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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **ITA 935/2015**

PR.COMMISSIONER OF INCOME TAX-08 ..... Appellant
Through: Mr. Sanjay Kumar and Mr. Dileep Shivpuri, Advocates

versus

STAUNCH MARKETING PVT. LTD. ..... Respondent
Through: Mr. Ved Kumar Jain, Mr. Rano Jain and Mr. Pranjal Srivastava, Advocates

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE CHANDER SHEKHAR

O R D E R

% 28.04.2017

1. This appeal under Section 260A of the Income Tax Act, 1961 ('Act') by the Revenue is against the order dated 12th May, 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 1643/Del/2008 for the Assessment Year ('AY') 2003-04.

2. While admitting this appeal by order dated 4th September 2016, the following question of law was framed:

> "Whether the tribunal fell into error in holding that the assessment for the concerned year was not effective because of lack of notice under Section 143 (2) of the Income Tax Act in the given facts of the case?"

3. The facts leading to the filing of the present appeal are that in the

assessment order passed by the Assessing Officer ('AO') on 31st August, 2006, it was noted *inter alia* that on 19th September 2005, a notice under Section 148 of the Act was issued requiring the Assessee to file a return of income for AY 2003-04. After several notices were not responded to, a show cause notice dated 23rd/24th January, 2006 was issued by the AO stating that there was no option left but to proceed with the assessment *ex parte*. However, a final opportunity was granted and a hearing was fixed for 27th January, 2006. On that date, the Director of the Assessee attended the hearing and sought further time. The case was then adjourned to 31st January, 2006.

4. Para 3.2 of the AO's order dated 31st August 2006 records the income tax return was filed by the Assessee. It reads as under:

> "3.2 An income-tax return form was submitted by the Assessee which is placed on record.
>
> The statement of income enclosed therein stated as under...."

5. Therefore, it is apparent that in the above proceedings the Assessee appeared and submitted its return. In the said return, the Assessee noted "Original filed vide Ack. No. 3680 Dt. 2/12/2003 Range-9". The AO, however, did not find any evidence that the original return was filed as claimed by the Assessee. According to the AO, despite several notices thereafter and even after examining the return register, it could not be established that any such return was filed by the Assessee. The AO then proceeded to complete the assessment.

6. One question that was raised by the Assessee in the appeal before the

Commissioner of Income Tax (Appeals) [CIT) (A)] was whether the assessment could have been completed without adequate opportunity being granted to the Assessee. However, there was no specific ground urged that notice under Section 143(2) of the Act should have been issued to the Assessee.

7. By the order dated 17th February, 2008, the CIT (A) partly allowed the appeal by deleting some of the additions made by the AO.

8. Aggrieved by the above order of the CIT(A), the Revenue filed ITA No. 1643/Del/2008. The Assessee also filed a cross-objection being C.O. 151/Del/2009. The said cross-objections were based on a solitary ground viz., that the assessment order was bad in law since the statutory notice under Section 143(2) of the Act was not issued.

9. The ITAT decided to take up the cross objections first since they went to the root of the matter. Relying *inter alia* on the decision of the ITAT in ***ITO v. Naseman Farms Pvt. Ltd.*** (ITA No.1175/Del/2011) which in turn relied on the decision of the Supreme Court in ***ACIT v. Hotel Blue Moon (2010) 321 ITR 362***, the ITAT came to the conclusion that the assessment order was void *ab initio* since notice under Section 143(2) was not issued to the Assessee. Consequently the cross-objection of the Respondent Assessee was allowed and the impugned assessment order of the AO was cancelled. As a consequence the ITAT observed that the grounds raised by the Revenue in its appeal had become infructuous. The Revenue's appeal was therefore dismissed.

10. The present appeal by the Revenue is directed only against the impugned order of the ITAT in so far as it rejected the Revenue's appeal being ITA No. 1643/Del/2008. The Revenue has not challenged the impugned order of the ITAT in so far as it has allowed the cross objections of the Assessee and held the assessment order to be void.

11. Consequently, the question that has been urged by the revenue in the present appeal and on which a question has been framed by the Court does not in fact arise in the Revenue's appeal being ITA No. 1643/Del/2008 before the ITAT. It arose in the cross objections being C.O. 151/Del/2009 filed by the Assessee. The revenue has filed an appeal only against the impugned order of the ITAT in so far as it has ordered the deletion of some additions. There is no appeal by the Revenue against the impugned order of the ITAT allowing the Respondent's cross objections. allows the cross objections of the Assessee. As a result, the impugned order of the ITAT has become final as regards the assessment order under Section 148 read with Section 144 of the Act is concerned. Therefore, the question that has been framed by the court does not arise in the present appeal filed by the Revenue which only pertains to its corresponding appeal before the ITAT being ITA 1643/Del/2008.

12. Once it is clear that the ITAT order allowing the Assessee's cross objections and holding the assessment order to be bad in law has attained finality, the question of entertaining of the present appeal of the Revenue does not arise at all. This is for the simple reason that entire assessment order has already been set aside by the ITAT as null and void. Therefore

nothing further remains.

13. Faced with this quandary, learned counsel for the Revenue sought to urge that this court should somehow treat this appeal as also against the allowing of Assessee's cross objections by the ITAT since after all the entire order was before the Court. This submission is unable to be accepted by the Court. In tax matters, it is very plain from reading the order of the ITAT as to which portion of the impugned order deals with either the appeal or the cross objections. The impugned order in the present appeal leaves no manner of doubt that the ITAT in fact dealt with the only the cross objections and allowed them. The failure by the Revenue to challenge the order insofar as it allowed the Assessee's cross objection cannot be characterized as a mere 'mistake'.

14. In any event, factually the Assessee filed a return pursuant to notice issued under Section 148 of the Act, notwithstanding that it may not have filed a return in the first place under Section 139 of the Act for the AY in question. Once a return is filed notice under Section 143 (2) of the Act to the Assessee is mandatory prior to framing an assessment. The question of framing an assessment ex parte without even issuing a notice under Section 143(2) of the Act did not arise. The mandatory nature of that requirement is settled not only by the decision of the Supreme Court in the case of ***ACIT v. Hotel Blue Moon*** (*supra*) but also by a decision of this court in ***Commissioner of Income Tax-08 v. Jai Shiv Shankar Traders Pvt. Ltd. (2016) 388 ITR 448 Del.***

15. For all the aforementioned reasons, the question framed does not arise

in the present appeal and is declined to be answered. In any event, the court does not find any substantial question of law arise from the impugned order. The appeal is, accordingly, dismissed.

S. MURALIDHAR, J

CHANDER SHEKHAR, J

APRIL 28, 2017
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