4

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

ITA No.1161/2010

CIT ..... Appellant
Through: Mr.Sanjeev Sabharwal, Sr. Standing Counsel.

versus

KUBER TOBACCO PRODUCTS P. LTD. ..... Respondent
Through: Mr. Ajay Vohra and Ms. Kavita Jha, Advocates

% Date of Decision : October 06, 2010

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT (ORAL)

: REVA KHETRAPAL, J.

In view of the reasons recorded in ITA No.1159/2010, the appeal is accordingly disposed of.

REVA KHETRAPAL
(JUDGE)

A.K. SIKRI
(JUDGE)

October 06, 2010/*km*

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

ITA No.1159/2010

CIT ..... Appellant
Through: Mr.Sanjeev Sabharwal, Sr. Standing Counsel.

versus

KUBER TOBACCO PRODUCTS P. LTD. ..... Respondent
Through: Mr. Ajay Vohra and Ms. Kavita Jha, Advocates.

% Date of Decision : October 06, 2010

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT (ORAL)

: REVA KHETRAPAL, J.

A search operation under Section 132A of the Income Tax Act, 1961 was conducted on 25th January, 1999 by the Investigation Wing of the Income Tax Department in pursuance to the excise raid conducted by the Anti Evasion Wing of the Central Excise, Delhi-I, in

6

the course of which ₹ 1,80,000/- was seized in some of the business premises of the assessee-company. A notice dated 12th September, 2000 under Section 158BC(a) of the Income Tax Act was issued by the Assessing Officer and was served on the assessee. In response to the said notice the authorized representatives of the assessee furnished the details asked for and filed its return of income on 29th September, 2000 declaring 'NIL' undisclosed income. Thereafter, assessment was framed by the Assessing Officer under Section 158BC of the Act on 29th January, 2001 at undisclosed income of ₹ 2,07,87,171/-. The assessee being dissatisfied with the order of the Assessing Officer filed an appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee and deleted the addition of ₹ 37,26,867/-. Aggrieved by the aforesaid order of CIT(A), the assessee as well as the Revenue filed cross-appeals before the Income tax Appellate Tribunal.

2. The assessee before the Income Tax Appellate Tribunal raised an additional ground: -

> "That under the facts and circumstances, the block assessment proceedings and consequential

block assessment order is without jurisdiction in the absence of issuance of mandatory legal notice under Section 143(2) of the I.T. Act."

3. The stand of the Department was that in view of the insertion of Section 292-BB, which was inserted by the Finance Act, 2008 with effect from 1st April, 2008, the assessee could not take the plea that the assessment should be held invalid merely on account of the fact that no notice under Section 143(2) was issued and that, in fact, the assessee was barred from taking such a plea.

4. In the aforesaid circumstances, the following question was referred by the Income Tax Appellate Tribunal to a Special Bench:

> "Whether the Assessee who has participated in the block assessment proceedings is precluded from taking any objection that notice under Section 143(2) was not served upon him or was not served upon him in time in view of the provisions of Section 292-BB inserted by the Finance Act, 2008 with effect from 01.04.2008 and if so, since when he can be said to be so precluded?"

5. Before the Tribunal it was contended on behalf of the assessee that Section 292-BB had no application to the facts of the present case

as the language thereof pre-supposes the issuance of notice under Section 143(2). According to the facts of the present case, there is no dispute that notice under Section 143(2) was never issued and if this be so, the question framed did not cover the controversy existing in the case of the assessee. Reliance was placed on the decision of the Gauhati High Court in the case of ***Bandana Gogoi vs. CIT [2007] 289 ITR 28*** wherein it was held that the defect of non-issuance of notice under Section 143(2) in the case of block assessment cannot be cured and such assessment suffers from both procedural as well as jurisdictional error. It was also contended that in any event Section 292-BB of the Act which was introduced with effect from 1st April, 2008 cannot be relied upon to uphold the validity of the block assessment for the reason that the said provision is not applicable to the assessment year in question. By the introduction of Section 292-BB, the assessee is precluded from taking a plea which is the right of the assessee and, therefore, in law, this provision cannot be held to be retrospective, more so as in the present case the assessment proceedings were completed prior to 1st April, 2008. Reference was

made to a large number of judicial pronouncements to support this contention.

6. The contention of the Revenue, on the other hand, was that the framing of assessment under the provisions of Chapter XIV-B on completion of the search operation partakes the character of procedural or machinery provisions and default in complying with any procedural provisions or irregularity in respect thereof would not be fatal to the assessment *per se* so as to render the charging Section otiose. In this context and with a view to illustrate the distinction between the interpretation of the charging provision of a statute and the interpretation of a machinery provision, a large number of judgments were cited, including the following: -

1) ***CIT vs. Shrawan Kumar, 210 ITR 886 (SC)***;

2) ***Associated Cement Co. Ltd. vs. CTO, 48 STC 466 (SC)***;

3) ***Vishwanath Prasad Bhagwati Prasad, 202 ITR 469 (All)***;

4) ***Sant Baba Mohan Singh vs. CIT, 90 ITR 197 (All)***;

5) ***Kapurchand Shrimal vs. CIT, 131 ITR 451 (SC)***;

10

6) ***Rasikkamani vs. CIT, 203 ITR 848 (Bom.)***;

7) ***Jai Prakash Singh vs. CIT, 219 ITR 737 (SC)***; and

8) ***CWT vs. Man Bahadur Singh, 208 ITR 658 (Raj.)***.

7. The Tribunal after considering the rival submissions of the parties by its order dated 14.01.2009 rendered the following findings, relying upon the dicta laid down by the Supreme Court in the case of ***Karimtharuvi Tea Estate Ltd. vs. State of Kerala [1966] 60 ITR 262*** (which is a decision rendered by five Judges of the Hon'ble Supreme Court), that the Income Tax Act, as it stands amended on the First day of April of any financial year, must apply to the assessment of that year:

> *"44. If the present issue is considered in the light of the above decision of Hon'ble Supreme Court then it has to be held that Section 292 BB is applicable to assessment year 2008-09 and subsequent years. Therefore, answer to the second aspect of the question is that assessee is precluded from taking such objection for and from assessment years 2008-09.*
>
> *45. Summarising our findings we hold as follows:-*
>
> *i) Section 292 BB even if it is procedural it is creating a new*

disability as it precluded the assessee from taking a plea which could be taken as a right, cannot be construed retrospectively as the same is made applicable by the statute w.e.f. 01.04.08.

ii) Section 292BB is applicable to the assessment year 2008-09 and subsequent assessment years.

46. Now the matter will be placed before the regular Bench to decide the appeals in regular manner."

8. Thereafter, the matter was once again taken up by the learned ITAT on 24th July, 2009 (in regular hearing), which quashed the assessment made under Section 158BC by following the decision of Jurisdictional High Court of Delhi in the case of ***CIT vs. Pawan Gupta (2009) 223 CTR (Del) 487*** and held that:

"9. The question whether the service of notice u/s 143(2) is mandatory both in the case of a regular assessment and a block assessment made under Chapter XIV B of the Act has been considered by the jurisdictional High Court of Delhi in the case of ***CIT vs. Pawan Gupta and Ors****., reported in* ***(2009) 223 CTR 487****, where it has been held that where the A.O. is not inclined to accept the return of undisclosed income filed by the assessee, the procedure prescribed in Section 143(2) has to be followed, and if he does not issue a notice under Section 143(2) and*

12

the assessment, such an assessment order would not be a mere irregular (sic. irregularity) but would be invalid. It was further held in the said case that requirement of making an assessment order pursuant to the grant of hearing and an opportunity to the assessee to produce material in support of his return is not an empty formality, and if such right is denied to the assessee, it would amount to a travesty of justice apart from being violative of the statutory prescription of Section 143(2) and 143(3) read with Section 158BC(b). It was, thus, held that where that A.O. is not inclined to accept the return of undisclosed income filed by the assessee, issuance of a notice under Section 143(2) is pre-requisite for framing the block assessment under Chapter XIVB of the Act. The Hon'ble Delhi High Court was in agreement with the decision of the Hon'ble Guwahati High Court in the case of Bandana Gogoi vs. CIT, (2007) 289 ITR 28 (Guwahati) on this aspect of the matter. In the light of the aforesaid decision of Special Bench in the present case, and in the light of the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of CIT vs. Pawan Gupta and Ors. (supra), we hold that since no notice under Section 143(2) was served upon the assessee before making the block assessment and before tinkering with the block return filed by the assessee showing 'Nil' undisclosed income, the assessment so made by the A.O. under Section 158BC is invalid and illegal and not merely irregular. We, therefore, quash the assessment made under Section 158BC by the A.O.

13

10. The additional ground raised by the assessee is thus, decided in favour of the assessee and against the department."

9. The assessee having emerged successful it was now the turn of the Department to feel aggrieved. Consequently, the present appeal under Section 260A of the Act is filed against the aforesaid order of the ITAT dated 24th July, 2009, whereby the appeal of the Assessee was allowed and the cross appeal filed by the Revenue was dismissed. The findings of the Tribunal, that in the absence of notice under Section 143(2), the assessment framed by the Assessing Officer under Section 158BC was rendered invalid, have been sought to be challenged as contrary to law.

10. The question of law which thus arises for our consideration is as follows:

"Whether the ITAT erred in cancelling the block assessment made by the Assessing Officer under Section 158BC by holding that the provisions of Section 292BB inserted by the Finance Act, 2008 with effect from 01.04.2008 were not retrospective in nature and did not preclude the assessee from taking an objection that notice under Section 143(2) not having been served upon him, the block assessment made by the

Assessing Officer under Section 158BC was illegal and invalid?"

11. We have heard the learned counsel for the parties and dwelt upon the precedents cited at the bar. At the outset, we deem it expedient to refer to the provisions of Section 292BB of the Act, which read as under:

> *"NOTICE DEEMED TO BE VALID IN CERTAIN CIRCUMSTANCES.*
>
> *Section 292 BB - Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or re-assessment, 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 proceedings 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 assessee has raised such objection before the completion of such assessment or reassessment."*

12. The Notes on Clauses explaining the aforesaid Section, which are apposite, are as follows:

"Clause 52 seeks to insert a new sec.292 BB in the Income Tax Act, laying down certain circumstances in which notice shall be deemed to be valid. It is proposed to provide that where an assessee has appeared in any proceeding or co-operated 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 the 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.

This amendment will take effect from 1st April, 2008."

13. It would also be relevant if the Memorandum explaining the provisions warranting the insertion of the above Section is reproduced, which reads as under:-

"Service of notice and the time-limit for issuance of notice u/s 143(2) of the IT Act.

Sub-section (2) of sec.143 of the Income Tax Act provides that the notice under this sub-section shall be served on the assessee within a period of 12 months from the end of the month in which the return is furnished. Further, the service of such notice must be effected in a manner laid down in Sections 282, 283 and 284 of the Income Tax Act, read with General Clauses Act. Instances have come to the notice of the

Department, where notice under sub section (2) of sec.143, though issued by registered post within 12 months from the end of the month in which the return was furnished, have been held "invalid" on the ground that the notice was actually received by the assessee after the limitation date and there was no 'service' as postulated under the section. This is notwithstanding the fact that the assessee has attended the assessment proceedings in response to the notice served on him. Instances have also come to notice where the orders of the AO are being quashed on the consideration that there is no evidence of issue or service of notice, even though the assessee and his AR have attended the hearing before the AO during the assessment proceedings. Further, the design of the limitation period with reference to the end of the month leads to administrative inconvenience in as much as the last day of every month becomes a time-barring date.

In order to address these issues and to reduce litigation, it is proposed to insert a new sec.292 BB in the Income Tax Act to provide that where an assessee has appeared in any proceeding or co-operated in any inquiry related to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act has been duly served upon him in time in accordance with the relevant provision of the Act.

Further, 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.

Similar amendment is also proposed in the Wealth Tax Act.

Further, it is also proposed to amend clause (ii) of sub-section (2) of sec.143 to provide that the notice under sub-section (2) of section 143 shall be served on the assessee within a period of 6 months from the end of the financial year in which the return is furnished. This amendment will take effect from 1st April, 2008."

14. Significantly, in the instant case, as noted by the ITAT in the impugned order, the block assessment is for the period from 01.04.1988 to 25.01.1999 and the said block assessment under Section 158BC was made by the Assessing Officer on 29.01.2001, i.e., prior to the insertion of Section 292BB, inserted with effect from 01.04.2008. Thus, it is submitted by the assessee that the provisions of Section 292BB are not applicable to the present assessment made under Section 158BC by the Assessing Officer on 29.01.2001. The plea of the Department, on the other hand, is that in the light of the fact that the assessee had participated in the assessment proceedings, the assessment order made under Section 158BC cannot be rendered

invalid and illegal merely for want of specific notice issued under Section 143(2) of the Act.

15. Dealing first with the question as to whether non-issuance of notice under Section 143(2) or non-service of notice under Section 143(2) on the assessee in terms of the provisions of Sub-section (2) of Section 143 could render the block assessment made under Section 158BC invalid, it is not in dispute that in the present case the Department has not produced any evidence to show that notice under Section 143(2) was served upon the assessee. In the case of ***Pawan Gupta (supra)***, the question whether service of notice under Section 143(2) is mandatory in the case of a block assessment made under Chapter XIV B of the Act was considered by a Division Bench of this Court, wherein it was laid down:

> *"Where the assessing officer is not inclined to accept the return of undisclosed income filed by the assessee then the procedure prescribed in Section 143(2) would have to be followed. If he does not issue a notice under Section 143(2) and completes the assessment all the same, such an assessment order would not be a mere irregularity but would be invalid. The requirement of making an assessment order pursuant to the grant of a hearing and an opportunity to the assessee to*

produce material in support of his return is not an empty formality. It is a substantive right of the assessee to be presented with the fullest opportunity to support the return filed by him. If such right is denied to the assessee, it would amount to a travesty of justice apart from being in violation of the statutory prescription of Section 143(2) and 143(3) read with Section 158 BC (b) of the said Act."

16. In the instant case, as noted hereinabove, it is not in dispute that the assessee filed block return for the block period 01.04.1988 to 25.01.1999 on 29.09.2000 declaring undisclosed income at 'Nil' pursuant to the notice issued under Section 158BC dated 12.09.2000 by the Assessing Officer. It is also not in dispute that the assessee had participated in the block assessment proceedings and even submitted his reply dated 29.12.2000 to the detailed questionnaire issued by the A.O. to the assessee on 05.12.2000. The Special Bench, however, held that Section 292BB cannot be construed to have retrospective operation and it is to be construed prospectively, meaning thereby that prior to 01.04.2008, i.e., upto 31.03.2008, the assessee is not precluded from taking any objection regarding invalidity of assessment/re-assessment on the ground of

20

improper/invalid issuance/service of notice and, therefore, the assessee cannot be precluded from raising the plea that notice under Section 143 was not served upon the assessee.

17. The appellant has not been able to cite any cogent justification to enable us to differ with the aforesaid view except to state that Section 292BB is procedural in nature and hence applicable to the present case and that in view of the participation of the assessee in the assessment proceedings, recourse by the assessee in ITAT proceedings to the provisions of Section 143(2) is not permissible. We are wholly unable to agree with the appellant. In our opinion, the Special Bench rightly held that Section 292BB does not have retrospective effect and is to be construed prospectively, inasmuch as the said Section creates a disability by precluding the assessee from taking a plea which otherwise could be taken by the assessee as a matter of right.

18. In our view the Tribunal has rightly relied upon the five- Judge Bench decision of the Hon'ble Supreme Court in the case of ***Karimtharuvi Tea Estate Ltd. vs. State of Kerala [1966] 60 ITR***

21

262 has clearly held that the Income Tax Act, as it stands amended on the First day of April of any financial year, must apply to the assessment of that year, the relevant portion of which is reproduced hereunder:

> *"10. Now, it is well-settled that the Income-tax Act, as it stands amended on the first day of April of any financial year must apply to the assessments of that year. Any amendments in the Act which come into force after the first day of April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force."*

19. We accordingly hold that Section 292BB is applicable to the assessment year 2008-09 and subsequent assessment years.

20. The question of law which arises in this appeal stands answered accordingly.

21. The appeal stands disposed of.

REVA KHETRAPAL
(JUDGE)

A.K. SIKRI
(JUDGE)

October 06, 2010
sk/km