IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.368 of 2010

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Bulaki Ram S/o Late Ganesh Ram, Mubarakganj, District-Rohtas

.... Appellant/s

Versus

Assistant Commissioner of Income-tax, Central Circle-4, Patna

.... Respondent/s

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Appearance :

For the Appellant/s : M/S. Ajay Kr. Jha
Sanjeev Kumar
Ruchikar Jha

For the Respondent/s : Mr. Rishi Raj Sinha Sr. Standing Counsel
Mrs. Archana Prasad, Junior Standing Counsel

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

Date: 29-04-2016

Heard learned counsel for the appellant assessee and learned Senior Standing Counsel for the Income-tax Department.

The appeal has been filed against the order dated 13.06.2008 passed by the Income-tax Tribunal, Patna Bench, Patna in IT (S.S.) A. No.26/Pat/2007 for the Block Assessment Year 1991-92 to 2001-02 up to 30.11.2000, by which the appeal was allowed in part.

The short facts of the case are that a raid was conducted on 01.08.2000 at the residential premises of the assessee and his brother Gopal Ram, Mubarakganj, Sasaram in which cash of Rs.3,65,972/- was seized, apart from country made revolver, rifle cartridges, pouch of country made liquor, Mahua, Gur and Borax. Upon receipt of information from the Inspector of Police, Sasaram, regarding police raid and the seizure of cash a warrant of authorization under Section 132A of the Income Tax Act, 1961 (in short 'Act') was issued on 30.11.2000 for requisitioning the assets and documents seized. Thereafter, notice under Section 158BC of the Act was issued on 12.12.2001 for filing the block return. The appellant filed the block return on 27.12.2001 declaring total income at Rs.4,64,000/- including undisclosed income computed under Section 158BB for the block period. Thereafter, detailed information was sought through a questionnaire to which the appellant replied. Total undisclosed income for the block period has been computed at Rs.29,05730/- by the assessing officer. Aggrieved by the same, the assessee filed an appeal before the Commissioner of Income-tax (Appeals)-1, Patna, which was registered as Appeal No.570/A-1/02-03 and by the order dated 11.12.2006, the appeal was partly allowed. In the further appeal before the Tribunal, the same was also partly allowed. Aggrieved by the same, the assessee is before this Court.

The appeal was admitted on 16.04.2012 with the following observations:-

> "The substantial question of law raised on behalf of the appellant is that in absence of any notice under Section 143 (2) of the Income Tax Act the block assessment

under Chapter XIV-B of the Act was vitiated in law. In support of this proposition reliance was placed upon a judgment of the Supreme Court in the case of C.I.T.Vrs. Hotel Blue Moon reported in (2010) 3 SCC 259.

This appeal is admitted for hearing on the aforesaid substantial question of law.

In our view, on account of submission advanced on behalf of the Revenue another substantial question of law also needs to be answered in this Case, i.e. whether plea of lack of notice and its effect can be raised before this Court for the first time for consideration under appellate power vested by Section 260 A of the Income Tax Act, when no such issue was taken up before the authority under the Act. This question shall also be decided at the time of final hearing of this appeal."

From a consideration of the aforesaid observations, it is evident that the matter has been admitted on the following questions of law:-

"(i) Whether on the facts and in the circumstances of the case in the absence of any notice under Section 143 (2) of the Income-tax Act the block assessment under Chapter XIV-B of the Act was vitiated in law?

> (ii) Whether the plea of lack of notice and its effect can be raised before this Court for the first time for consideration under appellate power vested by Section 260 A of the Income-tax Act, where no such issue was taken up before the authority under the Act?"

In support of his stand, learned counsel for the appellant relies upon the decision of the Supreme Court in the case of Assistant Commissioner of Income-Tax and another vs. Hotel Blue Moon: (2010) 321 ITR 362 (SC), in paragraph Nos. 15 and 16 of which it has been held as follows:-

> "15. 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 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". An analysis of this sub-section indicates that

after the return is filed, this clause enables the Assessing Officer to complete the assessment by following the procedure like issue of notice under Section 143 (2)/142 and complete the assessment under Section 143(3). This section does not provide for accepting the return as provided under section 143(1)(a). The Assessing Officer has to complete the assessment under section 143 (3) only. In case of default in not filing the return or not complying with the notice under section 143(2)/142, the Assessing Officer is authorized to complete the assessment ex parte under section 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 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 the assessing authority to issue notice under section 143 (2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under section 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 Assessing Officer 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 Assessing Officer. 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 Assessing Officer, if for any reason, repudiates the return filed by the assessee in response to notice under section 158BC(a), the Assessing Officer must necessarily issue notice under Section 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 Central Board of Direct Taxes in its Circular No.717 dated August 14, 1995 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 under section 143 (2) of the Act. However, it is contended by Sri Shekhar, learned counsel for the Department that in view of the expression "so far as may be" in section 153BC(b), the issue of notice is not mandatory but optional and are to be applied to the extent practicable. In support of that contention, the learned counsel has relied on the observation made by this Court in Dr. Pratap Singh's case (1985) 155 ITR 166. In this case, the court has observed that section 37 (2) provides that "the provisions of the Code relating to searches, shall so far as may be, apply to searches directed under section 37 (2). Reading the two sections together it merely means that the methodology prescribed for carrying out the search provided in section 165 has to be generally followed. The expression 'so far as may be' has always been construed to mean that those provisions may be generally followed to the extent possible". The learned counsel for the respondent has brought to our notice the observations made by this court in the case of Maganlal v. Jaiswal Industries, Neemach, (1989) 4 SCC 344 wherein this court while dealing with the scope and import of the expression "as far as practicable" has stated "without anything more the expression 'as far as possible' will mean that the manner provided in the Code of attachment or sale

> of property in execution of a decree shall be applicable in its entirety except such provision therein which may not be practicable to be applied."
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> 16. 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 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."

Relying upon the aforesaid decision, it is submitted by learned counsel for the appellant that issuance of notice under Section 143 (2) of the Act having been held to be mandatory in the aforesaid decision, the same goes to the root of the jurisdiction of the assessing officer and failure on his part under Section 143 (2) was not curable and the entire block assessment thus stood vitiated and fit to be set aside.

It is further submitted by learned counsel for the appellant that since the failure to issue notice goes to the root of the jurisdiction even if the said plea has not been taken by the appellant before the lower appellate authorities then the same being a pure question of law going to the root of jurisdiction of the assessing officer can be raised even in an appeal under Section 260 A of the Act before this Court.

As a matter of fact, learned counsel for the appellant submits that before the Tribunal the ground raised was that in the facts and circumstances of the case, the orders passed by the assessing officer as also by the CIT (Appeal) are also unsustainable in law being violative of the principles of natural justice as no reasonable opportunity of hearing was afforded to furnish defence in course of assessment as well as also appellate proceedings.

It is urged by learned counsel that the said ground would substantially cover the point sought to be argued before this Court.

It is also submitted by learned counsel that the plea regarding non-compliance of the mandatory provision of Section 143 (2) could not be taken before the lower appellate authorities for the reason that the decision in the case of Hotel Blue Moon (supra) itself was rendered on 2nd February, 2010, much after the decision of the

Tribunal.

Learned counsel for the Revenue, on the other hand, submits that while the Supreme Court in Hotel Blue Moon'case (supra) has held that the provision of issuance of notice under Section 143 (2) is mandatory but such plea ought to have been taken before the lower appellate authorities and the same not having been done would amount to a waiver of the rights by the appellant and it cannot be raised for the first time at the stage of the High Court, which is to consider substantial question of law.

It is also submitted that such plea is also barred in terms of Section 292 B of the Income Tax Act, which provides that such notice shall not be invalid or deemed to be invalid, if the proceedings were in substance and effect in conformity with or according to the intent and purpose of the Act.

From a perusal of the decision of the Apex Court in the case of Hotel Blue Moon (supra), it is evident that for the determination of undisclosed income for a block period under the provision of Section 158BC of the Act, the provisions of Section 142 and sub-section (2) and (3) of Section 143 have been held to be applicable and it has been clearly held that no assessment could be made without issuing notice under Section 143 (2) of the Act. The provision has thus been held to be mandatory and will go to the root of jurisdiction of the assessing officer to frame a block assessment and failure to do so would invalidate the entire proceedings in relation to the block assessment which would stand vitiated.

The next question which arises as to whether such plea could be taken for the first time before this Court in an appeal under Section 260 A of the Act.

In our view the plea in question is a pure question of law going to the root of the jurisdiction of the assessing authority invalidating the proceedings itself. In such circumstances, it can be permitted to be raised for the first time before this Court in appeal under Section 260A of the Act.

So far as the submission of learned counsel for the Revenue that non-issuance of notice would be protected by Section 292B of the Act is concerned, the said provision is in the following terms:-

> "292B. 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."

It is evident that the said provision does not speak of non-issuance of notice, apart from other matters stated therein, rather it merely protects such notice being issued in pursuance of any of the provisions of the Act from being considered invalid or deemed to be invalid on account of any mistake, defect or omission in such return of income assessment, notice, summons or other proceeding if it is in substance and effect in conformity with or according to the intent and purpose of the Act.

Thus, in the light of the aforesaid discussions, both the substantial questions of law as reframed above by us are answered in the affirmative in favour of the assessee and against the Revenue.

The appeal is, accordingly, allowed.

V.P.Sinha/-

(Ramesh Kumar Datta, J)

(Sudhir Singh, J)

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	