
(2010) 04 AHC CK 0013
In the Allahabad High Court

Virendra Dev Dixit and Smt. Kamla Devi Dixit	APPELLANT
Vs	
Assistant Commissioner of Income Tax	RESPONDENT

Date of Decision : 19-04-2010

Acts Referred:

Income Tax Act, 1961 — Section 139, 142, 142(1), 142(2), 142(3)

Citation : (2010) 233 CTR 177 : (2011) 331 ITR 483

Hon'ble Judges : Rajes Kumar, J;Pankaj Mithal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Rajes Kumar, J.—These are two appeals u/s 260A of the IT Act relating to the block period 1st April, 1988 to 28th April, 1998 arising from the order of the Tribunal dt. 6th Feb., 2009 raising the following substantial questions of law in both the appeals:

IT Appeal No. 120 of 2009

(i) Whether on the facts and in the circumstances of the case, the decision of the learned Tribunal is not erroneous in holding that the application of provision to Section 143(2) would not be applicable to block assessment procedure and the matter would necessarily travel back to the file of AO for the purpose of curing the defect of non-service of notice u/s 143(2) whereas the assessment deserves to be quashed?

(ii) Whether such restoration is valid in terms of Section 292B of the Act which cures only the defect or omission in the notice issued or purported to have been issued which in substance and effect is in conformity with or according to the intent and purpose of this Act; but does not cure the non-service of notice in view of the fact that the (i) defect or omission in the notice and (ii) non-service of notice which refers to the act of omission but not to any defect, are entirely two different factors and cannot be combined as defect of non-service of notice?

(i) Whether on the facts and in the circumstances of the case, the decision of the learned Tribunal is not erroneous in holding that the application of provision to Section 143(2) would not be applicable to block assessment procedure and the matter would necessarily travel back to the file of AO for the purpose of curing the defect of non-service of notice u/s 143(2) whereas the assessment deserves to be quashed?

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2. It appears that a search and seizure operation was conducted by the ITO on 28th April, 1998 at the residential premises of the appellants and in pursuance thereof orders u/s 158BC were passed against both the appellants for the block period 1st April, 1988 to 28th April, 1998. It appears that both the appellants have filed the returns for the block period on 16th Nov., 1999.

3. Challenging the order u/s 158BC the appellants filed appeals before the CIT(A). Both the appeals have been allowed in part.

4. Being aggrieved by the order of the CIT(A), the appellants as well as the Revenue filed appeals before the Tribunal. Before the Tribunal the appellants have submitted that for making assessment u/s 158BC it is mandatory to issue and to serve notice u/s 143(2) within the specified time. It was submitted that no notice was issued u/s 143(2) within the specified time and, therefore, the entire block assessment orders against both the appellants were illegal and without jurisdiction and liable to be quashed.

5. It appears that the senior Departmental Representative, before the Tribunal, has admitted that no notice u/s 143(2) has been issued to the appellants. The Tribunal, in the impugned order, has held that the provision of Section 143(2), i.e. the issue of verification notice for the block assessment under Chapter XIV-B, is applicable. The Tribunal, however, held that the application of the proviso to Section 143(2), providing for a time limit for the service of notice issued thereunder and, thus, also, to its issue, would not be applicable to the block assessment procedure. The Tribunal, accordingly, remanded back the matter to the AO to cure the defect. The Tribunal observed as follows:

6. This, then, concludes all the issues arising for adjudication of the assessee's additional ground. The matter, thus, would necessarily travel back to the file of the AO. For the purpose of curing the defect of non-service of the notice(s) u/s 143(2), so that the assessment stands framed in compliance with the mandate of

the procedure as statutorily defined. Before parting, however, it may be clarified that the restoration back to the file of the AO is only for the reason of the categorical admission by the senior Departmental Representative made with reference to the assessment record(s), of their being no issue of notice(s) u/s 143(2) in the present case, as if as it appears from the assessee's ground, if the same stand already served, albeit beyond the time limit as prescribed vide the proviso to the provision, there would be no purpose for remission thus, with we having confirmed the non-applicability of the said proviso to the block period assessment, as in the instant case(s), and restoring back the assessment back to the file of the AO. Only for that purpose. We decide accordingly.

6. Learned Counsel for the appellant submitted that issue of notice u/s 143(2) for the purposes of making the block assessment u/s 158BC is mandatory. The said notice has to be issued within the specified period and if not issued such defect is not curable and the block assessment order stand vitiated and liable to be quashed. He submitted that the service of notice on the assessee u/s 143(2) within the prescribed period of time is a pre-requisite for framing the block assessment under Chapter XIV-B of the Act and, therefore, the Tribunal has erred in remanding back the case to the AO to cure the defect instead of quashing the assessment order for want of non-issuance and non-service of the notices u/s 143(2) within the prescribed period. The reliance is placed on the decision of the Gauhati High Court in the case of Smt. Bandana Gogoi Vs. Commissioner of Income Tax and Another, the decision of the Delhi High Court in the case of Commissioner of Income Tax Vs. Pawan Gupta, and the recent decision of the apex Court in the case of Assistant Commissioner of Income Tax and Another Vs. Hotel Blue Moon,

7. Sri Shambhu Chopra, standing counsel, states that non-issuance of notice u/s 143(2) is merely an irregularity and is curable. He further submitted that the purpose for the issue of notice is to provide proper opportunity of hearing which has been duly afforded and, therefore, the Tribunal has rightly remanded back the matter to the assessing authority to cure the defect by issuing the notice u/s 143(2). He further submitted that the Tribunal has rightly held that the proviso to Section 143(2), which provides time limit, is not applicable to the assessment u/s 158BC.

8. Section 143(2) of the IT Act, 1961 reads as follows:

Where a return has been furnished u/s 139, or in response to a notice under Sub-section (1) of Section 142, the AO shall,-

(i) where he has reason 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 underpaid 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.

9. We have considered the rival submissions of learned Counsel for the parties and the materials on record. We are of the opinion that the issue involved is no more *res integra* and is covered by the decision of the apex Court in the case of *Asstt. CIT and Anr. v. Hotel Blue Moon* (supra). On the consideration of the scheme of the Act and the relevant provision, the Gauhati High Court in the case of *Smt. Bandana Gogoi* (supra) has held as follows:

For this reason, we hold that the provisions of Section 142 and Sub-sections (2) and (3) of Section 143 will have mandatory application in a case where the AO in repudiation of the return filed in response to a notice issued u/s 158BC(a) proceeds to make an inquiry. The defects crept in cannot be cured at this stage in view of the limitation provided in Section 143(2). The assessment order in the instant case thus suffers from both procedural and jurisdictional error. The option left with the AO is to compute the income and levy taxes on the basis of the return filed by the assessee.

The question formulated is answered against the Revenue and in favour of the assessee. Consequent thereupon, the orders passed by the authorities below are set aside. The appeal, accordingly, stands allowed.

10. Similar view has been taken by the Division Bench of the Delhi High Court in the case of *CIT v. Pawan Gupta* (supra). It has been held as follows:

Thus, we are of the clear view that where the AO is not inclined to accept the return of undisclosed assessment filed by the assessee issuance of a notice u/s 143(2) is a pre-requisite for framing the block assessment order under Chapter XIV-B of the IT Act, 1961. We are also of the view that if an assessment order is passed in such a situation without complying with Section 143(2), it would be invalid and not be merely irregular.

11. The aforesaid decisions of the Gauhati High Court and the Delhi High Court have been affirmed by the apex Court in the case of *Asstt. CIT and Anr. v. Hotel Blue Moon* (supra). The question for consideration before the apex Court was whether the service of the notice on the assessee u/s 143(2), within the prescribed period of time, is a pre-requisite for framing the block assessment

under Chapter XIV-B of the IT Act. The apex Court has held as follows:

We may now revert back to Section 158BC(b) which is the material provision which requires our consideration. Section 158BC(b) provides for enquiry and assessment. The said provision reads "that the AO 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." An analysis of this Sub-section indicates that, after the return is filed, this clause enables the AO to complete the assessment by following the procedure like issue of notice u/s 143(2)/142 and complete the assessment u/s 143(3). This section does not provide for accepting the return as provided u/s 143(1)(a). The AO has to complete the assessment u/s 143(3) only. In case of default in not filing the return or not complying with the notice u/s 143(2)/142, the AO is authorized to complete the assessment ex parte u/s 144. Clause (b) of Section 158BC by referring to Section 143(2) and (3) would appear to imply that the provisions of Section 143(1) are excluded. But Section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice u/s 143(2). However, if an assessment is to be completed u/s 143(3) r/w Section 158BC notice u/s 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice u/s 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice u/s 143(2) cannot be dispensed with. The other important feature that requires to be noticed is that Section 158BC(b) specifically refers to some of the provisions of the Act which require to be followed by the AO while completing the block assessments under Chapter XIV-B of the Act. This legislation is by incorporation. This section even speaks of sub-sections which are to be followed by the AO. Had the intention of the legislature been to exclude the provisions of Chapter XIV of the Act, the legislature would have or could have indicated that also. A reading of the provision would clearly indicate, in our opinion, if the AO, if for any reason, repudiates the return filed by the assessee in response to notice u/s 158BC(a), the AO must necessarily issue notice u/s 143(2) of the Act within the time prescribed in the proviso to Section 143(2) of the Act. Where the legislature intended to exclude certain provisions from the ambit of Section 158BC(b) it has done so specifically. Thus, when Section 158BC(b) specifically refers to applicability of the proviso thereto it cannot be excluded. We may also notice here itself that the clarification given by the CBDT in its Circular No. 717 dt. 14th Aug., 1995 [(1995) 127 CTR (St) 21], has a binding effect on the Department, but not on the Court. This circular clarifies the requirement of law in respect of service of notice under Sub-section (2) of Section 143 of the Act. Accordingly, we conclude that even for the purpose of Chapter XIV-B of the Act, for the determination of undisclosed income for a block period under the provisions of Section 158BC, the provisions of Section 142 and

Sub-sections (2) and (3) of Section 143 are applicable and no assessment could be made without issuing notice u/s 143(2) of the Act.

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 AO in repudiation of the return filed u/s 158BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of Section 142, Sub-sections (2) and (3) of Section 143.

On a consideration of the provisions of Chapter XIV-B of the Act, we are in agreement with the reasoning and the conclusion reached by the High Court.

(Emphasis, italicised in print, provided).

12. From the aforesaid decision it emerges that the service of notice on the assessee u/s 143(2) within the prescribed period of time is a pre-requisite for framing the block assessment under Chapter XIV-B of the Act. It is mandatory. Non-issuance of notice is not a mere procedural irregularity and the same is not curable. For the purpose of Chapter XIV-B of the Act, for the determination of undisclosed income for a block period under the provisions of Section 158BC the provisions of Section 142 and Sub-sections (2) and (3) of Section 143 are applicable and no assessment could be made without issuing notice u/s 143(2) of the Act within the time specified. Where the AO in repudiation of the return filed u/s 158BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of Section 142 and Sub-sections (2) and (3) of Section 143.

13. Admittedly, in the present case, the notice u/s 143(2) has not been issued. The period of limitation has already expired and, therefore, such notice cannot be issued.

14. Thus, we are of the view that the remand of the case to the AO to cure the defect by issuing a fresh notice is wholly unjustified. We are also of the view that the view of the Tribunal that the proviso of Section 143(2), which provides limitation for serving of the notice, does not apply to the block assessment u/s 158BC under Chapter XIV-B, is erroneous.

15. In the result, both the appeals are allowed. The order of the Tribunal as well as the order of the authority below are set aside.