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ITAT No.152 of 2015
GA No. 3671 of 2015

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-3
Vs.
OBEROI HOTELS PVT. LTD.

BEFORE :

The Hon'ble JUSTICE SANJIB BANERJEE
And
The Hon'ble JUSTICE ABHIJIT GANGOPADHYAY

Date : June 22, 2018.

Appearance
Md. Nizamuddin, Adv.

Mr. R.N. Bajoria, Sr. Adv.
Mr. Akhilesh Gupta, Adv.
Mr. Asim Choudhury, Adv.
Mr. Rohan Poddar, Adv.

The Court : The substantial questions of law that have arisen are in the context of reassessment proceedings initiated under Section 147 of the Income Tax Act, 1961 pursuant to a notice under Section 148 thereof.

The Appellate Tribunal has quashed the entire reassessment proceedings on the assessee's assertion that no notice under Section 143(2) of the Act was issued by the Assessing Officer before undertaking the reassessment. The judgment of the Appellate Tribunal is founded primarily on the *ratio decidendi* in the Supreme Court judgment reported at 321 ITR 362 (*Assistant Commissioner of Income Tax v. Hotel Blue Moon*). The Revenue is in appeal and says that in view of Section 292BB of the Act, the ground could not have been urged by the assessee before the Appellate Tribunal, particularly, as the assessee participated in course

of the reassessment, the objections of the assessee as to the reassessment were considered by the Assessing Officer and it was not pointed out by the assessee prior to the reassessment being completed that no notice under Section 143(2) of the Act had been issued to him in respect of the reassessment. In the alternative, the Revenue says that if a notice under Section 143(2) is deemed to be mandatory so that in the absence thereof the subsequent order of assessment (or reassessment) has to be annulled, the matter must be restored to the stage where a notice under Section 143(2) of the Act may be issued for completing the assessment or reassessment, as the case may be. In such circumstances, the following substantial questions of law arise:

“1. Whether the failure to issue a notice under Section 143(2) of the Act in course of reassessment proceedings would vitiate the reassessment proceedings altogether?

2. What is the effect in view of Section 292BB of the Act when a notice under Section 143(2) of the Act is not issued at all?”

The Supreme Court judgment in *Hotel Blue Moon* has first to be referred to since such judgment still holds the field. In course of a block assessment when the Assessing Officer repudiated the return filed by the assessee but failed to issue any notice under Section 143(2) of the Act within the prescribed period of time, the Supreme Court held, at paragraph 15 of the judgment, inter alia, as follows:-

“15. ... 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 158 BC, 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 ...”

It is evident that the dictum of the Supreme Court in *Hotel Blue Moon* is that a notice under Section 143(2) is mandatory if the return as filed is not accepted and an assessment order is to be made at variance with the return filed by the assessee. It is also evident that the issue is not limited to block assessment but would apply to every case where a notice under Section 143(2) of the Act is necessary. In the judgment and order of the Appellate Tribunal impugned herein dated May 14, 2015, the Tribunal noticed a judgment of this Court of April, 8, 2014 rendered in ITAT 149 of 2013 (*Commissioner of Income Tax v. Humboldt Wedag India Pvt. Ltd.*) where this Court had expressed an opinion that when an order of assessment was passed in course of reassessment under Section 143(3) of Act, “The omission could have been a reason for setting aside the order of assessment, but that could not have been a reason, in the facts and circumstances of this case, for nullifying the exercise under section 147 of the Income Tax Act.”

Such view taken by this Court in *Humboldt Wedag India Pvt. Ltd* was without noticing the Supreme Court judgment in *Hotel Blue Moon*. The relevant Bench also did not take into consideration a previous order of this Court of April

4, 2013 when the reassessment proceedings were quashed merely on the ground that no notice under Section 143(2) of the Act was issued to the assessee before making the reassessment. It is necessary to see the short order of April, 4, 2013 passed in ITAT 27 of 2013 (*CIT v. I. S. Leather*):

“Admittedly, no notice under section 143(2) of the I.T. Act was issued to the assessee before making the re-assessment. The learned Tribunal, relying on the judgment in the case of ACIT –vs- Hotel Bluemoon, reported in (2010) 321 ITR 362 (SC) and the judgment in the case of CIT –vs- C. Palaniyappan, reported in (2006) 284 ITR 257 (Madras), opined that the re-assessment was without jurisdiction and was, therefore, quashed. It is against this order that the revenue has come up.

“We find no infirmity in the order under challenge. The appeal is as such dismissed.”

The Revenue has sought to rely on a Madras High Court judgment reported at 294 ITR 233 (*Areva T & D India Ltd. v. ACIT*) where the view taken was that “the non-issuance of a notice under section 143(2) of the Act, will not make the reassessment nullity in law, which is validly initiated under section 148 of the Act”. However, such judgment of the Madras High Court was noticed and discussed in a later judgment of the same Court reported at 2010 Taxman 78 (*Sapthagiri Finance & Investments v. ITO*). It was held therein that the view taken in *Areva T & D India Ltd* was no longer good law in view of the Supreme Court judgment in *Hotel Blue Moon*. The assessee has also relied on another unreported judgment of the Madras High Court of November 19, 2014 in Tax Case (Appeal) 766 of 2014 (*N. Ahamed Ali v. ITO*) where it was held that a notice under Section

143(2) of the Act was mandatory and the judgment in *Areva T & D India Ltd* was not good law.

Section 148 of the Act permits the issuance of a notice in certain circumstances when it is discovered that income has escaped assessment and sub-section (1) thereof mandates a return to be filed upon an assessee being served a notice under such provision, whereupon “the provisions of this Act, shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139.”

Section 143 of the Act pertains to assessment and in its opening words refers to a return being made under Section 139 of the Act or in response to a notice under Section 142 (1) of the Act. At the time relevant for the assessment that was undertaken by the Assessing Officer after a notice under Section 148 of the Act had been issued, Section 143(2) in its then form had two clauses and a proviso after Clause (ii) that precluded a notice under Clause (ii) being served beyond a particular period. Further, Section 153 (2) of the Act directs an order of assessment, reassessment or recomputation to be made under Section 147 of the Act within a particular period. The relevant periods, both in terms of the proviso to Section 143(2) of the Act and in terms of Section 153 thereof, have expired. As noticed by the Supreme Court in *Hotel Blue Moon* and is quoted above, the time is of some significance and notices can no longer be issued after the expiry of the period mandated therefor nor can proceedings be continued after the time limit set therefor by the statute.

In the light of the above discussion, particularly taking into consideration the law laid down by the Supreme Court in *Hotel Blue Moon*, it is inescapable that the issuance of a notice under Section 143(2) of the Act is mandatory if the Assessing Officer seeks not to accept any part of the return as furnished by the assessee or make an assessment order contrary thereto and, even in course of reassessment proceedings, such notice cannot be dispensed with.

One of the arguments put forth on behalf of the Revenue is that in course of reassessment proceedings once a notice is issued under Section 148 of the Act, the assessee is made aware of what part of the income or on what count the assessee's income is perceived to have escaped attention. It is submitted that in such a scenario, the requirement of a notice under Section 143(2) may be somewhat diluted, if not unnecessary. Apart from the fact that such argument cannot be countenanced in the light of the dictum in *Hotel Blue Moon*, it is evident that an assessment under Section 143(3) of the Act is consequent upon a hearing and the production of evidence on such points on which the Assessing Officer may harbour doubts and are indicated in his notice under Section 143(2) of the Act. Section 143(3) of the Act contemplates an assessment undertaken by the Assessing Officer upon material being produced by the assessee on grounds which are indicated by the Assessing Officer in his notice under Section 143(2) of the Act in respect whereof the Assessing Officer may have misgivings or may disagree with the return filed by the assessee. Implicit in the wording of Section 143(3) of the Act is the indispensability of a notice under Section 143(2) thereof.

Apropos the second question framed above, it is necessary that Section 292BB of the Act be noticed in its entirety:

“292BB Notice deemed to be valid in certain circumstances –

Where an assessee has appeared in any proceeding or cooperated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was –

- (a) not served upon him; or
- (b) not served upon him in time; or
- (c) served upon him in an improper manner:

Provided that nothing contained in this section shall apply where the assessee had raised such objection before the completion of such assessment or reassessment.”

Even if the provision does not carry a non-obstante clause, since Section 292BB is a provision of general application, it would be applicable in all situations; but only in so far as it proclaims to operate. Section 292BB of the Act, read in the context of several provisions of the Act which mandatorily require notices to be issued in divers situations, cannot be said to have dispensed with the issuance of such notices altogether. Section 292BB must be understood to cure any defect in the service of the notice and not authorise the dispensation of a notice when the appropriate interpretation of a provision makes the notice provided for thereunder to be mandatory or indispensable.

This is not a case where the assessing officer says that a notice had been issued and there is a contradiction thereof by the assessee. It is evident that the assessee carried the objection before the Commissioner (Appeals) and the Commissioner brushed aside the objection on the ground that it was a technicality without addressing the issue or applying his mind to such aspect of the matter. Further, it is evident from the order impugned passed by the Appellate Tribunal that no notice under Section 143(2) of the Act had, in fact, been issued in this case. In such a situation, where a notice that is mandatorily required to be issued is found not to have been issued, Section 292BB of the Act has no manner of operation.

The two substantial questions of law are answered accordingly as follows:

- (1) If the time for issuance of the notice under Section 143(2) of the Act has expired or the time for completing the reassessment proceedings under Section 153(2) of the Act has run out, the failure to issue such notice under Section 143(2) of the Act would result in the entire proceedings, including any order of assessment, to be quashed.
- (2) Section 292BB of the Act does not dispense with the issuance of any notice that is mandated to be issued under the Act, but merely cures the defect of service of such notice if an objection in such regard is not taken before the completion of the assessment or reassessment.

In addition, it is held that in the light of the Supreme Court dictum in *Hotel Blue Moon*, the view expressed in *Humboldt Wedag India Pvt. Ltd* is *per incuriam* and, as such, not good law.

ITAT 152 of 2015 and GA 3671 of 2015 are disposed of.

There will be no order as to costs.

(SANJIB BANERJEE, J.)

(ABHIJIT GANGOPADHYAY, J.)

sg/pa/mg.