

HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

ITA No.10/2017

Date of order: 11.10.2018

Principal Commissioner of Income Tax v. M/S Broadway Shoe Co.

Coram:

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE ALOK ARADHE, JUDGE

Appearing counsel:

For Petitioner/applicant(s) : Ms. Humarya Shafi, Advocate, vice
Mr. J. A. Kawoosa, Advocate.

For respondent (s) : None for the respondents though served.

i/ Whether to be reported in Press/Media? Yes/No

ii/ Whether to be reported in Digest/Journal? Yes/No

Per Alok Aradhe-J

- 1) This appeal under Section 260-A of the Income Tax Act, 1961 (herein-after to be referred to as 'the Act'), has been filed against order dated 11.08.2017 passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar.
- 2) A Bench of this Court by an order dated 07.02.2018 has admitted the appeal on the following substantial question of law:-

“Whether in the facts and the circumstances of the case, the ITAT was right in holding that the notice under Section 143(2) of the Income Tax Act was required to be issued even in the case when no return in response to Notice under Section 148 was filed.”

In order to answer the aforesaid substantial question of law, reference to few relevant facts is necessary which are stated infra.

- 3) The assessee filed its return for the assessment year 2005-06 on 13.02.2008 declaring the net loss of Rs.6000/-. The return was filed by the assessee belatedly, therefore, the same could not be processed. Thereafter proceedings under Section 147 of the Act were initiated and a notice under Section 148 of the Income Tax Act 1961 was issued by which assessee was asked to file return of income tax within 30 days from the date of service of the notice. In response to the said notice, the assessee did not file return. In the absence of any explanation, an order of assessment was passed on 12.03.2013 making additions of Rs.3,90,786/- on account of disallowance of interest paid on Capital to the partners of the Firm. Sum of Rs.2,60,51,425/- on account of unexplained Opening Capital Balance of Partners of the Firm as per Balance Sheet drawn as on 31.03.2005 was also added. Sum of Rs.1,30,50,000/- on account of unexplained loan extended to one Sh. G. H. Shah and Mrs. Shah, was also added to the income of the assessee.
- 4) Being aggrieved, the assessee filed an appeal against the order of assessment, which was dismissed by the Commissioner of Income Tax (Appeals), Jammu, on 30.07.2014 and all the additions made to the return of income by the Assessing Officer were confirmed. Being aggrieved by an order of the Commissioner of Income Tax (Appeals), the assessee further preferred an appeal before the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar. The Tribunal vide order dated 11.08.2017 quashed the order of assessment as well as order passed by the Commissioner of Income Tax (Appeals), inter-alia, on the ground that no notice under Section 143(2) of the Act was issued by the Assessing Officer. In the aforesaid factual background, this appeal has been filed.
- 5) Learned counsel for the appellant submitted that the judgments relied on by the Tribunal in the cases of '**ACIT vs. Hotel Blue Moon**' (2010) 321 ITR 362 (SC), '**CIT vs. Madhya Bharat Energy Corporation Ltd.**' (2011) 337

ITR 389 (Del) and ‘CIT vs. Vision Inc.’ (2012) 73 DTR 201 (Del), has no application to the fact situation of the instant case. It is submitted that the Tribunal ought to have appreciated that in the present case no return in terms of notice issued under Section 148 of the Act was filed by the assessee. It is also submitted that in the decisions in cases of **‘ACIT vs. Hotel Blue Moon’**, **‘CIT vs. Madhya Bharat Energy Corporation Ltd.’** and **‘CIT vs. Vision Inc.’** (supra) the assessee had filed the original return which was accepted and also filed additional return in response to the notice under Section 148 of the Act. However, the aforesaid aspect of the matter has not been appreciated by the Tribunal. Despite service of notice none has appeared on behalf of the respondent, therefore, the respondent was proceeded ex-parte by an order dated 01.08.2018.

- 6) We have considered the submissions made by the learned counsel for the Revenue and have perused the record. Section 148 of the Act permits issuance of 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 assessee being served a notice under such provisions, whereupon the provisions of this Act shall, so far as it may be, apply accordingly as if such return were a return required to be furnished under Section 139 of the Act. Section 143 of the Act pertains to an assessment and its opening words referred to “a return being made under Section 139 of the Act or in response to a notice under Section 142(1) of the Act. Thus plain reading of Section 143(2) of the Act, which talks about issuance of notice where return has been furnished and Section 148(1) of the Act, which talks about return filed in response to notice being treated as return under Section 139, makes it clear that the procedure prescribed in Section 143(2) becomes applicable only when a return has been furnished.

- 7) The Supreme Court in the case of **ACIT vs. Hotel Blue Moon** (supra) in paragraph 15 held as under:-

“Paragraph 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 the 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.”

Thus, it is evident that ratio laid down by the Supreme Court in the aforesaid decision 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. The aforesaid decision would not apply to a case where no return is filed by the assessee as would be axiomatic from plain reading of Section 143(2) of the Act also. It is also pertinent to mention here that in **CIT v. Madhya Bharat Energy Corporation Ltd. and CIT v. Vision Inc.**, the assessee had filed the original return in response to the notice under Section 148 of the Act. Therefore, the aforesaid decisions have no application to the obtaining factual matrix of the case where assessee admittedly did not file the return.

- 8) Admittedly in the instant case, the return was filed by the assessee after the time prescribed for filing return under Sections 139(1) and 139(4) had expired. Therefore, the return filed by the assessee has to be treated as

non-est. The proceedings under Section 147 of the Act were initiated on the ground that the return for the assessment year 2005-06 was the first ever return filed by the assessee and was filed on 13.02.2008. The Assessing Officer asked to explain the opening capital and source of advances through notices on various dates from December 2012 to February 2013. However, no response was made by the assessee. Subsequently, the Assessing Officer vide draft letter dated 28.02.2013 asked to comply and give response to the draft assessment order on 11.03.2013. The assessee did not respond to the draft assessment order where certain additions were proposed on account of unexplained opening capital balances of partner, unexplained loan extended to Mr. and Mrs. Shah and disallowance of interest. In absence of any explanation, the Assessing Officer made the additions. The Notice under Section 143(2) is required to be given only when return is furnished. Furnishing of the return is a sine qua non for issuance of notice under Section 143(2) of the Act. If no return is furnished by the assessee, there can be no reason for issuance of notice under Section 143(2) of the Act. Similar view has been taken by a Division Bench of this Court in the case of **Azziz Qazi & Brothers v. ITO, (1974) Tax LR 540 (J&K)**.

- 9) In view of the preceding analysis, the substantial question of law framed by this Court vide order dated 07.02.2018 is answered in the negative and in favour of the revenue. Accordingly, the impugned order dated 11.08.2017 is quashed. In the result, the appeal is allowed.

(ALOK ARADHE)
JUDGE

(GITA MITTAL)
CHIEF JUSTICE

Srinagar
11.10.2018
Surinder