

(2014) 03 KL CK 0092

In the High Court Of Kerala

Case No : I.T.A. No. 15 of 2014 (Block Assessment Period 1-4-1985 to 15-9-1995)

R. Romi

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 06-03-2014

Acts Referred:

Income Tax Act, 1961 — Section 132, 139, 142, 143(2), 143(3)

Citation : (2014) 363 ITR 311

Hon'ble Judges : Manjula Chellur, C.J;A.M. Shaffique, J

Bench : Division Bench

Advocate : T.M. Sreedharan, Senior Advocate, V.P. Narayanan, Smt. Bobby M. Sekhar and Smt. Divya Ravindran, Advocate for the Appellant; Jose Joseph, Standing Counsel for Income-tax, Advocate for the Respondent

Judgement

A.M. Shaffique, J.—This appeal is filed by the assessee challenging the order passed by the income tax Appellate Tribunal, Cochin Bench, in I.T. (S & S) A. No. 13/Coch/96. The assessment relates to the block period from April 1, 1985, to September 15, 1995. The facts involved in the case would disclose that the assessee was assessed to income tax for the block period from April 1, 1985, to September 15, 1995, u/s 143(3) read with section 158BC of the income tax Act, pursuant to a search u/s 132 in the premises of one Sri Babu Rajendra Prasad and Sri Sasidharan on September 15, 1995. Notice u/s 158BC was issued to the assessee on June 25, 1996. He filed the return of income declaring nil undisclosed income on August 22, 1996. Subsequently, the Assessing Officer passed an order u/s 143(3) read with section 158BC of the Act on September 27, 1996, determining the total undisclosed income at Rs. 9,55,380 and demanding income tax of Rs. 5,73,228.

2. The assessee preferred an appeal before the income tax appellate authority, which was disposed of reducing the estimated additions made in the assessment order. The assessee had taken a contention that the entire assessment ought to

have been set aside as no notice was issued u/s 143(2) of the income tax Act. However, the Tribunal did not accept the said contention and modified the order only to a limited extent.

3. The assessee has now produced before this court certain information received under the Right to Information Act. Annexure D is the said information. The question was whether notice u/s 143(2) of the income tax Act was issued to the assessee for the block period from April 1, 1985, to September 15, 1985. The answer was that no such notice was issued. On this basis, it is contended by the assessee that the entire proceedings are liable to be set aside.

4. The assessee has raised the following substantial questions of law:

(i) Whether, on the facts and in the circumstances of the case, did not the Appellate Tribunal err in law in not setting aside the assessment order, annexure A, for the block period April 1, 1985, to September 15, 1995, on the ground of violation of mandatory requirement of section 143(2) of the income tax Act, 1961?

(ii) Should not the Appellate Tribunal have held that the block assessment order, annexure A, is invalid in the absence of any undisclosed income of the appellant evidenced by the seized material?

(iii) Did not the Appellate Tribunal err in law in partially sustaining the estimate of undisclosed income when the entire assessment is illegal and invalid?

(iv) Is not the order of the Appellate Tribunal, annexure C, arbitrary and illegal and liable to be set aside?

5. We have heard the learned counsel for the appellant as well as the learned standing counsel appearing for the Department as well. We have requested the learned standing counsel to verify the correctness of the information received in terms of annexure D and the learned standing counsel fairly submitted that the information given was correct and that no notice u/s 143(2) of the income tax Act was issued to the assessee for the block period from April 1, 1985, to September 15, 1995.

6. The Tribunal had considered this issue in paragraph 5 of the order, which reads as under:

5. With regard to the second legal issue, viz., non-issuance of notice u/s 143(2) of the Act, we notice that the assessee has raised this legal issue simply for the reason that the notice u/s 143(2) was not available in his record. The assessee was subjected to search in 1995 and we are hearing the appeal afresh in 2013. Thus, almost 18 years have elapsed since the date of search and, hence, the possibility of misplacing the section 143(2) notice cannot be ruled out. The assessee did not urge this legal issue at the time of filing appeal before the Tribunal but urged for the first time before us after a lapse of considerable years. We also notice that the assessee has not taken any step to inspect the

assessment record in order to ascertain whether the Assessing Officer has issued the notice u/s 143(2) of the Act before completing the block assessment. It is well settled proposition of law that it is the responsibility of the person making allegations to prove the same with credible evidence. In the instant case, the assessee has failed to prove the allegation with any material. Under these circumstances, we do not find any justification in admitting this legal ground at this stage and, accordingly, dismiss the same in limine.

7. But, apparently, on the basis of annexure D, it is not open for the Department to contend that notice was issued u/s 143(2). The Tribunal has proceeded on the basis that notice would have been issued especially since the matter was being considered after 18 years and it would have been misplaced. This finding of the Tribunal is now found to be incorrect on the basis of the specific answer given by the authority concerned. Section 143(2) reads as under:

(2) Where a return has been furnished u/s 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer shall,--

(i) where he has reasons to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:

Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003;

(ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return:

Provided that no notice under clause (ii) shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished.

8. As contended by the learned counsel appearing for the appellant, it is not in dispute that in order to make assessment u/s 143(3) read with section 158BC, notice should be issued u/s 143(2) and omission to issue such a notice is not a procedural irregularity and is not curable. The judgment relied upon is Assistant Commissioner of Income Tax and Another Vs. Hotel Blue Moon, . Having regard to the law laid down by the Supreme Court in the above judgment and having regard to the fact that it is now admitted by the Department that no notice was issued u/s 143(2) of the income tax Act to the assessee, we are inclined to set aside the orders passed by the Tribunal as well as the Assessing Officer and

accordingly, this appeal is allowed answering the questions of law in favour of the assessee. The appeal is hence allowed, setting aside the order passed by the Tribunal and the Assessing Officer.