SUPREME COURT OF INDIA

Commissioner of Income Tax

Vs

.

Laxman Das Khandelwal

C.A.No.6261-6262 of 2019

(Uday Umesh Lalit and Vineet Saran.,,)

13.08.2019

JUDGMENT

Uday Umesh Lalit,J.,

SLP(Civil)No.19320-19321 of 2019

1. Delay condoned. Leave granted.

2. These Appeals are directed against the judgment and final order dated 27.04.2018 passed by the High Court in Income Tax Appeal No.97 of 2018 and against the order dated 14.09.2018 in Review Petition No.1289 of 2018 arising from said Income Tax Appeal No.97 of 2018.

3. The relevant facts leading to the filing of aforementioned Income Tax Appeal No.97 of 2018 before the High Court, as culled out from the judgment and order dated 27.04.2018 presently under appeal are as under:-

> "The assessee is an individual carrying a business of brokerage. Search and seizure operation was conducted under Section 132 of the Act of 1961 on 11.03.2010 at his residential premises. The assessee submitted return of income on 24.08.2011, declaring total income of Rs.9,35,130/-. The assessment was completed under Section 143(3) read with Section 153(D) of 1961 Act. Rupees 9,09,110/- was added on account of unexplained cash under Section 69 of 1961 Act. Rs.15,09,672/- was added on account of unexplained jewellery. Rupees 45,00,000/- was added on account of unexplained hundies and Rs.29,53,631/- was added on account of unexplained cash receipts. Aggrieved, the assessee filed an appeal before the Commissioner Income Tax (Appeal). The Commissioner of Income Tax (Appeal) deleted an amount of Rs.7,48,463/- holding that jewellery found in locker weighing 686.4 gms stood explained in view of circular No.1916 and further deleted the addition of Rs.29,23,98,117/- out of Rs.29,53,52,631/- holding that the correct approach would be to apply the peak formula to determine in such transaction

which comes to Rs.29,54,514/- as on 05.03.2010. Aggrieved, Revenue filed an appeal. The Assessee filed cross objection on the ground of jurisdiction of Assessment Officer regarding non issue of notice under Section 143(2) of the Act of 1961. The Tribunal vide impugned order upheld the cross objection and quashed the entire reassessment proceedings on the finding that the same stood vitiated as the assessment Officer lacked jurisdiction in absence of notice under Section 143(2) of the act of 1961. The Tribunal observed:

"17. In conclusion, we find that there was no notice issued u/s 143(2) prior to the completion of assessment under section

143 (3) of the Act by the AO; that the year under consideration was beyond the scope of the provisions of Section 143A of the Act, it being the search year and not covered in the six year to the year of search as per the assessment scheme/procedure defined u/s 153A; that the AO has passed regular assessment u/s 143(3) of the Act; although the Id. CIT has mentioned the section as 143 r.w.s. 153A and that the department had not controverted these facts at the stage of hearing. It is noted that issue of notice u/s 143(2) for completion of regular assessment in the case of the assessee was a statutory requirement as per the provisions of the Act and non issuance thereof is not a curable defect. Even in case of block assessment u/s 158BC, it has been so held by the apex Court in the case of 'ACIT v. Hotel Blue Moon' (2010) 321 ITR 362 (Supra)."

4. In said appeal arising from the decision of the Income Tax Appellate Tribunal ('the Tribunal', for short), the issue that arose before the High Court was the effect of absence of notice under Section 143(2) of the Income Tax Act, 1961 ('the Act', for short). The Respondent-Assessee relied upon the decision of this Court in Assistant Commissioner of Income Tax and Another vs. Hotel Blue Moon . On the other hand, reliance was placed by the Appellant on the provisions of Section 292BB of the Act to submit that the Respondent having participated in the proceedings, the defect, if any, stood completely cured.

5. At the outset, it must be stated that out of two questions of law that arose for consideration in Hotel Blue Moon's case2 the first question was whether notice under Section 143(2) would be mandatory for the purpose of making the assessment under Section 143(3) of the Act. It was observed:-

"3. The Appellate Tribunal held, while affirming the decision of CIT (A) that non-issue of notice under Section 143(2) is only a procedural irregularity and the same is curable. In the appeal filed by the assessee before the Gauhati High Court, the following two questions of law were raised for consideration and decision of the High Court, they were:

"(1) Whether on the facts and in circumstances of the case the issuance of notice under Section 143(3) of the Income Tax Act, 1961 within the prescribed time-limit for the purpose of making the assessment under Section 143(3) of the Income Tax

Act, 1961 is mandatory? And (2)

2. Whether, on the facts and in the circumstances of the case and in view of the undisputed findings arrived at by the Commissioner of Income Tax (Appeals), the additions made under Section 68 of the Income Tax Act, 1961 should be deleted or set aside?"

4. The High Court, disagreeing with the Tribunal, held, that the provisions of Section 142 and sub-sections (2) and (3) of Section 143 will have mandatory application in a case where the assessing officer in repudiation of return filed in response to a notice issued under Section 158-BC(a) proceeds to make an inquiry. Accordingly, the High Court answered the question of law framed in affirmative and in favour of the appellant and against the Revenue. The Revenue thereafter applied to this Court for special leave under Article 136, and the same was granted, and hence this appeal.

13. The only question that arises for our consideration in this batch of appeals is: whether service of notice on the assessee under Section 143(2) within the prescribed period of time is a prerequisite for framing the block assessment under Chapter XIV-B of the Income Tax Act, 1961?

27. The case of the Revenue is that the expression "so far as may be, apply" indicates that it is not expected to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143 strictly for the purpose of block assessments. We do not agree with the submissions of the learned counsel for the Revenue, since we do not see any reason to restrict the scope and meaning of the expression "so far as may be, apply". In our view, where the assessing officer in repudiation of the return filed under Section 158- BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143."

6. The question, however, remains whether Section 292BB which came into effect on and from 01.04.2008 has effected any change. Said Section 292BB is to the following effect:-

"292BB. Notice deemed to be valid in certain circumstances. - Where an assessee has appeared in any proceeding or cooperated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was -

(a) Not served upon him; or

(b) Not served upon him in time; or

(c) Served upon him in an improper manner: Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment."

7. A closer look at Section 292BB shows that if the assessee has participated in the proceedings it shall be deemed that any notice which is required to be served upon was duly served and the assessee would be precluded from taking any objections that the notice was (a) not served upon him; or (b) not served upon him in time; or (c) served upon him in an improper manner. According to Mr. Mahabir Singh, learned Senior Advocate, since the Respondent had participated in the proceedings, the provisions of Section 292BB would be a complete answer. On the other hand, Mr. Ankit Vijaywargia, learned Advocate, appearing for the Respondent submitted that the notice under Section 143(2) of the Act was never issued which was evident from the orders passed on record as well as the stand taken by the Appellant in the memo of appeal. It was further submitted that issuance of notice under Section 143(2) of the Act being prerequisite, in the absence of such notice, the entire proceedings would be invalid.

8. The law on the point as regards applicability of the requirement of notice under Section 143(2) of the Act is quite clear from the decision in Blue Moon 's case2. The issue that however needs to be considered is the impact of Section 292BB of the Act.

9. According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.

10. Since the facts on record are clear that no notice under Section 143(2) of the Act was ever issued by the Department, the findings rendered by the High Court and the Tribunal and the conclusion arrived at were correct. We, therefore, see no reason to take a different view in the matter.

11. These Appeals are, therefore, dismissed. No costs.