

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.49/2008

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

Versus

M/s. Sodder Builder and Developers
(P) Ltd., Saunto Vaddo,
Calangute, Bardez, Goa. Respondent.

Ms. Amira Abdul Razaq, Standing Counsel for the Appellant.

Mr. A.F. Diniz, with Mr. Nigel Fernandes, Advocates for the Respondent.

***Coram : M.S. Sonak &
Nutan D. Sardesai, JJ.***

Date : 16th July, 2019.

ORAL JUDGMENT : (Per M.S. Sonak, J.)

Heard Ms. Amira Razaq, learned Standing Counsel for the Appellant and Mr. A. F. Diniz, learned Counsel for the Respondent.

2. This Court, on 1st April, 2019, framed an additional substantial question of law by making the following order :

“Mr. Diniz, learned counsel for the Respondent states that though the Respondent has not filed any cross objection, the Respondent is entitled to challenge the findings of fact

rendered by the Income Tax Appellate Tribunal of the State which are against his client. He submits that there is an error in the findings of fact rendered by the ITAT on the issue as to whether a notice under Section 143(2) of the Income Tax Act, 1961 was mandatory or not before passing the order of assessment under Section 143(3) of the Income Tax Act, 1961. He submits that the ITAT has rendered findings against the Respondent based on the order of the Special Bench of ITAT in the case of Nawal Kishore & Sons Jewellers, 87 ITD 407.

2. The learned counsel invited our attention to the judgment of the Hon'ble Supreme Court in the case of Assistant Commissioner of Income Tax and another Vs Hotel Blue Moon 1 and in particular the paragraphs 13, 21, 22, 24 and 27 in support of the submission that the Hon'ble Supreme Court has held that the issuance of notice under Section 143(2) is mandatory before passing the assessment order under Section 143(3). He tenders an additional substantial question of law with a request to decide the same along with other questions. We are satisfied that an additional substantial question of law can be framed even at this stage which is necessitated in view of the judgment of the Hon'ble Supreme Court in case of Hotel Blue Moon (supra). We, therefore, frame an additional substantial question of law as under :

'Whether the finding of the Tribunal (& the CIT (A)) that non issuance of notice under Section 143(2) of the Income Tax Act, does not vitiate the proceedings, is unsustainable in view of the judgment of the Hon'ble Supreme Court reported in 2010(3) SCC 259, and consequently, the assessment has to be set aside on this ground also ?'

3. This additional substantial question of law to be

considered along with the other substantial question of law already formulated by this Court at the stage of admission of this appeal.

4. *Stand over to 23rd April, 2019.”*

3. It is common ground that if the additional substantial question of law, as framed in the order dated 1st April, 2019, is answered against the Revenue and in favour of the Assessee, then, there will not be any necessity of adverting to the remaining substantial questions of law which were framed at the stage of admission of the appeal. Accordingly, we proceed to decide on the additional substantial question of law, as recorded in the order dated 1.4.2019.

4. The facts, in brief, are that a search was conducted in the Assessee's premises on 9/3/2000 and 10/3/2000, pursuant to which a notice was issued under Section 158 BC of the Income-tax Act, 1961 (said Act) on 26/3/2000 to the Assessee seeking to assess the undisclosed income by initiating proceedings under the provisions of Chapter XIV-B of the said Act. The assessment order was made by ACIT, Central Circle, Panaji on 28/3/2002. An appeal against the same was dismissed by the Commissioner (Appeals) on 31.3.2004. The Assessee, thereupon, appealed to the Income Tax Appellate Tribunal (ITAT) which appeal, was allowed by Judgment and Order dated 13.8.2007. The Revenue has, therefore, instituted the present

appeal under Section 260-A of the said Act.

5. As noted earlier, we permitted framing of an additional substantial question of law because the records indicated that no notice under Section 143(2) of the said Act was issued to the Assessee and it was the contention of the Assessee that non-issuance of such a notice vitiates the assessment undertaken under the special procedure under Chapter XIV-B of the said Act.

6. The record indicates that the aforesaid contention, based upon non-issuance of notice under Section 143(2) of the said Act, was specifically raised by the Assessee before both, the Commissioner (Appeals), as well as the ITAT. However, this contention was negated by the Commissioner (Appeals), as well as the ITAT by relying upon the decision of the Special Bench in the case of *Nawal Kishore & Sons Jewellers vs. Assessee*, 87 ITD 407.

7. The issue relating to service of notice under Section 143(2) of the said Act, is an issue which goes to the root of the matter. The Hon'ble Apex Court in the case of *Assistant Commissioner of Income Tax & anr. vs. Hotel Blue Moon*, 2010 (3) SCC 259 has now held that issuance of notice under Section 143(2) of the said Act is a mandatory requirement and not some mere procedural irregularity which can be said to be curable. In this decision, the

Apex Court, in clear terms, has held that omission on the part of the assessing authority to issue a notice under Section 143(2) cannot be regarded as a procedural irregularity which is curable. Therefore, the requirement of notice under Section 143(2) cannot be dispensed with. The Hon'ble Apex Court has, in fact, concluded that even for the purpose of Chapter XIV-B of the said Act for determination of the undisclosed income for a block period under Section 158BC, provisions of Section 142 and Section 143(2), and (3) are applicable and no assessment could be made without issuing a notice under Section 143(2) of the said Act.

8. In the present case, admittedly, no notice under Section 143(2) of the said Act was ever issued to the Assessee. By applying the law laid down by the Hon'ble Apex Court in *Hotel Blue Moon* (supra), we will have to hold that the assessment made in the present case stands vitiated. Therefore, even if we were to hold in favour of the Revenue with regard to the other substantial questions of law framed at the time of admission of this appeal, the assessment made in the present matter would nevertheless stand vitiated for want of mandatory notice under Section 143(2) of the said Act.

9. Accordingly, the additional substantial question of law as framed in the order dated 1st April, 2019 is required to be answered against Revenue and in favour of the Assessee. As a result, this

Appeal is required to be dismissed and is, hereby, dismissed. In the facts of the present case, there shall be no order as to costs.

Nutan D. Sardesai, J.

M.S. Sonak, J.