(2016) 12 AHC CK 0044

In the Allahabad High Court

Case No : Income Tax Appeal No. 147 of 2012

Commissioner of Income Tax — APPELLANT

Vs

M/s. Monga Metals (P) Ltd. — RESPONDENT

Date of Decision : 07-12-2016

Acts Referred:
Income Tax Act, 1961 — Section 143(2), Section 158BC

Citation : (2017) 292 CurTR 81 : (2017) 95 UPTC 82

Hon'ble Judges : Sudhir Agarwal and Prabhat Chandra Tripathi, JJ.

Bench : Division Bench

Advocate : S.K. Garg, Amit Shukla, R.S. Agarwal and Ashish Bansal, Advocates, for the Respondent; Shambhu Chopra, Ashok Kumar, A.N. Mahajan, B. Agarwal, G. Krishna and Subham Agarwal, Advocates, for the Appellants

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J. - We have heard Sri Subham Agarwal, learned counsel for appellants and Sri Ashish Bansal, learned counsel for respondent.

2. This appeal under Section 260-A of Income Tax Act, 1961 (hereinafter referred to as ''Act, 1961'') has arisen out of judgement and order dated 30.06.1999 passed by Income Tax Appellate Tribunal, Allahabad Bench ''A'', Allahabad (hereinafter referred to as ''Tribunal'') in I.T.A. No.1377 (All) of 1997, allowing assessee''s appeal partly.

3. Appeal was admitted on following substantial questions of law:

"(1) Whether in view of Section 292 B of Income Tax Act, 1961, notice under Section 158BC dated 12.12.1996 issued in the name of assessee-company M/s Monga Steels (P) Limited, is invalid and illegal?

(2) Whether Income Tax Appellate Tribunal was justified in holding that notice under Section 158BC is equivalent to the notice under Section 148 of Income Tax Act?

(3) Whether in view of Section 131 and 131(1A) of Income Tax Act, Assistant Director of Income Tax (Investigation) was justified in recording statement and taking evidence consequent upon search under Section 132(1) of Act?

(4) Whether in view of Taxation Laws Amendment Act, 1987, Income Tax Appellate Tribunal was not justified in holding that the seized material on record could not be handed over to Assistant Commissioner of Income Tax by completely overlooking the fact that the word ''Income Tax Officer'' was substituted by the word ''Assessing Officer'' by the aforesaid Amending Act of 1987?

(5) Whether no opportunity of hearing is required to be given by Commissioner, Income Tax prior to approval under Section 158BG?

(6) Whether Income Tax Appellate Tribunal was justified in deleting the additions of Rs.3,42,357/- with regard to the investment in the factory building even though valuation report fully justify addition made by Assessing Officer?

(7) Whether on the basis of duplicate sets of accounts and papers seized during the course of search, additions of Rs.1,53,28,028/- could not be legally deleted by Tribunal?

(8) Whether Income Tax Appellate Tribunal was not justified in deleting addition of Rs.18,00,000/- towards working capital, Rs.33,85,210/- towards addition on account of undisclosed business income and addition of Rs.21,99,000/- worked out of excess stock of scrap found during the course of search apart from the addition of Rs.89,33,128/- as unexplained introduction of cash amount?"

4. However, when commenced arguments, learned counsel for Revenue stated at the outset that substantial questions of law involved in the matter are whether a valid notice under Section 158 BC (a) is mandatory and lack of a valid notice under aforesaid provision would render block assessment illegal. The second question would be whether notice under Section 143(2) read with 158 BC is also mandatory and want of such notice would render block assessment invalid. He stated that there are two questions which he proposes to argue and may be considered by this Court.

5. In these circumstances, we have re-framed substantial questions of law as under:

"(1) Whether Tribunal is justified in holding that no valid notice under Section 158 BC was issued in the name of Assessee Company? In other words, whether notice dated 12.12.1996 purported to have been issued by Assessing Authority under Section 158 BC can be said to be a legal and valid notice complying all the requirements of statute?

(2) Whether notice under Section 158 BC is mandatory and want of valid notice under said provision would render block assessment illegal?

(3) Whether defect of notice under Section 158 BC can be protected by taking

recourse to Section 292 B of Act, 1961?

(4) Whether notice under Section 143(2) for block assessment was mandatory and want of such notice would render block assessment illegal?

(5) Whether Tribunal was justified in holding that notice under Section 158 BC is at par with notice under Section 148 of Act, 1961 and the law applicable to Section 148 can be made applicable to notice under Section 158 BC?"

6. Learned counsel for both the parties have advanced their submissions on the aforesaid questions of law.

7. Before adjudicating aforesaid substantial questions of law it would be appropriate to have a brief factual matrix of entire matter which may help us in arriving at a correct conclusion.

8. The assessee, M/s Monga Metals (Private) Limited is a company incorporated vide certificate dated 19.01.1991 under Companies Act, 1961, and is engaged in the business of manufacture and sale of ingots. It has its registered office at 76/43, Halsey Road, Kanpur and factory is at Malwan, District Fatehpur.

9. Search and seizure operations were carried out at the business premises at 76/43, Halsey Road, Kanpur and other places of assessee on 03.09.1996 including residential premises of Vijay Kumar Agrawal, Vinod Kumar Agrawal and Sanjay Agrawal, Directors of assessee company. A notice dated 12.12.1996 was issued under Section 158BC of Act, 1961 which was served upon assessee on 13.12.1996. Assessing Officer required assessee to file return for block period ending on 03.09.1996 which included Assessment Years (hereinafter referred to as ''AY'') 1993-94, 1994- 95, 1995-96 and 1996-97 and 1997-98 i.e. up to the date of search. No returns as directed for block period were filed, hence, another letter dated 23.07.1997 was issued along with notice under Section 142(1) requiring assessee to file returns for block period by 29.07.1997, reconcile position of stock as available on the date of search and explain seized paper. Again assessee failed to file return.

10. It is also evident from record that loose papers (Annexure LP 1 to Rs. P 31) were recovered from residence of Sri Madan Hada, Ex-Director of assessee company. These papers mostly related to financial year 1994-95 (AY 1995-96). Sri Madan Hada in his statement before Assistant Director (Investigation) on 08.11.1996 stated that these papers related to assessee company and of the period when he was Director.

11. Assessing Officer computed undisclosed income taxable in block assessment as under:

"1.

A.Y. 1995-96

Total income in respect of trading transaction being the peak cash introduced in the books of account.

98,54,103

Less: Profit disclosed in the regular return of income.

64,54,540

Balance undisclosed income.

33,99,563

2.

A.Y. 1996-97

Total income being net cash introduction in books of account

1,31,68,732

Less: Profit discloses in the regular books of a/c maintained by the assessee.

76,30,167

Balance undisclosed income

55,38, 565

3.

A.Y. 1997-98

(Upto the date of search) Total income being net cash introduced in the books of account

30,25,133

Less: Profits disclosed in the book of account.

31,60,957

Balance undisclosed income

NIL

Addition Rs.89,38,128 only

As has been discussed on page 40 of assessment order, the undisclosed investment in the stock as found on the date of search amounting to Rs.21,99,000/- is treated as covered by the undisclosed business income of the assessee company. Keeping in view of these facts, the undisclosed income of the assessee for the block period is worked out as below:-

Total undisclosed income as worked-out on page no.40 of the assessment order.

Rs.2,18,77,745

Add:Unexplained introduction of cash as discussed above

Rs.89,38,128

Rs. 3,08,15,873

Deduct: Addition on account of unexplained investment in the stock

Rs.21,99,000

Rs.2,86,16,873"

12. Assessing Officer after considering material collected in search operations and recording statements of several persons, passed assessment order dated 30.09.1997 and worked-out undisclosed income for block period as under:

"Asstt. Year 1993-94:

Since the factory has been completed and used for the first time in the assessment year 1993-94, the undisclosed investment in the cost of construction of the factory is treated as undisclosed income u/s 69 of I.T. Act, 1961.

1.

Undisclosed investment in the cost on construction of the factory building (Page No.36 of Asstt. Order)

3,42,357/-

Asstt. Year 1995-96

1.

Undisclosed Business Income (Page 34)

Rs.1,53,28,028/-

Less: Allowable depreciation as discussed above

Rs.11,76,850/-

Net Business Income

1,41,51,178/-

2.

Income from other sources, Undisclosed investment in working capital (Page No.37 of the Asstt. Order)

18,00,000/-

Asstt. Year 1997-98

1.

Undisclosed business income (page no.39 of the Asstt. Order)

33,85,210/-

2.

Income from other sources, Undisclosed investment in stock (page no.35 of Asstt. Order)

21,99,000/-

2,18,77,745/-

The aggregate undisclosed income, thus, worked-out as under:

AY

1993-94

1995-96

1997-98

Total Income

Amount

Rs.3,42,357

Rs.1,59,51,178

Rs.55,84,210

Rs.2,18,77,745"

13. Assessee preferred appeal i.e. I.T.A. No.1377 (All) of 1997 challenging assessment order on various grounds including (i) No valid notice under Section 148 of Act, 1961 was served upon assessee (ii) Notice under Section 158BC is not a substitute of notice under Section 142(1)/143 of Act, 1961. Even notice under Section 158 BC was neither properly addressed nor given to proper person, therefore, it was invalid in law and defect was incurable and not protected by Section 292 B of Act, 1961.

14. Tribunal formulated following three questions for adjudication of appeal:

"(i) The first question is with respect to the nature/status of the notice required to be served U/s 158 BC of the Act i.e. is such a notice akin/analogous and within the parameter of a notice U/s 148 of the Act?

(ii) If so can the points raised by assessee''s counsel amounts to illegalities in the notice and consequently have they rendered the notice illegal, bad in law and vague;

(iii) If the notice is found to be vague, can the assessment for block period be quashed as a nullity?"

15. After examining scheme of Act, 1961 including Sections 143, 147, 148, 149,

158B, 158BA, 158BB and 158BC, it held that so far as regular assessment is concerned, Assessing Officer is to complete the same after serving notice upon assessee under Section 143(2) and on the date specified in such notice or as soon as afterwards, as may be, on the basis of evidence which assessee may like to produce or such other evidence which Assessing Officer may require assessee to furnish on specified points and after taking into account the relevant material which he has gathered. The assessment/reassessment made on escaped income with reference to Sections 147, 148 and 149 and scheme of special procedure for assessment in search cases under Chapter XIV-B is different. The object is different i.e. to tax income which has not already been taxed. When the matter is covered by assessment made in search and seizure cases and the provisions of Chapter XIV-B are applicable, Assessing Officer is obliged to serve a notice in conformity with the requirement of Section 158BC upon the person in whose case search has been conducted and in whose case Assessing Officer wants to make an assessment under the aforesaid Chapter. The requirement of a valid notice is must, being a jurisdictional issue and not mere procedural. The scheme of Act, 1961 shows that the moment a notice under Section 148 is served in the scheme of assessment of escaped income or notice under Section 158 BC is served in the scheme of assessment of undisclosed income in search cases, the already completed assessments or the assessment for the year for which income has escaped (where there is no search) and the assessments falling within the block period, for the assessment of undisclosed income (where there is a search), get reopened.

16. In paras 6.4 and 7.4 of the order, Tribunal has said as under:

"6.4. The above provisions envisaged in the 2 schemes (supra) confirm beyond any doubt that:

[(1) Purpose of both the notices is same viz;

(i) A notice under Section 148 and under Section 158 BC can be issued only after fulfilment of required conditions such as a escapement of income or action U/s 132 of the Act, as the case may be.

(ii) In both the cases service of a valid notice is a mandatory prerequisite condition before proceeding to make a reassessment or assessment of Block Period, as the case may be.)

7.4. In view of the above discussion, we are of the opinion that a notice required to be served under the provisions of Section 158BC is akin, analogous and within the same parameter, as a notice under Section 148 and therefore the grounds on which a notice U/s 148 can be held to be bad in law are sufficient to hold a notice U/s 158BC as bad in law."

17. When coming to the second question formulated by Tribunal as noticed above, it held that a notice would be invalid or illegal if:

"(i)(a)it has not been addressed in accordance with the provisions of Section 282.

(i) (b) Status of the person has not been mentioned.

(iii) ?.. Respectfully, following the ratio of this decision, we hold that for a notice U/s 158BC to be a valid notice, the Assessment Year covered by the block period, in a given case, must also be specified clearly."

18. Tribunal after considering the notice issued by Assistant Commissioner of Income Tax, Central Circle-II, Kanpur dated 03.09.1996 found that it had following shortcomings:

"(i) The notice has not been addressed to the Principal Officer as required U/s 282 of the Act.

(ii) Status, in which the return of so called undisclosed income, was required to be furnished has not been mentioned.

(iii) ''Assessment year'' i.e. Previous Years relevant to Assessment year falling within the Block Period, which in a way is an Assessment Year for the purpose of Assessment of the Block period, has not been mentioned. On the contrary, the notice specifies the ''definition'' of the Block period i.e. Assessment Years this purpose, which could not be equated to the specifying of the specific previous years falling within the Block Period."

19. It consequently held that notice is vague and illegal and cannot be said to be a valid notice as required under Section 158BC.

20. When coming to third question formulated by Tribunal as noticed above, it held that purpose of notice under Section 158 BC is to complete block assessment in the cases where assessee is said to have undisclosed income on the basis of material found on search and seizure under Section 132 or books of account, other documents or assets are requisitioned under Section 132A and since this notice gives jurisdiction to Assessing Officer to proceed to make block assessment it is mandatory and has to be tested in same manner as requirement of notice under Section 148 itself has been tested time and again and held mandatory.

21. It, thus, answered all the three questions noted above holding that notice under Section 158 BC was bad in law, hence, block assessment made by Assessing Officer is without jurisdiction.

22. If view taken by Tribunal on the question of notice is sustained, there is no reason to proceed with the matter on other aspects and hence, we proceed to consider this aspect first, since substantial questions of law which have been pressed before us, substantially revolve around this very issue.

23. Chapter XIV B was inserted by Finance Act, 1995. It introduced a new concept of assessment in the cases relating to search conducted under Section 132 of Act, 1961 or requisition made under Section 132 A of Act, 1961 after 30.06.1995.

24. Section 158 BC reads as under:

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

(a) the Assessing Officer shall-

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

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

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

Provided that no notice under Section 148 is required to be issued for the purpose of proceeding under this Chapter:

Provided further that a person who has furnished a return under this clause shall not be entitled to file a revised return;

(b) the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142, sub-sections (2) and (3) of section 143 (section 144 and section 145) shall, so far as may be, apply;

(c) the Assessing Officer, on determination of the undisclosed income of the block period in accordance with this Chapter, shall pass an order of assessment and determine the tax payable by him on the basis of such assessment;

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

25. Counsel appearing for Revenue has placed reliance on the judgement of Bombay High Court in Shirish Madhukar Dalvi v. Assistant Commissioner of Income Tax and others ((2006) 287 ITR 242 (Bom)), contending that it has been held therein that Section 148 is a substantive section while Section 158 BC is a procedural section and, therefore, rigour of Section 148 cannot be imported and applied when notice contemplated under Section 158 BC is considered.

26. The special nature of provisions made in Chapter XIV B has been considered in the Assistant Commissioner of Income Tax, Chennai v. A.R. Enterprises (2013) 3 SCC 196. It was held that Chapter XIV B is a self-contained code and gets

attracted as a result of search proceedings initiated by Income Tax Authorities under Section 132 of Act notwithstanding any other provisions of Act except to the extent provided for in the chapter.

27. A Constitution Bench in Commissioner of Income Tax v. Vatika Township Private Limited (2015) 1 SCC 1 also echoed a similar view observing that provisions in Chapter XIVB laid down a special procedure for assessment of search cases with a view to combat tax evasion and also to expedite and simplify assessments in search cases.

28. A perusal of Section 158 BC makes it clear that Assessing Officer shall serve a notice to such person in respect of whom a search was initiated under Section 132, requiring him to furnish within such time not being less than fifteen days, but not more than forty-five days, as may be specified in the notice, a return in prescribed form, verified in same manner as a return Under Clause (i) of Sub-section (1) of Section 142, setting forth his total income including undisclosed income for block period. Clause (b) of Section 158BC provides that Assessing Officer shall proceed to determine undisclosed income of block period in the manner laid down in Section 158BB and provisions of Section 142, Subsections (2) and (3) of Section 143 and Section 144 shall, so far as may be, apply. The language is mandatory. It makes obligatory, upon Assessing Officer to send notice under Clause (a) (ii) where search has been made after 1st day of January, 1997. In respect to applicability of Sections 142, 143 (2) and (3) and 144, it has been said that same shall apply so far as may be.

29. Notice under Section 158BC (a) (ii) giving time to assessee to file return in the manner prescribed under Section 142 (1) (i) gives jurisdiction to Assessing Officer to proceed to make block assessment and hence it is a jurisdictional step and in our view mandatory.

30. We find support from judgement of Supreme Court in Assistant Commissioner of Income Tax and another v. M/s Hotel Blue Moon (2010) 3 SCC 259, decided on 02.02.2010. An argument was raised that for the purpose of block assessment under Chapter XIVB, service of notice under Section 143(2) within prescribed time limit was not a prerequisite. Court repelled this argument and held that Chapter XIV B provides for an assessment of undisclosed income unearthed as a result of search without affecting regular assessment made or to be made. Search is the sine qua non for block assessment. Special provisions are devised to operate in the distinct field of undisclosed income and are clearly in addition to regular assessments covering previous years falling in block period. Special procedure of Chapter XIV B is intended to provide a mode of assessment of undisclosed income, which has been detected as a result of search. It is not intended to be substitute for regular assessment. Its scope and ambit is limited in that sense to materialize unearthed during search. It is in addition to regular assessment already done or to be done. Assessment for block period can only be done on the basis of evidence found as a result of search or requisition of books of accounts or documents and such other materials or information as are

available with Assessing Officer. Therefore, income assessable in block assessment under Chapter XIV B is the income not disclosed but found and determined as a result of search under Section 132.

31. With regard to notice, Section itself prescribes time limit minimum and maximum, look. Having said so Court very categorically said that by making notice issued under this Section, mandatory, it makes such notice the very foundation for jurisdiction. Such notice under the Section is required to be served on the person who is found to be having undisclosed income. Form of notice is prescribed under Rule 12(1A) which in turn prescribes Form 2B for block return. Court further held that Section 158 BC(b) is a procedural provision for making a regular assessment applicable to block assessment as well. It provides for enquiry. Assessment and analysis of entire scheme of Section 158 BC indicates that after the return is filed, Assessing Officer gets jurisdiction to complete assessment by following procedure like issue of notice under Sections 143(2)/142 and complete assessment under Section 143(3). This Section does not provide for accepting return as provided under Section 143(1) (a). Assessing Officer has to complete assessment under Section 143(3) only. In case of default in not filing return or not complying with notice under Sections 143(2)/142, Assessing Officer is authorised to complete assessment ex-parte.

32. Section 158 BC (b) excluded application of Section 143 (1) but especially mentions 143(2) and (3). Section 143(2) becomes necessary only where it becomes necessary to check return, so that where block return conforms to undisclosed income inferred by authorities, there is no reason, why authorities should issue notice under Section 143(2). However, if an assessment is to be completed under Section 143(3) read with Section 158BC, notice under Section 143(2) should be issued within one year from the date of filing of block return. Omission on the part of Assessing Authority to issue notice under Section 143(2) cannot be a procedural irregularity and same is not curable and, therefore, requirement of notice under Section 143(2) cannot be dispensed with. It is mandatory.

33. This decision in our view answers the question that notice under Section 158 BC (a) as well as under Section 158 BC (b) are mandatory. Notice under Section 158 BC (a) has a different intent and requirement of notice under Section 143(2) read with 158 BC (b) is with different intent. Two are mutually exclusive but both have to comply with. In the present case, Tribunal has held that no valid notice under Section 158BC was given to assessee and provision being mandatory block assessment made by Assessing Officer is illegal.

34. Judgement of Bombay High Court in Shirish Madhukar Dalvi v. Assistant Commissioner of Income Tax and others ((2006) 287 ITR 242 (Bom)) cannot help Revenue in view of law laid down by Supreme Court in M/s Hotel Blue Moon (Supra), wherein notice under Section 158 BC (a) and (b) read with 143(2) of Act, 1961 have been held mandatory.

35. In view thereof we answer questions formulated above against Revenue and in favour of assessee. Judgment of Tribunal, therefore, in holding block assessment illegal for want of valid notice is, therefore, confirmed. Appeal is dismissed with cost which we quantify to Rs.25,000/-.