

Asstt.Commr.Of Income Tax & Anr vs M/S Hotel Blue Moon on 2 February, 2010

Author: H.L. Dattu

Bench: H.L. Dattu, S.H. Kapadia

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1198 OF 2010
(Arising out of SLP(C) No. 22973 of 2007)

Assistant Commissioner of Income Tax & Anr.Appellants

Versus

M/s. Hotel Blue MoonRespondent

WITH

C.A. No. 1199/2010 @ S.L.P.(C) No.30284/2009,
C.A. No. 1200/2010 @ S.L.P.(C) No.30285/2009,
C.A. No.1201/2010 @ S.L.P.(C) No.30286/2009,
C.A. No.1202/2010 @ S.L.P.(C) No.30287/2009, and
C.A. No.1203/2010 @ S.L.P.(C) No.30288/2009

JUDGMENT

H.L. Dattu,J.

1) Leave granted in all the special leave petitions.

2) These six appeals have been heard together. They arise out of similar facts and the question of law arising therefrom is the same.

3) The facts in the lead case are : This is an appeal against the judgment of the High Court of Guwahati in a appeal under Section 260A of the Income Tax Act, 1961, hereinafter referred to as 'the Act', and the point that is raised for our determination is, whether issue of notice under Section 143(2) of the Act within the prescribed time for the purpose of block assessment under Chapter XIV-B of the Act is mandatory for assessing undisclosed income detected during search conducted

under Section 132 of the Act. While, according to the department, issue of a notice under Section 143(2) is not essential requirement in block assessment under Chapter XIV-B of the Act. According to the assessee, service of notice on the assessee under Section 143(2) of the Act within the prescribed period of time is a pre-requisite for framing the block assessment under Chapter XIV-B of the Act. The Appellate Tribunal held, while affirming the decision of the CIT(A) that non-issue of notice under Section 143(2) is only a procedural irregularity and the same is curable. In the appeal filed by the assessee before the Guwahati High Court, the following two questions of law were raised for consideration and decision of the High Court, they were : -

"(1) Whether on the facts and in circumstances of the case the issuance of notice u/s 143(3) of the Income Tax Act, 1961 within the prescribed time limit for the purpose of making the assessment under Section 143(3) of the Income Tax Act, 1961 is mandatory? And (2) Whether, on the facts and in the circumstances of the case and in view of the undisputed findings arrived at by the Commissioner of Income Tax (Appeals), the additions made u/s 68 of the Income Tax Act, 1961 should be deleted or set aside."

4) The High Court, disagreeing with the Tribunal, held, that the provisions of Section 142 and sub-sections (2) and (3) of Section 143 will have mandatory application in a case where the assessing officer in repudiation of return filed in response to a notice issued under Section 158 BC(a) proceeds to make an inquiry. Accordingly, the High Court answered the question of law framed in affirmative and in favour of the appellant and against the revenue. The revenue thereafter applied to this Court for special leave under Article 136, and the same was granted, and hence this appeal.

5) The learned counsel Sri Shekhar for the revenue submitted, that, Chapter XIV B of the Act provides a special procedure for search cases and is a complete code in itself dealing with both the substantive as well as procedural aspects of search cases and, therefore, there is a distinction between the procedure for regular assessment under Chapter XIV and the procedure of Block assessment under Chapter XIV B. Therefore, it is submitted for the purpose of block assessments the assessing authority need not follow the procedure prescribed under Chapter XIV which includes issuance of notice under Section 143(2). The learned counsel has further contended that in a proceeding under Section 158 BC, there is no requirement of a notice to be issued under Section 143(2), since issuance of notice for the purpose of Section 158 BC is separately prescribed. It is further submitted that Block assessment is in addition to regular assessment, and what is included in regular assessment, cannot be assessed again in the course of a Block assessment and similarly, what is assessed in Block assessment, cannot be the subject matter of regular assessment. It is further submitted that Section 143(2) of the Act is in two parts. The first part deals with jurisdiction and the second with the procedure. The proviso to Section 143(2) puts an embargo on the assessing officer to exercise jurisdiction after the expiry of 12 months from the end of the month in which the return was filed by the assessee. It is the discretion of the assessing officer to accept the return as it is or to proceed further with the assessment of income, once the assessing officer decides to proceed, he has to issue notice under Section 143(2) within the prescribed time limit to make the assessee aware that his return has been selected for scrutiny assessment. In distinction to this procedure, under the special procedure prescribed in Chapter XIV B, there is no discretion left with the assessing officer. It is further contended that the source and origin of a Block assessment is the

search which has been conducted under Section 132 of the Act. Once the search has been carried out, the assessing officer is left with no discretion but to proceed with the Block assessment. It is also submitted that in search cases the material is already found and is in the knowledge of the assessing officer. This is distinct and different from the situation of an ordinary assessment, where, the assessing officer does not have any material other than the return filed by the assessee. Therefore, the requirement of notice under Section 143(2) is essential for production of material by the assessee. This is so because in regular assessments the assessing officer in the first instance has no material available to him except the return filed by the assessee. It is further submitted that the computation of undisclosed income of the Block period has to be done in accordance with the provisions of Section 158 BB and on the basis of evidence found as a result of search or requisition of books of account, or other documents and such other materials or information as are available with the assessing officer and relatable to such evidence and, therefore, issuance of notice under Section 143(2) is not required for Block assessment proceedings. It is further submitted that the provisions of Section 143(2) and other provisions mentioned in Section 158 BC(b) are to be applied only to the extent possible, since the provisions incorporated in the Chapter XIV B constitute a special Code to assess the undisclosed income in search cases, they would override the provisions of Chapter XIV being the procedure for normal assessments. In support of this contention, reference is made to the decision of this Court in the case of Dr. Pratap Singh vs. Director of Enforcement, [1985] 155 ILR 166 (SC). Lastly, it is submitted, that, since both the schemes under Chapter XIV for a regular assessment and under Chapter XIV B for Block assessments are different that while no assessment under Section 143(3) could be completed without the issuance of notice under Section 143(2), the same restriction would not be applicable in the case of Block assessment.

6) Per contra, the contention on behalf of the assessee(s) is that, for the purpose of Block assessment under Section 158 BC, the provisions of Section 142 and Sub-sections (2) and (3) of Section 143 are applicable and, therefore, no Block assessments could be made without issuing notice under Section 143(2) of the Act. It is further contended that notice under Section 143(2) could have been dispensed with by the assessing officer if he proceeds to determine the income on the basis of the return without going for scrutiny. Referring to the provisions in clause

(v) of the Second Proviso to Section 158 BC, it is submitted by the learned counsel that the words "so far as may be" does not give any discretion to the assessing officer to dispense with the requirement of such a notice under Section 143(2), when he proceeds to make an enquiry within the scope and ambit of Section 143(2). It is further contended that after a notice under Section 158 BC is issued, the assessee is required to file a return within a stipulated period. Once the return is filed, it is open to the assessing officer to accept the same or to require further investigation. If he accepts the return of undisclosed income as it is, then, there would be no necessity of issuing any notice under Section 143(2) of the Act. However, if the assessing officer is not satisfied with the return so filed, then he is required to issue further notice under Section 143(2) before an assessment order is passed under Chapter XIV-B of the Act.

7) The only question that arises for our consideration in this batch of appeals is, whether service of notice on the assessee under Section 143(2) within the prescribed period of time is a pre-requisite for framing the block assessment under Chapter XIV-B of the Income Tax Act, 1961?

8) Chapter XVI-B prescribes the special procedure for making the assessment of search cases.

9) Section 158 B defines "undisclosed income", and "block period" which are the two basic factors for framing the block assessments.

10) Section 158 BA is an enabling section, empowering the assessing officer, to assess "undisclosed income" as a result of search initiated or requisition made after June 30, 1995, in accordance with the provisions of this Chapter and tax the same at the fixed rate specified in Section 113. Section 158 BB provides the methodology for computation of undisclosed income of the block period. Section 158 BC prescribes the procedure for making the Block assessment of the searched person. Section 158 BD enables assessment of any person, other than the searched person. Section 158 BE sets the time limits for completion of the Block assessments. Section 158 BF provides for immunity from levy of interest under Sections 234A, 234B and 234C and penalties under Section 271(1)(C), 271A and 271B. Section 158 BFA provides for levy of interest and penalty in cases of search on or after January 1, 1997. Section 158 BG specifies the authorities competent to make the block assessment. Section 158 BH provides for application of all the other provisions of this Act, except those as provided in Chapter XIV-B. Section 158 BI provides for abolition of the scheme in cases of search after 31.5.2003.

11) The scheme of Block assessment has been explained by Central Board of Direct Taxes in paragraph 39.3 of Circular No.717 dated 14th August, 1995 ([1995] 215 ITR.70). We may only notice clause (e) of the circular which provides for the procedure for making Block assessment. Omitting what is not necessary for the purpose of this case, clause (e) is extracted and it reads as under :-

"(e) Procedure for making block assessment: (i) The Assessing Officer shall serve a notice on such person

requiring him to furnish within such time, not being less than 15 days, as may be specified in the notice, a return in the prescribed form and verified in the same manner as a return under clause

(i) of sub-section(1) of section 142 setting forth his total income including undisclosed income for the block period. The officer shall proceed to determine the undisclosed income of the block period and the provisions of section 142, sub-sections (2) and (3) of section 143 and section 144 shall apply accordingly."

12) Chapter XIV-B provides for an assessment of the undisclosed income unearthed as a result of search without affecting the regular assessment made or to be made. Search is the sine qua non for the Block assessment. The special provisions are devised to operate in the distinct field of undisclosed income and are clearly in addition to the regular assessments covering the previous years falling in the block period. The special procedure of Chapter XIV-B is intended to provide a mode of assessment of undisclosed income, which has been detected as a result of search. It is not intended to be substitute for regular assessment. Its scope and ambit is limited in that sense to materials unearthed during search. It is in addition to the regular assessment already done or to be done. The assessment for the block period can only be done on the basis of evidence found as a

result of search or requisition of books of accounts or documents and such other materials or information as are available with the assessing officer. Therefore, the income assessable in Block assessment under Chapter XIV-B is the income not disclosed but found and determined as the result of search under Section 132 or requisition under Section 132A of the Act.

13) Section 158 BC stipulates that the Chapter would have application where search has been effected under Section 132 or on requisition of books of accounts, other documents or assets under Section 132A. By making the notice issued under this Section mandatory, it makes such notice the very foundation for jurisdiction. Such notice under the Section is required to be served on the person who is found to be having undisclosed income. The Section itself prescribes the time limit of 15 days for compliance. In respect of searches on or after 1.1.1997, the time limit may be given up to 45 days instead of 15 days for compliance. Such notice is prescribed under Rule 12(1A) which in turn prescribes Form 2B for block return.

14) Section 158 BC(b) is a procedural provision for making a regular assessment applicable to Block assessment as well. Section 158 BC(c) would require the assessing officer to compute the income as well as tax on completion of the proceedings to be made. Section 158 BC(d) would authorise the assessing officer to apply the assets seized in the same manner as are applied under Section 132B.

15) We may now revert back to Section 158 BC(b) which is the material provision which requires our consideration. Section 158 BC(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 158 BB and the provisions of Section 142, sub-section (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 Sections 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(i)(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 Sections 143(2)/142, the assessing officer is authorized to complete the assessment ex-parte under Section

144. Clause (b) of Section 158 BC 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 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. The other important feature that requires to be noticed is that the Section 158 BC(b) specifically refers to some of the provisions of the Act which requires 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 was 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 158 BC(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 158 BC(b) it has done so specifically. Thus, when Section 158 BC(b) specifically refers to applicability of the proviso thereto cannot be exclude. We may also notice here itself that the clarification given by CBDT in its circular No.717 dated 14th August, 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 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 158 BC, 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 153 BC(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(SC). 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 Vs. Jaiswal Industries, Neemach and Ors., [(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 for 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."

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 158 BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143.

17) Section 158 BH provides for application of the other provisions of the Act. It reads : "Save as otherwise provided in this Chapter, all the other provisions of this Act shall apply to assessment made under this Chapter." This is an enabling provision, which makes all the provisions of the Act, save as otherwise provided, applicable for proceedings for block assessment. The provisions which are specifically included are those which are available in Chapter XIV-B of the Act, which includes

Section 142 and sub-sections (2) and (3) of Section 143.

18) 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.

19) The result is that the appeals fail and are dismissed. No order as to costs.

.....J.
[S.H. KAPADIA]

.....J.
[H.L. DATTU]

New Delhi,
February 2, 2010