<u>Court No.32</u>

Income Tax Appeal No.180 of 2005
Nawal Kishore & Sons Jewellers
v.
The Commissioner of Income-tax, Kanpur

<u>Hon. Sunil Ambwani, J.</u>
<u>Hon. A. N. Mittal, J.</u>

We have heard Shri Ashish Bansal, learned counsel for the petitioner. Shri R.K. Upadhyay appears for the Income Tax department.

In pursuance to the search and seizure operation on the business and residential premises of the assessee/ appellant, on 14th May, 1997, a notice under section 158 BC of the Income Tax Act (the Act) was issued. In compliance of which, a "return" in the prescribed Form 2-B was filed on 10th August, 1998 by the assessee showing an income of Rs.16,59,595/-. On the admitted tax liability on the income so shown in the return in Form 2-B, amounting to Rs.9,95,757/-, was discharged by payment. On the enquiries made by the Assessing Officer, thereafter, through the notices issued under Section 142 (1) of the Act, prior to the filing of "return" as aforesaid as also thereafter, a block assessment order was passed on 25/28th May, 1999 under section 158BC, wherein the 'undisclosed income' was computed at Rs.74,22,037/-. A chronology of 'dates' and 'events' during the intervening period, and which have got a bearing on the issues involved in this appeal is given hereunder:-

Sl.No.	Date	Events
1.	14.5.1997	Search took place at the business premises of the assessee/appellant, as well as residential premises of the partners of appellant firm.
2.	19.12.1997	Notice under section 158 BC was issued by the ACIT for filing the Block return.
3.	8.6.1998	Letter sent by the ACIT to 'Valuation Officer' for valuation of ornaments.
4.	8.6.1998	Notice under section 142 (1) along with

		questionnaire was issued to the assessee/appellant. The last paragraph of the said questionnaire reads as under:- “Please explain why the compliance was not made to the notice issued under section 158 BC of the Income-tax Act, 1961 dated 19.12.97. Statutory notice under section 142 (1) is enclosed herewith. Date of compliance is fixed for 18.6.98.”
5.	15.6.1998	Another notice under section 142 (1) along with questionnaire was issued. Last paragraph of the said questionnaire reads as under:- “Please explain why compliance was not made to the notice issued under section 158 BC of the IT Act, 1961 dated 19.12.97. Statutory notice under Section 142 (1) is enclosed herewith. Date of compliance is fixed for 29.6.98.”
6.	29.6.1998	The matter was adjourned with the order as follows:- “Shri Anil Jaiswal, Authorised Representative appeared along with Shri Kamta Prasad Garg, Partner. Reason for not filing of return is stated to be dissension amongst the partners. Written explanation filed. In compliance of the questionnaire dated 15.6.1998, adjournment is granted to 14th July, 1998.”
7.	31.8.1998	A return was filed in the prescribed form showing undisclosed income of Rs.16,59,595/-.
8.	13.11.1998	Notice under section 142 (1) along with questionnaire issued.
9.	23.11.1998	Inspection of seized material took place.
10.	18.12.1998	Again inspection of seized material took place
11.	5.1.1999	Reply to questionnaire was filed
12.	11.1.1999 to 5.5.1999	Statements of various persons were recorded by the Assessing Officer.
13.	5.5.1999	Fact of the case discussed with Jt. CIT
14.	7.5.1999	Facts of the case discussed with Jt. CIT
15.	11.5.1999	The draft Assessment order sent to the Joint CIT (C), and the case was discussed with Joint CIT (C)
16.	12.5.1999	Facts of the case discussed with Joint CIT

	and 13.5.1999	(C)
17.	17.5.1999	Letter from Joint CIT (C) dated 13.5.1999 issued
18.	17.5.1999	Questionnaire issued, for the assessee to be complied by 20.5.99.
19.	20.5.1999	Reply to questionnaire issued was filed.
20.	25/28.5.99	Block assessment order was passed at an income of Rs.74,22,037/-.

This appeal was admitted on following questions of law:-

"(i) Whether on a true and correct interpretation of the provisions of law as contained in Section 143 (2) as a whole read with Section 158 BC (b), the Tribunal was legally correct in holding that non-issuance/ service of notice under section 143 (2) (on the assessee) did not affect the validity of block assessment order dated 25/28th May, 1999?

(ii) Whether the Tribunal was legally correct in holding that absolute non-compliance of the provision of section 143 (2) at the part of the Assessing Officer does not go to affect the validity of block assessment order dated 25th/28th May, 1999 as has been passed in the case of the assessee?

(iii) Whether the Tribunal was legally correct in holding that in view of the phraseology "so far as may be" as appearing in section 158 BC (b), the applicability of section 143 (2) as a whole, to the block assessment proceedings, was optional at the end of the Assessing Officer and non-issuance (by the Assessing Officer) and non-service (on the assessee) of such a notice does not affect the validity of block assessment order?

(iv) Whether the Tribunal was legally correct in holding that the Circular No.717 dated 14th August, 1995 as issued by the CBDT, whereby issuance and service of notice under section 143 (2) (on the assessee) has been made absolute, was wholly redundant having no bearing on the applicability of the said provision on the block assessment?

(v) Whether on the facts and circumstances of the case, the Tribunal was legally correct in holding that the block assessment order dated 25/28th May, 1999 was not adversely affected by non-issuance/ service of notice under Section 143 (2) on the assessee and in upholding the validity of the block assessment order?"

Shri Ashish Bansal submits that in this case admittedly the notice under Section 143 (2) of the Act was not issued. For that purpose he relies upon the findings recorded by the Income Tax Appellate Tribunal in para 5 of the impugned judgment, which is quoted as below:-

> *"We have given our careful consideration to the matter and we find that there is no ambiguity in the order of the Hon'ble Special Bench, on the issue. It has been clearly held by our learned brothers that non-issuance of notice under Section 143 (2) does not in principle, render the block assessment order invalid. At best, it can be said to be an irregularity which can be cured by giving appropriate directions, as are warranted on the facts of each case. Respectfully following the decision of the Special Bench (supra) in the assessee's own case, we hold that the block assessment order dated 22/28.05.1999 is a valid assessment, even on the face of undisputed fact that after filing the block assessment on 10.08.1998, no notice under Section 143 (2) was issued by the A.O."*

In **Asstt. CIT v. Hotel Blue Moon, (2010) 321 ITR 362 (SC)**, it was held by the Supreme Court that if the Assessing Officer for any reason repudiates the return filed by any assessee in response to the notice under Section 158 BC (a) of the Act relating to the block assessment, 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), the issuance of notice is mandatory and that the very foundation of the jurisdiction under Section 158BC of the Act requires a notice to be served on the person, who is found to have undisclosed income. The requirement of notice under Section 143 (2) cannot be dispensed with.

Shri R.K. Upadhyay, learned counsel for the department submits that in the present case the petitioner had participated in the assessment proceedings. He relies upon para 23 of the assessment order in which the assessee admitted that some of the transaction may not have been entered in the regular books of accounts. He unsuccessfully tried to explain the excess stocks of gold, which was found in his possession.

The questions of law raised in this appeal are covered by the judgment in Hotel Blue Moon's case (Supra). Once it is admitted that the assessing officer has repudiated the return filed by the assessee under Section 158BC of the Act, the entire proceedings in the absence of notice under Section 143 (2) of the Act subsequent thereto suffer from lack of jurisdiction.

In **CIT v. Mukesh Kumar Agrawal, (2012) 345 ITR 29 (All)**, an argument was raised that Section 292 BB of the Act inserted in the Income Tax Act by the Finance Act, 2008 will make a difference, where the assessee has participated in the assessment proceedings. This Court held that Section 292 BB is rule of evidence, which validates the notice in certain circumstances. It provides that where an assessee appears in any proceedings or has cooperated in any enquiry relating to assessment or reassessment, it shall be deemed that any notice under any provisions of the Act, which is required to be served upon him has been duly served upon him in accordance with the provisions of the Act, and such assessee shall be precluded from taking any objections in any proceedings or enquiry under the Act that the notice was not served upon him or not served upon him in time or served upon him in an improper manner. The Court observed:-

> *"The Supreme Court held in Hotel Blue Moon's case that if the Assessing Officer, for any reason, repudiates the return filed by an assessee in response to notice under Section 158BC (a) of the Act relating to a block assessment, 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). It was further held that by making the issue of notice mandatory, Section 158BC, dealing with block assessments, makes such notice the very foundation for jurisdiction. Such notice is required to be served on the person, who is found to have undisclosed income. The requirement of notice under Section 143 (2) cannot be dispensed with.*
>
> *Section 292BB is a rule of evidence, which*

validates the notice in certain circumstances. The newly inserted Section 292BB provides that where an assessee has appeared in any proceedings 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 the Act that the notice was not served upon him or not served upon him in time or served upon him in an improper manner.

In the present case the Tribunal has returned the findings that the notice under Section 143 (2) of the Act was admittedly not issued in this case. The Assessing Authority thus did not have jurisdiction to proceed further and make assessment."

In the present case the admitted position is that the notice under Section 143 (2) of the Act was not issued, and thus question of service, or improper service is not relevant. The question nos.(i) to (v), framed by the Court are thus decided in favour of the assessee and against the department.

The income tax appeal is **allowed.** The order dated 9th August, 2004 as passed by the ITAT is set aside. The consequential assessment orders are annulled.

Dt.10.07.2012
SP/