



\$~13

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

Date of decision: 08th July, 2026

+ ITA 527/2017

SUN AERO LTD

.....Appellant

Through: Mr. Jayant Bhushan and Mr. Sachit Jolly, Senior Advocates with Mr. Siddharth Garg, Advocate.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX.....Respondent

Through: Mr. Siddhartha Sinha, Senior Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE DINESH MEHTA

HON'BLE MR. JUSTICE RAJNEESH KUMAR GUPTA

J U D G M E N T

Per DINESH MEHTA, J. (Oral)

1. The instant appeal under Section 260(A) of the Income Tax Act, 1961 (*hereinafter referred to as 'the Act of 1961'*) is directed against the order dated 20.09.2016 passed by the Income Tax Appellate Tribunal (*hereinafter referred to as 'the Tribunal'*) in appeal bearing No. IT(SS)A No. 06/DEL/2004, that was filed by the Revenue.

2. The following questions have been framed *vide* order dated 13.05.2019:

(i) Whether it was mandatory for the Assessing Officer('AO') to have issued a notice under Section 143 (2) of the Income Tax Act, 1961 ('Act') within one year from the date of filing of the return of income for the block period and only thereafter complete the assessment under Section 158 BC of the Act?



(ii) Whether the additions for undisclosed income in the block assessment under Section 158 BC of the Act can be made notwithstanding that the issue has already been adjudicated in the original assessment under Section 143 of the Act?

(iii) Whether the ITAT was right in deleting the addition of Rs.21 crores made by the AO under Section 45 read with Section 47 (v) of the Act?”

3. Before adverting to adjudication of the questions of law so framed, it would be apt to lay down the factual foundation giving rise to the present appeal.

4. The appellant – M/s. Sun Aero Ltd. (*hereinafter referred to as ‘Sun Aero’*), claims itself to be a wholly owned subsidiary of a company known as Sun Air Hotels Ltd. (*hereinafter referred to as ‘Sun Air’*), which was conferred right to develop a hotel at Bangla Sahib Road by the New Delhi Municipal Corporation (*hereinafter referred to as ‘NDMC’*) in the year 1970. However, in the year 1990, due to some difference which arose between the Sun Air and NDMC and the NDMC cancelled the development rights. Sun Air challenged the action of the NDMC before the Delhi High Court. During the pendency of the suit, Sun Air transferred its rights as per the license deed to Sun Aero-respondent/assessee herein for nil consideration. However, the rights were transferred back to Sun Air in 1995 for a consideration of Rs. 21 crores.

5. The Appellants filed a return of income for Assessment Year 1995-96 claiming the amount of Rs. 21 crores as exempt from capital gains under Section 47(v) of the Act of 1961, which claim of the appellant, was accepted by the Assessing Officer while passing assessment order dated 09.02.1998, under Section 143(3) of the Act of 1961 after due scrutiny in the matter.



6. A search was conducted on 21.11.2000 at the appellant's premises, during which no incriminating material (as claimed by the appellant) in relation to the appellant's status being wholly owned subsidiary of the company known as Sun Air Hotels Limited was found.

7. Be that as it may. The assessment order records that, after the search, certain material came to the notice of the Assessing Officer on the basis whereof, he formed an opinion that the appellant – assessee is not the wholly owned subsidiary of said company (Sun Air Hotels Limited) and an order for the block period under Section 158BC of the Act of 1961 and made addition of Rs. 21 crores in appellant's hands came to be passed. By way of appeal, the appellant assailed the said order of the Assessing Officer (dated 29.11.2002) before the Commissioner of Income Tax (Appeals) [*hereinafter referred to as 'CIT (A)'*], who allowed the same *vide* order dated 31.10.2003, while observing thus:

“3.20. In the letter dt. 20/2/2003, it is submitted that the issue regarding taxability of capital gain has already been examined earlier by the Assessing Officer, Special Range-5, New Delhi while passing the order u/s 143(3) for the relevant assessment year 1995-96. Hence, the addition made is beyond the scope of Chapter XIV-B of the Act as it is a completely disclosed transaction in the regular books of account.”

8. The addition so made by the Assessing Officer was set aside by CIT (A). Against the order of the CIT (A). dated 31.10.2003, the Revenue preferred an appeal bearing No. IT(SS)A No. 06/DEL/2004 before the Income Tax Appellate Tribunal, which rejected the appeal filed by the Revenue *vide* its order dated 26.10.2007.

9. Thereafter, the revenue brought the matter before this Court by way of



an appeal under Section 260(A) of the Act of 1961, bearing ITA No. 562/2008, in which the following questions of law were framed by the High Court :

“(i) Whether the Income Tax Appellate Tribunal was right in deleting the addition of Rs. 21 crores made by the Assessing Officer under Section 45 read with Section 47(v) of the Income Tax Act, 1961?

“(ii) Whether the impugned order passed by the Income Tax Appellate Tribunal is perverse ?”

10. The High Court heard the appeal and, *vide* its order dated 01.06.2012, remitted the matter back to the Tribunal, holding the order of the Tribunal to be perverse. In other words, the High Court decided the question no. 2 only and left all the questions, including the ground relating to question no. 1 recorded hereinabove in para No. 5, to be dealt with and decided afresh by the Tribunal.

11. When the matter went before the Tribunal pursuant to the remand, the Tribunal allowed the appeal filed by the Revenue *vide* its order dated 20.09.2016, which is impugned in the present appeal before this Court. The appellant's legal grounds, more particularly, the ground that no incriminating material was found during the search was not entertained by the Tribunal by observing that the assessee had not filed any cross-appeal. The arguments advanced on behalf of the assessee were brushed aside by the Tribunal by observing that unless an additional ground was raised or a cross appeal was filed, the legal issue could not be gone into. Against the said order of the Tribunal, the present appeal has been preferred and the questions quoted in paragraph 1 hereinabove have been framed.



12. Mr. Jayant Bhushan, learned Senior Counsel appearing for the appellant, at the outset, submitted that while dealing with the present appeal, a crucial and important fact has to be borne in mind that the CIT (A) had already allowed the assessee's appeal holding the assessment order to be bad in the eye of law, as there was no material to invoke Chapter XIV-B of the Act of 1961 and that the assessment was completely beyond the scope of Chapter XIV-B of the Act of 1961, as no incriminating material was found during the search, and that it was a completely disclosed transaction. In this regard, he referred to paragraph 3.20 of the order (as quoted above in para No. 7).

13. Mr. Bhushan, learned Senior Counsel submitted that in an appeal filed by the Department, an assessee can always support the order passed by the authorities below on the grounds mentioned therein or otherwise and no separate appeal or cross-objection reiterating the very same grounds is necessary. He argued that the Tribunal has, therefore, clearly erred in not considering the appellant's arguments in relation to the fact that no incriminating material was found during the search and seizure and that the appellant's assessment had been made on the very same material, which clearly stood disclosed and had already been considered during assessment under Section 143(3) of the Act of 1961.

14. Learned Senior Counsel then made submissions in regard to question nos. 1 and 2 framed by this Court and argued that, notwithstanding his contention aforesaid, the appeal deserves to succeed on question no.3 as well. He submitted that first two questions, which are jurisdictional questions, are considered, the assessment order passed by the Assessing Officer is liable to be set aside or annulled in light of the judgments of this Court and of Hon'ble the Supreme Court.



15. In relation to the first question, he submitted that while proceeding under Section 158BC of the Act, it is incumbent upon the Assessing Officer to issue a notice under Section 143(2) of the Act, as has been held by Hon'ble the Supreme Court in the case of **Assistant Commissioner of Income Tax vs. Hotel Blue Moon, 2010 3 SCC 259** and by this Court in the case of **Principal Commissioner of Income Tax vs. Silver Line, 2016 383 ITR 455**. He invited Court's attention to paragraph 22 of the **Hotel Blue Moon** (supra) and paragraph 16 and 18 of the **Silver Line** (supra). The relevant paragraphs are as follows :

In **Hotel Blue Moon** (supra), Hon'ble the Supreme Court observed as under :

“22. Clause (b) of Section 158-BC by referring to Sections 143(2) and (3) would appear to imply that the provisions of Section 143(1) are excluded. But Section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under Section 143(2). However, if an assessment is to be completed under Section 143(3) read with Section 158-BC, notice under Section 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under Section 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under Section 143(2) cannot be dispensed with.”

In **Silver Line** (supra), this Court has observed as under:

“16. As regards the objection of the Revenue to the Income-tax Appellate Tribunal permitting the assessee to raise the point concerning non-issuance of notice under section 143(2) of the Act for the first time in the appeal before



the Income-tax Appellate Tribunal, the court is of the considered view that in view of the settled legal position that the requirement of issuance of such notice is a jurisdictional one, it does go to the root of the matter as far as the validity of the reassessment proceedings under section 147/148 of the Act is concerned. It raises a question of law as far as the present cases are concerned since it is not in dispute that prior to finalisation of the reassessment orders, notice under section 143(2) of the Act was not issued by the Assessing Officer to the assessee. With there being no fresh evidence or disputed facts sought to be brought on record, and the issue being purely one of law, the Income-tax Appellate Tribunal was not in error in permitting the assessee to raise such a point before it. This finds support in the decision of the Supreme Court in National Thermal Power Co. Ltd. v. CIT (supra) and the decision of this court in Gedore Tools (P.) Ltd. v. CIT (supra).

18. The wording of section 143(2)(ii) of the Act, which is applicable in the present case, requires the Assessing Officer to be satisfied on examining the return filed that prima facie the assessee has "understated the income" or has "computed excessive loss" or has "underpaid the tax in any manner". The Assessing Officer has the discretion to issue a notice under section 143(2) if he considers it "necessary or expedient" to do so. This exercise by the Assessing Officer under section 143(2) of the Act is qualitatively different from the issuance of a notice under section 142(1) of the Act, which as noted hereinbefore, is in a standard pro forma."

16. In relation to the other question, that unless incriminating material is found during the search, an order under Section 158 BC cannot be passed, he relied upon and invited Court's attention to paragraph 18 of the **Hotel Blue Moon** (supra). The relevant paragraph is as follows :

"18. Chapter XIV-B provides for an assessment of the undisclosed Income unearthed as a result of search without



affecting the regular assessment made or to be made. Search is the sine qua non for the block assessment. The special provisions are devised to operate in the distinct field of undisclosed income and are clearly in addition to the regular assessments covering the previous years falling in the block period. The special procedure of Chapter XIV-B is intended to provide a mode of assessment of undisclosed income, which has been detected as a result of search. It is not intended to be a substitute for regular assessment. Its scope and ambit is limited in that sense to materials unearthed during search. It is in addition to the regular assessment already done or to be done. The assessment for the block period can only be done on the basis of evidence found as a result of search or requisition of books of accounts or documents and such other materials or information as are available with the assessing officer. Therefore, the income assessable in block assessment under Chapter XIV-B is the Income not disclosed but found and determined as the result of search under Section 132 or requisition under Section 132-A of the Act.

17. Mr. Siddharth Sinha, learned Senior Standing Counsel for the respondent, on the other hand, submitted that the arguments, which have so vociferously been put forth by learned Senior Counsel, though framed by this Court, cannot be entertained and decided, as they do not flow from the order of the Tribunal. He argued that these two questions were never agitated or raised by the assessee, when the matter was remitted by the High Court to the Tribunal. He submitted that since the matter had travelled up to the High Court, these questions, unless agitated and argued before the Tribunal, cannot be allowed to be raised for the first time before this Court. In support of his aforesaid contentions, Mr. Sinha relied upon the judgment of the Appellate Tribunal of Electricity, ***Damodar Valley Corporation, DVC Towers, VIP Road, Kolkata-700054 vs. Central Electricity Regulatory Commission and***



Others, 2010 SCC Online APTEL 47 and the judgment of Hon'ble the Supreme Court in ***Damodar Valley Corporation vs. Central Electricity Regulatory Commission and Others, (2020) 6 SCC 795.***

18. Learned Senior Standing Counsel for the respondent, invited Court's attention towards the relevant part of the assessment order dated 29.11.2002 and submitted that during the course of search, certain material was seized from the premises of the assessee which created a genuine doubt about the appellant's claim as a wholly owned subsidiary of the holding company namely 'Sun Air'. The relevant part of the assessment order is reproduced thus:

"During the course of search and seizure operation the fact came to light that M/s Sunaero Ltd. had declared Rs. 21 Crores as their profit for assessment year 1995-1996 and claimed exemption u/s 47 (v) of the Income Tax Act, 1961 on the ground that it was wholly owned subsidiary of M/s Sunair Hotels Ltd. However seizure operations conducted at the Reg. office of the assessee company, certain materials were seized from the premises of the assessee company which indicated that the claim regarding the status of the company as wholly owned subsidiary of the holding company M/s Sunair Hotels Ltd. was not correct. Investigations regarding this fact that whether this company was actually a wholly owned subsidiary of M/s Sunair Hotels Ltd. were carried out during post search investigation. Vide reply of the assessee dated 29.08.2002 it was stated that "the assessee company is a 100% subsidiary of Sunair Hotels Ltd. right from its incorporation till date because as per the Company Act, minimum seven registered, shareholders should be there in any public limited company and therefore seven such persons were appointed as nominees to hold shares on behalf of the holding company M/s Sunair Hotels Ltd. It was also stated that the said nominee, shareholders did not make any investment to acquire the share of M/s Sunaero Ltd., but the entire investment was made by Sunair Hotels Ltd. Therefore, the consideration of Rs. 21 Crores so received by the assessee company was exempt from



tax as it was a wholly owned subsidiary of M/s Sunair Hotels Ltd. for the reasons given above.”

19. Having read the above quoted portion of the assessment order, learned counsel submitted that the fact that certain material was found is evident from the above part of the assessment order and therefore, the assessee's claim that no material was found during the search is untenable. In relation to assessee's contention that notice under Section 143(2) of the Act of 1961 was not issued to the appellant, learned Senior Standing Counsel argued that this contention was never raised by the assessee and the same was not the basis for setting aside the Assessing Officer's order by the CIT(A). He argued that the same cannot be entertained by this Court, simply because it appears or happens to be a question of law.

20. He was, however, not in a position to refute/controvert the assessee's assertion that no notice under Section 143(2) of the Act of 1961 was issued to the appellant. He submitted that during the pendency of the present appeal, he has tried to ascertain this fact from the Assessing Officer but since the matter is an old one, he could not lay his hands on relevant record/material, so as to apprise the Court in this regard.

21. Heard learned Counsel for the parties and perused the relevant material including the judgments cited.

22. Before moving to the questions which have been framed by this Court, we would like to first deal with the preliminary objection raised by Mr. Sinha that Question Nos. 1 & 2, though framed, cannot be gone into and decided by this Court.

23. True it is, that the Question Nos. 1 & 2 in the manner as framed, had never been argued by the assessee. But so far as substance of issue of



Question No.2 is concerned, the same was very much raised before the CIT(A) and he, as a matter of fact, had annulled the assessment order essentially on such ground but maybe with a different expression holding that the case is beyond the scope of Chapter XIV-B of the Act of 1961. While holding so, he had observed that it was a completely disclosed transaction in the regular books of account.

24. However, if the appellant's contentions noted in the previous round of litigation (in paragraph No. 30 of judgment dated 01.06.2012) is taken into account, we find that such argument had been raised by the assessee. We deem it appropriate to reproduce the assessee's arguments as noted by this Court during the previous proceedings i.e., **ITA 562/2008**:

30. At this stage, we may notice two contentions of the respondent. The first contention is that block assessment proceeding are bad as no material or evidence was found in the search. This aspect has not been examined and dealt with by the tribunal. A reading of the order passed by the Assessing Officer would show that he has referred to the evidence and material which was found during the search and thereafter, he has referred to the post search investigation and verification. As per the assessment order, the evidence/material found during the search and post search investigation had revealed that the respondent assessee was not 100% subsidiary of Sunair Hotels Ltd. As we are passing order or remit, this question, if raised, will be examined and considered by the tribunal. The second contention of the respondent relying upon the assessment order dated 9th February, 1998, does not help or assist the respondent for the said order has proceeded on the assumption that the respondent assessee was 100% subsidiary of Sunair Hotels Ltd. However, as per the case of the appellant, material and evidence found during the search and subsequent enquiries had revealed that the respondent assessee was not a 100% subsidiary of Sunair Hotels Ltd. It is, therefore, the contention of the appellant that the assessment order dated 9th February, 1998 does not help or protect the respondent assessee as



the said order had proceeded on the basis of premise and assumption that the respondent assessee was not a 100% subsidiary of Sunair Hotels Ltd. This aspect will be examined by the tribunal. We refrain from deciding this aspect/question. Order of the tribunal we record is silent on this question.

25. We feel that what has been observed by the High Court in its order dated 01.06.2012 was necessitated because the High Court found that various submissions advanced by the appellant and Revenue were neither dealt with by the CIT(A) nor by the Tribunal. A perusal of paragraph no.14 clearly reveals that High Court, having heard rival Counsel, found that various arguments have not even been noticed. It is in the backdrop of this fact situation, we are of the view that the High Court had left every issue open to be argued and agitated by both the parties before the Tribunal.

26. We cannot be oblivious of the fact that the CIT(A) had set aside the assessment so framed by the Assessing Officer, maybe on a slightly different count, but once the CIT(A) had held in assessee's favour, there was no occasion for the assessee to raise the grounds by way of cross appeal, as were orally raised before the High Court, because before the Tribunal, it was Revenue's appeal.

27. According to us, before the Tribunal, an assessee can always support the order passed by the Appellate Authority on all permissible grounds, including the ground on which the appeal had been allowed. In a bid to support an order passed by the Authority below, an assessee can raise oral contentions, if the same are not subservient to any additional evidence. In other words, an assessee can support an order of the CIT(A) on other grounds also, and contend that the order of the Assessing Officer is erroneous if the same is contrary to any subsequent judgment, passed by the jurisdictional



High Court or the Supreme Court, because ultimately it is the legal position which should triumph and prevail and not the procedural formalities of filing a cross appeal.

28. On a perusal of the impugned order of the Tribunal, we find that though while remanding the matter, this Court had given a liberty to the assessee to raise all grounds before the Tribunal and the assessee did make an endeavour to advance such arguments but the same were not considered by the Tribunal taking a hyper technical view that the assessee had not filed any appeal or cross-appeal. We are of the firm view that the Tribunal has erred in not considering the appellant's arguments that the assessment order was liable to be set aside or no proceedings could be taken against the appellant assessee, as no material was found during the search.

29. In any event, the Question Nos.1 & 2 framed by this Court are purely legal issues and go to the root of the matter. It is a settled legal position that legal issues can be raised at any stage, and, if they are jurisdictional issues- they can be raised even before the High Court or before Hon'ble the Supreme Court.

30. We, therefore, reject the preliminary objection raised by Mr. Sinha that Question Nos.1 and 2 cannot be gone into by this Court, at this stage.

31. Moving on to Question No.2, a perusal of the assessment order gives an indication that during search, the Assessing Officer had found some material such as share certificate, etc. but the Assessing Officer did not record any finding about the material on the basis of which he had inferred that the appellant was not a fully owned subsidiary of Sun Air.

32. A perusal of the above quoted part of the assessment order (Para No.14) clearly unravels that the Assessing Officer had found certain material



post-search investigation. According to us, the search continues only during the period mentioned in the warrant of authorization issued under Section 132 of the Act of 1961. And once that period is over, any material which was found subsequently cannot be said to be a material found during search.

33. According to us, what has been found after the search was a material collected during the course of assessment proceedings and not during the search. And since the impugned assessment order is based upon a material purportedly recovered post search, this cannot be made a basis for raising a demand against the appellant, as has been held by Hon'ble the Supreme Court in ***Hotel Blue Moon (supra)***, more particularly because appellant's assessment had been made under Section 143(3) of the Act of 1961.

34. Adverting to the Question No.1 in relation to issuance of notice under Section 143(2) of the Act of 1961, judgment of this Court in the case of ***Silver Lining (supra)*** is clear and categorical, wherein it has been held that a notice under Section 143(2) of the Act of 1961 is required to be issued. On a perusal of the judgment in the case of ***Silver Lining (supra)***, we find that even in that case, the question of issuance of notice was raised first time before the Tribunal as can be seen from paragraph no.16 of the order in the said case. And this Court has not only held that such legal issue or ground can be raised at the stage of Tribunal but has also held that a notice under Section 143(3) of the Act of 1961 is mandatory.

35. A perusal of the assessment order and record does not show any evidence of issuance of any notice to the appellant assessee during the course of proceedings under Section 158BC of the Act of 1961.

36. Mr. Sinha, learned Senior Standing Counsel for the Department, also is not in a position to place any notice issued to the petitioner under Section



143(2) of the Act of 1961. This leads us to conclude that no notice under Section 143(2) of the Act of 1961 was issued to the appellant during the proceedings under Section 158 BC of the Act of 1961.

37. In view of the aforesaid, Question Nos.1 & 2 are decided in the affirmative and in favour of the assessee.

38. The appeal, therefore, succeeds. The first two questions are thus decided in favour of the assessee.

39. The impugned assessment order dated 29.11.2002 and the order of the Tribunal dated 20.09.2016 are quashed and set aside. Consequences to follow.

40. As the assessment order has been annulled on jurisdiction aspect, we do not deem it necessary to go into the third question. The same is left undecided/open.

41. The appeal stands disposed of.

DINESH MEHTA
(JUDGE)

RAJNEESH KUMAR GUPTA
(JUDGE)

JULY 8, 2026/nd/kk