* **THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN**

AND

THE HON'BLE SRI JUSTICE C.V.BHASKAR REDDY

+ **I.T.T.A.No.246 of 2022**

% Date: 05.09.2022

Pr. Commissioner of Income Tax-2, Hyderabad.

... Appellant

v.

$ M/s GJ Trading Pvt. Ltd.

... Respondent

! Counsel for the appellant : Ms. K.Mamata Chowdary
(Standing Counsel for Income Tax Department)

^ Counsel for respondent : None appeared

< GIST:

➢ HEAD NOTE**:**

? CASES REFERRED:

1. (1998) 229 ITR 383 (SC)
2. (2010) 321 ITR 362 (SC)

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JUDGMENT: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Ms. K.Mamata Chowdary, learned Standing Counsel for Income Tax Department appearing for the appellant.

2. This appeal has been preferred by the revenue as the appellant under Section 260A of the Income Tax Act, 1961 (briefly, 'the Act' hereinafter) assailing the order dated 12.07.2021 passed by the Income Tax Appellate Tribunal, Hyderabad 'B' Bench, Hyderabad (Tribunal), in ITA No.337/Hyderabad/2017 for the assessment year 2008-09.

3. The appeal has been preferred proposing the following as substantial questions of law:

> "1. Whether on the facts and in the circumstances of the case and in law, the ITAT is

correct in applying the ratio of Apex Court in the case of **ACIT v. Hotel Blue Moon** ((2010) 321 ITR 362), when a valid notice u/s. 143(2) of the Act was issued and served within the prescribed limit?

2. Whether on the facts and in the circumstances of the case and in law, the ITAT is correct in holding that mentioning of "Section 115WE(2)" in the notice issued will invalidate the assessment proceedings when the provisions of "Section 115WE(2) of the Act were very much in vogue for A.Y.2008-09 and the provisions of Section 115WE(2) are in ***pari materia*** with the provisions of Section 143(2) for scrutiny of the return of "Fringe Benefit"?"

4. To appreciate the above, we may briefly analyse the relevant facts. Respondent is an assessee under the Act having the status of a company, engaged in the business of trading in iron and steel products. Respondent filed its return of income for the assessment year 2008-09 on 29.09.2008 declaring total loss of Rs.26,18,29,327.00. The return was selected for scrutiny whereafter notices under Section 143(2) and 143(1) of the Act were issued. The matter

was heard. In the course of assessment proceedings, assessing officer noted that respondent had shown sales of Rs.210,39,18,689.00 and declared gross loss of Rs.26,20,10,099.00 which worked out to 12.45%. Assessing officer further noted that gross loss admitted by the respondent for the immediately preceding assessment year i.e., 2006-07 was 4.28% and immediately succeeding year i.e., 2007-08 was 0.067%. Details as to claim of various expenditures made by the respondent were called for. Assessing officer further noticed that in one of the group cases namely M/s. Ganga Exim Pvt. Ltd., assessee had declared gross profit of 0.75% for the assessment year 2008-09 while admitting gross profit of 0.65% for the assessment year 2007-08 and 1.14% for the assessment year 2006-07. Holding that respondent had failed to produce any evidence to substantiate its claim of loss, assessing officer rejected the book results and estimated the income of the respondent at 2.5%

on the gross receipts of Rs.210,39,18,689.00 which worked out to Rs.5,25,97,967.00 whereafter tax and interest were levied.

5. This assessment order came to be challenged by the respondent before the first appellate authority i.e., Commissioner of Income Tax (Appeals) - 2, Hyderabad. First appellate authority by the appellate order dated 24.11.2016 held that assessing officer had dealt with the issue elaborately. Though opportunities were granted, respondent failed to produce any evidence in support of its claim. Agreeing with the conclusions drawn by the assessing officer, first appellate authority held that assessing officer was justified in estimating the income of the assessee at 2.5% of the gross receipts and accordingly dismissed the appeal.

6. Aggrieved by the above, respondent preferred further appeal before the Tribunal. Before the Tribunal, respondent filed a petition dated 24.05.2021

for raising an additional ground in view of the decision of the Supreme Court in **NTPC Limited v. CIT**[1] that assessing officer had failed to issue notice under Section 143(2) of the Act within the specified period of six months from the end of financial year in which the return was furnished. Further reliance was placed on the decision of the Supreme Court in **Assistant Commissioner of Income Tax v. Hotel Blue Moon**[2] on the very same issue. Tribunal noticed that the additional ground raised on behalf of the respondent pertains to a pure question of law. Therefore, Tribunal allowed the respondent to raise the above ground. Though it was contended by the revenue that notices under Section 143(2) of the Act dated 17.09.2009 and 25.05.2010 were issued, Tribunal rejected the same on the ground that the said notices basically pertain to Section 115WE(2) of the Act dealing with Fringe Benefit Tax, which was abolished with effect from the

[1] (1998) 229 ITR 383 (SC)
[2] (2010) 321 ITR 362 (SC)

assessment year 2010-11. Tribunal held that such a notice could not be construed to be a notice for determining the respondent's correct taxable income despite the return having been filed on 29.09.2008. Concurring with the view taken by the Supreme Court in **Hotel Blue Moon**'s case (supra), Tribunal vide the order dated 12.07.2021 set aside the order of assessment on the ground that there was no valid notice under Section 143(2) of the Act. Relevant portion of the order of the Tribunal dated 12.07.2021 reads as under:

> "4. We have given our thoughtful consideration to rival pleadings against and in support of the correctness of the impugned assessment on account of Assessing Officer's alleged failure; as per the assessee's stand, in issuing section 143(2) notice "within a specified time factor of six months from the end of financial year of furnishing of its return." We find merit in assessee's instant additional ground petition (supra) as per (2012) 137 ITD 26 (Mum) (SB) All Cargo Global Logistics Ltd. Vs. DCIT holding in light of hon'ble apex court's judgment in NTPC Ltd (supra) that this tribunal can

very well entertain a pure question of law, in order to determine correct tax liability of an assessee provided all the relevant facts are already on record.

5. We next advert to this Revenue's paper book pages 14 & 16 containing the alleged section 143(2) notice(s) dt.25.5.2010 and 17.9.2009; respectively. We find no merit in Revenue's foregoing arguments since the said notices pertained to section 115WE(2) Fringe Benefit Tax "FBT" proceedings (abolished w.e.f. A.Y. 2010-11) than assuming jurisdiction for determining the assessee's correct taxable income despite the fact that it had duly filed its return on 29.09.2008. We thus quote Hotel Blue Moon (supra) and hold that the impugned assessment is not sustainable in law since framed in absence of a valid section 143(2) notice issued within the prescribed time period. The same stands quashed therefore. All other pleadings on merits are rendered academic."

7. Learned Standing Counsel for Income Tax Department has drawn our attention to page No.32 of the paper book to show that it was a notice under Section 143(2) of the Act and therefore, Tribunal had

erred in holding that there was no valid notice under Section 143(2) of the Act.

8. We have perused the notice at page No.32 of the paper book. As already noticed above, the return of income for the assessment year 2008-09 was filed on 29.09.2008. The notice is dated 17.09.2009 and it was issued under Sections 143(2) and 115WE(2) of the Act, the latter dealing with Fringe Benefit Tax. Section 143 of the Act deals with assessment. Sub-section (2) of Section 143 says that when a return is filed under Section 139 of the Act or in response to a notice under sub-section (1) of Section 142 of the Act, the assessing officer, if he considers it necessary to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, shall serve on the assessee a notice requiring him, on a date to be specified therein, either to attend the office of the assessing officer or to produce, or cause to be produced before the assessing

officer any evidence on which the assessee may rely in support of the return. As per the proviso, no notice under this sub-section shall be served on the assessee after the expiry of six months from end of the financial year in which the return is furnished. We may mention at this stage that by the Finance Act, 2021, the period of six months has now been substituted by three months with effect from 01.04.2021.

9. As pointed out above, the return of income was filed by the respondent on 29.09.2008. In other words, in the financial year 2008-09. The six months period was available to the assessing officer till 30.09.2009.

10. The question before this Court is whether the notice dated 17.09.2009 on which much reliance has been placed by the learned Standing Counsel for the Income Tax Department can be construed to be a notice under Section 143(2) of the Act?

11. Section 115WE(2) of the Act deals with income tax on fringe benefits. It was inserted by the Finance Act, 2005, with effect from 01.04.2006 and withdrawn with effect from the assessment year 2010-11. Section 115WA of the Act provides for charge of fringe benefit tax. As per sub-section (1), in addition, to the income tax charged under the Act, there shall be charged for every assessment year commencing on or after the 1st day of April, 2006, additional income tax referred to as fringe benefit tax in respect of the fringe benefits provided or deemed to have been provided by an employer to his employees during the previous year at the rate of thirty percent on the value of such fringe benefits. According to sub-section (2) thereof, even if no income tax is payable by an employer on his total income computed in accordance with the provisions of the Act, the tax on fringe benefits shall be payable by such employer. What are fringe benefits have been explained in Section 115WB of the Act. According to

Section 115WD of the Act, without prejudice to the provisions contained in Section 139 of the Act, every employer who has paid or made provision for payment of fringe benefits to his employees during the previous year shall on or before the due date furnish the return of fringe benefits to the assessing officer. Section 115WE of the Act deals with assessment. As per sub-section (1) thereof, where a return has been made under Section 115WD of the Act, such return shall be processed in the manner provided thereunder. Sub-section (2) of Section 115WE of the Act provides that where a return has been furnished under Section 115WD, the assessing officer shall, if he considers it necessary or expedient to ensure that the assessee has not understated the value of fringe benefits or has not underpaid the tax in any manner, serve on the assessee a notice requiring him to attend his office or to produce any evidence relied upon by the assessee on specified date. As per the proviso, no notice under

sub-section (2) shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished.

12. From a reading of the above notice in conjunction with Section 143(2) and Section 115WE(2) of the Act, there can be no manner of doubt that the above notice was issued in the context of the return filed for fringe benefits by the respondent.

13. In **Hotel Blue Moon**'s case (supra), the question before the Supreme Court was whether issuance of notice under Section 143(2) of the Act within the prescribed time limit is mandatory or not. On due consideration, Supreme Court took the view that such a notice is not a mere procedural requirement, but a mandatory provision. Though the above question was examined in the light of Section 158BC of the Act dealing with block assessment following search and seizure, nonetheless Supreme Court upheld the views

expressed by the Gauhati High Court that Section 143(2) of the Act is mandatory and violation thereof cannot be construed to be a procedural irregularity.

14. Though Tribunal had followed the aforesaid decision which decision may not be strictly applicable to the facts of the case, nonetheless, we are of the view that the notice dated 17.09.2009 cannot be construed to be a notice under Section 143(2) of the Act for the purpose of assessment under Section 143 of the Act. It was a notice issued for the purpose of assessment on fringe benefits. Insofar this issue is concerned, we are of the view that it goes to the root of the matter and therefore, Tribunal was justified in entertaining the petition filed by the respondent raising the additional ground, which is nothing but a pure question of law going to the root of jurisdiction.

15. Therefore, not on the ground on which the Tribunal arrived at the conclusion, but for the reasons

mentioned above, we are not inclined to interfere with the order of the Tribunal dated 12.07.2021.

16. Thus we do not find any question of law involved, not to speak of any substantial question of law.

17. Consequently, writ appeal is dismissed.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

UJJAL BHUYAN, CJ

C.V.BHASKAR REDDY, J

05.09.2022
vs