, the writ petitions as well as the appeals are being disposed of by a common order.

(18) We have heard the learned counsel for the parties in detail and have perused the record with their assistance.

(19) Learned counsel for the petitioner submitted that it was not mandatory for the Managing Director to have signed/verified the return under Section 140(c) of the Act. The return having been filed, signed and verified by Shri Kultar Krishan who had been duly authorized by a resolution passed by the Company, the refund could not have been withheld by the Revenue. He also submitted that the real intention of the expression 'shall' is to be seen in the context in which it is used. By relying upon the Apex Court judgment in **M/s. Sainik Motors Jodhpur and others** *versus* **State of Rajasthan (1),** the learned counsel urged that the word 'shall' contained in Section 140(c) of the Act is to be read as 'may' and wherever possible, the return is to be signed by the Managing Director but that is not *sine qua* non for valid filing of the return as in the given circumstances it can also be signed and verified by a duly authorized person.

(20) The learned counsel then next contended in the alternative that the defect which had resulted into the filing of the original return was a curable defect under Section 292B of the Act and the Assessing Officer in terms of provisions of Section 139(9) of the Act ought to have provided an opportunity to rectify the said mistake in the return which was filed on 30th November, 2000. He buttressed his submission by relying upon **Commissioner of Income Tax** *versus* **Masoneilan (India) Ltd. (2)** ; **Vanaja Texitiles Ltd.** *versus* **Commissioner of Income Tax and another (3)** and **Vidyawati Gupta and others** *versus* **Bhakti Hari Nayak and others (4).**

(1) AIR 1961 S.C. 1480
(2) (2000) 242 I.T.R. 569 (Kerala)
(3) (2001) 249 I.T.R. 374 (Karnataka)
(4) (2006) 2 S.C.C. 777

(21) Learned counsel project that once it was held that the defect in the return was a curable defect and in terms of Section 139(9), the Assessing Officer was under duty to have provided an opportunity to remove the defect, recourse to Section 154 of the Act was totally without jurisdiction. In case the assessee had failed to cure the defect, it was only then that Section 154 of the Act could have been invoked. He placed reliance on **Commissioner of Income Tax** *versus* **Hero Cycles Pvt. Ltd. and others (5)** and **Masoneilan (India) Ltd's** case *(supra).*

(22) Concluding his submission, learned counsel laid stress on the plea that against the order, dated 27th July, 2004 of the Assessing Officer passed under Section 154 of the Act whereby the original return, dated 30th November, 2000 was held to be non-est and void, an appeal was carried by the petitioner and the Commissioner of Income-tax (Appeals) while accepting the appeal had directed the Assessing Officer to get the defect of non signing by the Managing Director rectified and then to give relief to the petitioner Company by treating the original return filed on 30th November, 2000 as valid one. The counsel next submitted that the said defect was cured as the Chairman Managing Director in compliance thereto signed and verified the return, and the Assessing Officer was precluded from denying the refund to the assessee-petitioner by raising new plea, by wrongly invoking the provisions of Section 239 of the Act as in remand proceedings only those issues can be agitated on which the remand had been made by the appellate authority. He placed reliance on **Baldev Singh Giani** *versus* **Commissioner of Income-Tax and others (6)** in support of his submission and further urged that an assessee, under Section 240 of the Act, is not required to file any claim for the refund of the amount and the revenue is obliged to issue refund of its own wherever assessee is found entitled for the same. According to the learned counsel, the revenue was in error in taking aid of Section 239 for denying the refund to the assessee. He relied upon a Delhi High Court judgment in **Commissioner of Income-Tax** *versus* **Goodyear India Ltd. (7)** and of Gujarat High Court in **Atmaram J. Hathiwala** *versus* **Smt. S. Sarup, ITO (8)** and the Apex Court's

(5) (1997) 228 I.T.R. 463 (S.C.)
(6) (2001) 248 I.T.R. 266
(7) (2001) 249 I.T.R. 527
(8) (1994) 209 I.T.R. 456

decision in **Commissioner of Income-Tax** *versus* **Shelly Products and another (9)** in support of the Submission.

(23) On the other hand, Shri Sanjiv Bansal, learned counsel appearing for the Revenue vehemently controverted the aforesaid submissions. According to the Counsel, Section 292B does not come to the rescue of the petitioner as the non-signing of the return is not a curable defect which otherwise goes to the root of the validity of the return, and the said return thus, is non-est and invalid in the eyes of law. The Assessing Officer having committed mistake apparent on the record in ordering refund in the original assessment order could invoke provisions of Section 154 of the Act and rectify the said error which was apparent on the face of the record. The counsel placed reliance on a catena of judgments reported in **Commissioner of Income-Tax, Jullundur** *versus* **Dr. Krishan Lal Goyal (10) ; National Insurance Co. Ltd.** *versus* **Commissioner of Income-Tax (11) ; Khialdas and sons** *versus* **Commissioner of Income-Tax (12),** Madhya Pradesh) ; **Commissioner of Income-Tax** *versus* **Ram Lal Babu Lal (13), Electricity Instrument Company** *versus* **Commissioner of Income-Tax (14),** and **Commissioner of Income-Tax** *versus* **Aparna Agency Pvt. Ltd. (15).**

(24) We have thoughtfully considered the respective submissions of the learned counsel for the parties. We find force in the arguments of learned counsel for the assessee.

(25) The controversy raised in the present petition can be categorized into four sub-headings as mentioned hereinbelow :—

(a) Whether a return filed under the Income Tax Act by a Company is mandatorily required to be signed by its Managing Director under Section 140(c) of the Act or it can be filed by an authorized signatory duly appointed by a resolution of the Board of Directors ?

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(9) (2003) 261 I.T.R. 367
(10) (1984) 148 I.T.R. 283 (P&H) ,
(11) (1995) 213 I.T.R. 862 (Calcutta)
(12) (1997) 225 I.T.R. 960 (Madhya Pradesh)
(13) (1998) 234 I.T.R. 776 (P&H)
(14) (2001) 250 I.T.R. 734 (Delhi)
(15) (2004) 267 I.T.R. 50 (Calcutta)

(b) Whether under Section 292B of the Act, non-signing of a return by its Managing Director, or where there is no Managing Director, by any Director thereof, is a curable defect and the Assessing Officer is required to provide opportunity to the assessee under Section 139(9) of the Act to cure such a defect ?

(c) Whether the assumption of jurisdiction by the Assessing Officer under Section 154 of the Act is legal and valid ?

(d) Whether in the facts and circumstances of the present case, the claim of the assessee for the refund under the Act could be denied on the ground that the same was time barred under the provisions of Section 239 of the Act.

(26) Adverting to the first issue, it would be material to reproduce provisions of Section 140(c) of the Act, which read thus :

Section 140

RETURN BY WHOM TO BE SIGNED :

The return under section 139 shall be signed and verified—

XXX XXX XXX

(c) In the case of a company, by the Managing Director thereof, or where for any unavoidable reason such managing director is not able to sign and verify the return, or where there is no Managing Director, by any Director thereof :

Provided that where the company is not resident in India, the return may be signed and verified by a person who holds a valid power of attorney from such company to do so, which shall be attached to the return :

Provided further that.—

(a) Where the company is being wound up, whether under the orders of a court of otherwise, or where any person has been appointed as the receiver of any assets of the company, the return shall be signed and verified by the liquidator referred to in sub-section (1) of section 178 ;

(b) Where the management of the company has been taken over by the Central Government or any State Government under any law, the return of the company shall be signed and verified by the Principal Officer thereof.

(c) In the case of a firm, by the Managing partner thereof, or where for any unavoidable reason such Managing Partner is not able to sign and verify the return, or where there is no Managing Partner as such, by any partner thereof, not being a minor ;"

(27) Before delving on the said issue, it would be essential to refer to the legislative history of the said provision. The Taxation Laws (Amendment) Act, 1975 substituted the existing clause (c) with effect from 1st April, 1976. Prior to its amendment, the provision provided that in the case of a Company, the return could be signed by the Principal Officer of the Company. However, after amendment, it has specifically been provided that a valid return shall be signed by the Managing Director of the Comapny and in his absence, by any Director thereof. It is well settled that wherever the statute provides for carrying out a particular thing in a specified manner, then it has to be done in that manner and in no other manner. The tenor of the language used in the aforesaid provision leaves no manner of doubt that the provision is mandatory and the word 'shall' has to be read in that context and it cannot be read to mean 'may'. In **Khialdas and sons'** case *(supra)*, the Hon'ble Chief Justice speaking for the High Court of Madhya Pradesh, observed that :

> "Section 140 says that a return under section 139 shall be signed and verified. The word "shall" has been used which shows that it is mandatory that every return should be signed and verified and if it is not signed and verified, then it is in breach of the provisions of section 140 of the Act."

(28) Accordingly, it is held that the return is required to be signed mandatorily by the Managing Director of the Company and in his absence, due to certain reasons, by the Director thereof and the reliance of the assessee in the circumstances, on the apex Court's decision in **M/s. Sainik Motors Jodhpur and others'** case *(supra)* is of no advantage to him.

(29) The second question which is the primary question and goes to the root of the case requires attention of this Court. In order to appreciate

the controversy, it would be apposite to refer to Section 139(9) and 292B of the Act which at the relevant time read thus :

Section 139

RETURN OF INCOME.

XXX XXX XXX

(9) Where the Assessing Officer considers that the return of income furnished by the assessee is defective, he may intimate the defect to the assessee and give him an opportunity to rectify the defect within a period of fifteen days from the date of such intimation or within such further period which, on an application made in this behalf, the Assessing Officer may, in his discretion, allow ; and if the defect is not rectified within the said period of fifteen days or, as the case may be, the further period so allowed, then, notwithstanding anything contained in any other provision of this Act, the return shall be treated as an invalid return and the provisions of this Act shall apply as if the assessee had failed to furnish the return :

Provided that where the assessee rectifies the defect after the expiry of the said period of fifteen days or the further period allowed, but before the assessment is made, the Assessing Officer may condone the delay and treat the return as a valid return.

Explanation.—For the purposes of this sub-section, a return of income shall be regarded as defective unless all the following conditions are fulfilled, namely :—

(a) the annexures, statements and columns in the return of income relating to computation of income chargeable under each head of income, computation of gross total income and total income have been duly filled in ;

(b) The return is accompanied by a statement showing the computation of the tax payable on the basis of the return ;

(bb) The return is accompanied by the report of the audit referred to in section 44AB, or where the report has been furnished prior to the furnishing of the return, by a copy of such report together with proof of furnishing the report ;

(c) The return is accompanied by proof of - (i) the tax, if any, claimed to have been deducted at source and the advance tax and tax on self-assessment, if any, claimed to have been paid ;

(ii) The amount of compulsory deposit, if any, claimed to have been made under the Compulsory Deposit Scheme (Income-tax Payers) Act, 1974 (38 of 1974) ;

(d) Where regular books of account are maintained by the assessee the return is accompanied by copies of :—

(i) manufacturing account, trading account, profit and loss account or, as the case may be, income and expenditure account or any other similar account and balance sheet ;

(ii) In the case of a proprietary business or profession, the personal account of the proprietor ; in the case of a firm, association of persons or body of individuals, personal accounts of the partners or members ; and in the case of a partner or member of a firm, association of persons or body of individuals, also his personal account in the firm, association of persons or body of individuals ;

(e) Where the accounts of the assessee have been audited, the return is accompanied by copies of the audited profit and loss account and balance sheet and the auditor's report and, where an audit of cost accounts of the assessee has been conducted, under section 233B of the Companies Act, 1956 (1 of 1956), also the report under that section ;

(f) Where regular books of account are not maintained by the assessee the return is accompanied by a statement indicating the amounts of turnover or, as the case may be, gross receipts, gross profit, expenses and net profit of the business or profession and the basis on which such amounts have been computed, and also disclosing the amounts of total sundry debtors, sundry creditors, stock-in-trade and cash balance as at the end of the previous year.

Section 292B :

RETURN OF INCOME, ETC., NOT TO BE INVALID ON CERTAIN GROUNDS.

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 issued 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."

(30) Section 139(9) specifies the circumstances in which a return would be regarded as a defective return. The list of defects mentioned in the Explanation thereof is illustrative and not exhaustive.

(31) Section 292B of the Act provides that no return of income shall be invalid merely by reason of any mistake, defect or omission, if such return is, in substance and effect in conformity with or according to the intent and purpose of the Act. The section has its applicability to those cases where purely technical objection without substance arises in a case of a return of income. Section 139(9) of the Act contains a non obstante clause, namely, 'notwithstanding anything contained in any other provision of this Act' and would, therefore, over-ride the other provisions of the Income-tax Act including Section 292B. If any curable defect is noticed in the return, the Assessing Officer is required to provide an opportunity to the assessee to rectify the same within the stipulated time and in a case where any of the specified defects is not removed within the time allowed under Section 139(9), the return shall be treated as an invalid or non-est return.

(32) It would, thus, be concluded that a return of income filed by a Company which is signed and verified by a person other than the one authorized under the Act, the return in such circumstances shall be treated to be defective which shall be amenable to the provisions of Section 292B and 139(9) of the Act. The Assessing authority in such circumstances shall provide an opportunity under Section 139(9) before treating the same to be invalid and non-est. However, a different situation would arise where a return is not signed and verified at all. The question of removal of defect

in such a situation does not arise as the defect goes to the very root and jurisdiction of the validity of the return. A Division Bench of this Court in **Commissioner of Income-Tax** *versus* **Norton Motors (16),** while interpreting Section 292B of the Act had observed :

> "A reading of section 292B of the Income-tax Act, 1961, makes it clear that a mistake, defect or omission in the return of income, assessment, notice, summons or other proceeding is not sufficient to invalidate an action taken by the competent authority, provided that such return of income, assessment, notice, summons or other proceeding in substance and effect is in conformity with or according to the provisions of the Act. To put it differently, section 292B can be relied upon for resisting a challenge to the notice, etc., only if there is a technical defect or omission in it. However, there is nothing in the plain language of that section from which it can be inferred that the same can be relied upon for curing a jurisdictional defect in the assessment notice, summons or other proceeding. In other words, if the notice, summons or other proceeding taken by an authority suffers from an inherent lacuna affecting its jurisdiction, the same cannot be cured by having resort to section 292B."

(33) Where the return was signed by an Executive Director instead of Managing Director or other authorized Director, it was held by Kerala High Court in **Vanaja Textiles Ltd's case** ***(supra),*** to be a curable defect.

(34) In the light of the legal position crystallized above, it would be pertinent to see the applicability thereof to the facts of the present case. In the case in hand, the return for the assessment year 2000-2001 was signed by Kultar Krishan, an employee of the petitioner company, who had been duly authorized by a resolution of the Board to do so as there was litigation between the Management which was pending in Company Petition No. 76 of 1999 before the Company Law Board. The return was, thus, not signed by an authorised person in terms of Section 140(c) of the Act. However, the return was got signed and verified by Managing Director and filed along with letter dated 13th October, 2003 which was acknowledged in the income-tax office on 26th February, 2004 (Annexure P-10). Even on an opportunity provided by the Assessing Officer to remove the curable defect in pursuance to the order of CIT(A), the Managing Director, Shri Vijay Chopra attended

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the office of the assessing officer on 8th March, 2005 and signed the verification portion of the return. In such circumstances, the return filed by the Company could not be treated to be invalid or non-est.

(35) In the light of answer to second proposition, the third question is rendered only academic. The assessee was afforded an opportunity to remove the defect in the return under the provisions of the Act and the assessee having fulfilled the same, the return could not be held to be non-est or invalid. The return having been held to be valid, the initiation of proceedings under Section 154 of the Act could not be taken recourse to.

(36) Lastly, it may be noticed that the forth limb of argument of the learned counsel for the petitioner again has considerable force. A Division Bench of this Court in **Baldev Singh Giani's** case *(supra),* while describing the scope of remand proceedings had laid down as under :—

> "We have thoughtfully considered the respective submissions. In our opinion, the initiation of reassessment proceedings by respondent No. 3 and the direction given by respondent No. 2 to the said respondent to continue with the said proceedings are vitiated by patent error of law and deserve to be quashed. At the cost of repetition, we may mention that while allowing the appeal filed by the petitioner against the order dated 24th March, 1995, passed by the Commissioner of Income-tax (Appeals), the Tribunal had directed the Commissioner of Income-tax (Appeals) to record a finding on the petitioner's plea that initiation of reassessment proceedings was contrary to section 148(2) of the Act and observed that if the reasons are not found recorded, appropriate order be passed in the light of the decisions of the Supreme Court, Patna High Court and Bombay High Court and the proceedings be quashed. That order acquired finality because the Revenue did not challenge the same by seeking reference under section 256 of the Act or otherwise. Therefore, the Commissioner of Income-tax (Appeals) and respondent Nos. 2 and 3 were bound to confine their consideration to the question as to whether the file available with the Department contained reasons recorded by the Assessing Officer and such reasons were communicated to the petitioner. However, instead of doing that, the Commissioner of Income-tax (Appeals) remanded the case to respondent No. 3 and by procuring letter dated 26th November, 1999, from Shri R. S. Jain, the said respondent tried

to create evidence to show that the reasons had been recorded by the then Assessing Officer but the paper containing those reasons are not available and in this manner, he travelled beyond the parameters laid down by the Tribunal. In our opinion, respondent No. 3 was bound to act within the four corners of the order passed by the Tribunal and he did not have the jurisdiction to create fresh evidence on the issue of recording of reasons and communication thereof."

(37) The Assessing Officer having failed to raise any issue with regard to the plea of Section 239 of the Act at appropriate stage and the CIT(A) having remanded the case for purposes of getting the defect cured and to give effect to that order, could not raise a new plea inconsistent with the remand order. Still further, in the present case, the provisions of Section 240 of the Act would be attracted whereunder an obligation is cast upon the Revenue to refund the amount to the assessee without having to make any claim in that regard in cases of refund arising on account of appeal or other proceedings under the Act. The contention of the Revenue is thus rejected being merit-less.

(38) In all fairness to the learned counsel appearing for the Revenue, we refer to the case law relied upon by him.

(39) In **Dr. Krishan Lal Goyal's** case (supra), the issue before the Division Bench of this Court related to an unsigned return prior to the incorporation of provisions of Section 292B in the statute book. The observations made therein in this behalf would have no bearing on the issue under consideration.

(40) In **Ram Lal Babu Lal's** case (supra), the question before the Court was with regard to the scope of Section 154 of the Act. As observed earlier, in the present case there was no occasion for the Assessing Officer to have taken recourse to Section 154 of the Act. The said decision also does not help the Revenue.

(41) The Madhya Preaesh High Court in **Khialdas and Sons'** case *(supra)* wherein the return was not at all signed, held that return of income shall be non-est. The relevant observations are extracted as under :

"Section 292B of the Act only says that 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 issued or taken in pursuance of any of the provisions of the 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. The idea is that if any minor defect is there which does not militate against the intent and purpose of the Act, then such minor defect can be cured but, according to Section 140, which is mandatory, every return has to be signed and verified. Section 140 says that a return under section 139 shall be signed and verified. The word "shall" has been used which shows that it is mandatory that every return should be signed and verified and if it is not signed and verified, then it is in breach of the provisions of Section 140 of the Act. Therefore, this cannot be a defect which can be cured and any return which has been filed without signature and verification of the assessee, will not be treated as a valid return."

(42) The issue before Delhi High Court in **Electricity Instrument Company's** case (supra) and Calcutta High Court in **National Insurance Company's** case (supra) was, where the return of income was not signed and verified at all. Again before the Calcutta High Court, in **Aparna Agency Pvt. Ltd.'s** case (supra), the issue was with regard to, whether the defect in an unsigned notice could be cured, which is not the position in the present case. The reported cases thus, have no application to the controversy under discussion.

(43) In view of the above, the substantial question of law raised in the appeals is disposed of in the light of the discussion above and finding no merit in the appeal, the same are dismissed. The writ petitions, however, succeed and order dated 2nd May, 2005 Annexure P-1, is quashed. The respondent No. 3 i.e. the Assistant Commissioner of Income Tax, Range-III, Jalandhar, is directed to refund the amount to the assessee in accordance with law. No costs.

R.N.R.