IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL No. 75 OF 2008

The Commissioner of Income Tax,
Having office at Aayakar Bhavan
Patto Plaza, Panaji, Goa. **…. Appellant.**

Versus

M/s. Fomento Finance and Investment
Pvt. Ltd.,
Villa Flores de Silva
Erasmo Carvalho Street
Margao, Goa. **… Respondent.**

Ms. Susan Linhares, Standing Counsel for the Appellant.
Mr. Pardiwala, Senior Advocate alongwith Ms. Jasmine Amalsadvala and Ms. Vinita Palyekar, Advocates for the Respondents.

AND

MISCELLANEOUS CIVIL APPLICATION No. 179 OF 2016

Fomento Finance and Investments Pvt.
Ltd., Vila Flores Da Silva
Erasmo Carvalho Street,
Margao, Goa-403601. **… Applicant.**

Versus

1. The Assistant Commissioner of
   Income Tax, Circle-I,
   Blessing Pioneer Complex,
   Opp: Dist & Session Court,
   Margao, Goa – 403601.

2. The Commissioner of Income-Tax,
Aayakar Bhavan,
EDC Complex, Patto Plaza,
Panaji, Goa – 403001. **… Respondents.**

Mr. Pardiwala, Senior Advocate alongwith Ms. Jasmine Amalsadvala and Ms. Vinita Palyekar, Advocates for the Applicants.

Ms. Susan Linhares, Standing Counsel for the Respondents.

Coram : M. S. SONAK &
NUTAN D. SARDESSAI, JJ.

Date : 13th September, 2019.

Oral Judgment: (Per M. S. Sonak, J.)

Heard Ms. Susan Linhares, Standing Counsel for the Appellant, Mr. Pardiwala, learned Senior Counel alongwith Ms. Jamsine Amalsadwala and Ms. Vinita Palyekar, Advocates for the Respondents.

2. This Appeal was admitted on 27.08.2008 on the following substantial questions of law:

"(A) Whether on the facts and in the circumstances of the case the ITAT was right in holding that the amount of Rs.11,23,36,500/- representing bogus claim of bad debts was not chargeable to tax as undisclosed income in terms of the amended Sections 158B(b) and 158BB(1) of the I.T.Act?

(B) Whether on the facts and in the circumstances of the case the ITAT was right in law in holding that the sum of Rs.11,23,36,500/- constituted genuine bad debts of the assessee, when the fact remained that the debtor disclosed the same as outstanding debts in their accounts?

(C) Whether on the facts and in the circumstances of the case the ITAT was right in law in holding that surcharge u/s 113 of the Act was not leviable on the assessee ignoring in the process the conclusive decisions of the Hon'ble Supreme Court of India in "CIT V/s. Suresh N. Gupta" (2008) 297 ITR 322, upholding this levy in all assessments relating to searches?"

3. Thereafter, on 11.02.2016, the Respondents filed a memo of cross-objections alongwith application for condonation of delay. This is numbered as Miscellaneous Civil Application No. 179 of 2016.

4. On 07.03.2016, the Division Bench of this Court ordered that the application for condonation of delay in filing the cross-objections will be examined at the stage of hearing of Tax Appeal No. 75 of 2008 as was suggested by the learned Counel appearing for both the parties.

5. Today, therefore, the Tax Appeal as well as the application for condonation of delay as filed in cross-objections are taken up for hearing.

6. Admittedly, the substantial questions of law so framed by the order dated 27.08.2008 arise in the context of a special procedure for assessment of such cases under Chapter XIV-B of the Income Tax Act, 1961, which includes, inter alia, Section 158BC. This provision relates to the provision for block assessment.

7. In the present case, before ITAT, there were Appeals filed by both, the Assessee as well as the Revenue which came to be disposed of by impugned Judgment and Order dated 10.12.2007. The Assessee had specifically raised a preliminary objection to the assessment proceedings on the grounds that no notice under Section 143(2) of the Income Tax act, 1961 was ever issued to them. This objection was noted by the ITAT. However, this objection was not decided by the ITAT because the ITAT deemed it appropriate to grant the Assessee relief on other grounds, i.e. the ground that this was not a case of "undisclosed income", which was regarded as one of the prerequisite for assessment under this Chapter.

8. The substantial questions of law framed in our Order dated 27.08.2008 therefore, mainly relate to this ground on the basis of

which the ITAT chose to grant relief to the Assessee.

9. By filing cross-objections, the Assessee seeks to urge the ground based upon non-service of notice under Section 143(2) of the Income Tax Act, 1961.

10. Mr. Pardiwala, learned Counsel for the Assessee submits that the Hon'ble Apex Court in the case of **Assistant Commissioner of Income Tax And Another *v/s.* Hotel Blue Moon**[1] has now held that notice under Section 143(2) of the Income Tax Act is necessary in case of assessment proceedings under Section 158 BC of the Income Tax Act. He submits that this is a issue which goes to the root of jurisdiction. He submits that in case, if this issue is taken up for consideration and decided in favour of the Assessee, then, there will be no necessity to decide the substantial questions of law framed at the time of admission of this Appeal. He submits that sufficient cause has been shown in the application seeking condonation of delay.

11. Mr. Pardiwala, without prejudice, submits that in this case, no cross-objections were filed earlier because at the time when this Appeal was admitted, the issue as to whether notice under Section 143(2) of the Income Tax Act is necessary or not had not been

1 2010 3SCC 259

decided by the Hon'ble Apex Court. Besides, he points out that the ITAT in this case, had not given any specific finding on this issue against the Assessee. Therefore, it was felt that there was no necessity to file any cross-objections. He submits that there are sufficient powers vested in this Court to frame additional substantial questions of law even at the stage of final hearing of the Appeal. He refers to the decision of this Court in **Commissioner of Income Tax *v/s.* M/s. Sodder Builder and Developers (P) Ltd.,** in **Tax Appeal no. 49 of 2008** decided on 16.07.2019 to submit that the additional substantial questions of law precisely on the issue of non-issuance of notice under Section 143(2) of the Income Tax Act was framed by this Court and answered in favour of the Assessee. For all these reasons he submits that either the delay in the institution of the cross-objections be condoned and the cross-objections be taken into consideration or at least substantial questions of law be framed at this stage, now that the matter is fully covered by the decision of the Hon'ble Supreme Court in the case of **Hotel Blue Moon.**

12. In addition to the aforesaid, Mr. Pardiwala points out in terms of Section 260A(7), the provisions of Code of Civil Procedure (CPC) apply to Appeals to the High Court. He refers to the provisions of Order 41 Rule 33 of the CPC to submit that the Appellate Court has ample powers to consider the question of non-issuance of notice under Section 143(2) and decide the matter in

favour of the Assessee. He also refers to provisions of Section 260A(6) of the Income Tax Act to submit that the High Court may determine any issue which has not been determined by the Appellate Tribunal. He submits that in the present case the ITAT failed to determine the issue of necessity of notice under Section 143(2) of the Income Tax Act and therefore, this Court may determine the same in this Appeal.

13. Mrs. Susan Linhares, learned Standing Counsel for the Appellant submits that there is no case made out for condonation of delay which is of over 2000 days in filing cross-objections. She submits that the Assessee was represented by an Advocate and there is no reason to hold that the Assessee was not properly advised in the matter. She further points out that the ITAT has recorded that no further arguments on any other points raised on behalf of the Assessee.

14. In the peculiar facts and circumstances of the present case, we are satisfied that following substantial question of law does arise for determination in this Appeal:

> "Whether non-issuance of notice under Section 143(2) of the Income Tax Act, 1961 vitiates that assessment proceedings under Section 158 BC of the Income Tax Act in view of the Judgment of the Hon'ble Supreme

Court in **Assistant Commissioner of Income Tax And Another** *v/s.* **Hotel Blue Moon** reported in **2010 3SCC 259**?"

15. Section 260A reads as follows:

*"**260A.** (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal [before the date of establishment of the National Tax Tribunal], if the High Court is satisfied that the case involves a substantial question of law.*

(2) The Principal Chief Commissioner or Chief Commissioner or the Principal Commissioner or Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be -

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Principal Chief Commissioner or Chief Commissioner or Principal Chief Commissioner or Commissioner.

(b) [***]

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(2A) The High Court may admit an appeal after the expirty of the period of one hundred and twenty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

***Provided** that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.*

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is

founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which–

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

[(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.]"

16. Section 260A(3) provides that where the the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

17. Section 260A(4) provides that the appeal shall be heard only on the question so formulated and the Respondents shall at the time of hearing of the appeal be allowed to argue that the case does not involve such a question. The proviso to this sub-section however states that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it,

if it is satisfied that the case involves such a question.

18. According to us, there is no dispute from the record that notice under Section 143(2) of the Income Tax Act was never issued to the Assessee before initiating of proceedings under Section 158 BC of the Income Tax Act. The Commissioner (Appeals), in his Order dated 13.09.2004 has given several reasons as to why the issuance of such notice was not a prerequisite for initiating of assessment proceedings under Section 158 BC of the Income Tax Act. According to us, such reasoning cannot any longer prevail after the ruling of the Hon'ble Apex Court in the case of **Hotel Blue Moon** (supra). In this case, the Hon'ble Apex Court, in terms has held that the requirements of issuance of notice under Section 143(2) within the prescribed period is not some procedural formality or a procedural irregularity to hold that such a requirement is mandatory and non-dispensable. The Hon'ble Apex Court had held that such defect of non-issuance of notice under Section 143(2) of the Income Tax Act is not even a curable defect. Record also indicate that this issue was precisely raised by the Assessee before the ITAT. The ITAT however, after recording that such issue was raised before it, failed to decide such issue one way or the other because, the ITAT held in favour of the Assessee on some other grounds.

19. Upon cumulative consideration of the aforesaid

circumstances, we are quite satisfied that this Appeal involves the aforesaid substantial question of law. We are also satisfied that if the substantial question of law is decided in favour of the Assessee, then, there will be no necessity to decide the other substantial questions of law framed by us on 27.08.2008 at the time of admission of this Appeal.

20. In **M/s. Sodder Builder and Developers (P) Ltd** (supra) in similar circumstances, this Court framed an additional question of law precisely on the issue of absence of notice under Section 143(2) of the Income Tax Act in relation to proceedings under Section 158BC of the Income Tax Act. In the said decision as well, this Court held that if such issue were to be decided in favour of the Assessee, then there would arise no question of going into the substantial questions of law framed at the time of institution of Appeal instituted by and on behalf of the Revenue.

21. Now that we have framed the aforesaid question of law, which according to us, is certainly involved in the matter, we proceed to decide the aforesaid substantial question of law with the consent of the learned Counsel appearing for the parties.

22. According to us, the aforesaid substantial question of law will have to be decided in favour of the Assessee in view of the

decision of the Hon'ble Apex Court in **Hotel Blue Moon** (supra). The issue relating to service of notice under Section 1432(2) of the Income Tax Act is a issue which goes to the root of the matter. In **Hotel Blue Moon**(supra), the Hon'ble Supreme Court has now held that issuance of notice under Section 143(2) of the Income Tax Act, 1961 is a mandatory requirement and not some mere procedural irregularity and the same can be said to be curable. In its decision the Apex Court in clear terms has held that the omission on the part of the Assessing Authority to issue notice under Section 143(2)cannot be regarded as a procedural irregularity and the same is not curable and such requirement cannot be dispensed with. Hon'ble Apex Court has held that even for the purpose of Chapter XIV-B of the Income Tax Act for determining of undisclosed income for block assessment in proceedings under Section 158BC, provisions of Section 142, 143(2) and 143(3) are applicable and no assessment can be made without issuing notice under Section 142 of the said Act.

23. Accordingly, we decide the additional substantial question of law in favour of the Assessee and against the Revenue.

24. Since, jurisdictional issue is decided in favour of the Assessee and against the Revenue, no useful purpose will be served in deciding the substantial questions of law framed at the time of admission of this Appeal on 27.08.2008. Even if we were to decide these questions

of law in favour of the Revenue, same, would be of no avail to the Revenue because the very initiation of the assessment proceedings without issuance of notice under Section 143(2) of the Income Tax Act has rendered such assessment proceedings incompetent.

25. In the aforesaid circumstances, we see no ground to interefere with the impugned Judgment and Order dated 10.12.2007. By answering the additional substantial question of law in favour of the Assessee and against the Revenue, we dismiss this Appeal. There shall be no order as to costs.

26. In view of the aforesaid, any decision on the issue of condonation of delay in filing the cross-objections is rendered merely academic and therefore, the Miscellaneous Civil Application No. 179 of 2016 is also disposed of, accordingly.

NUTAN D. SARDESSAI, J. ***M. S. SONAK, J.***

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