

IN THE INCOME TAX APPELLATE TRIBUNAL : 'A' BENCH, KOLKATA

**Before : Shri J. Sudhakar Reddy, Accountant Member and
Shri S.S.Viswanethra Ravi, Judicial Member**

ITA No. 566/Kol/2012 A.Y 1996-97

I.T.O., Ward 1(1), Kolkata Vs. **M/s. Aminex Merchant
Pvt. Ltd. PAN AACCA5556A**
[Appellant] [Respondent]

C.O No. 12/Kol/2016
[ITA No. 566/Kol/2016 A.Y 1996-97]

Aminex Merchant Vs. **I.T.O., Ward 1(1), Kolkata**
Pvt. Ltd. [Cross Objector-Assessee] [Department-Respondent]

Appellant by : Shri Sallong Yaden, Addl.CIT, Id. Sr.DR
Respondent by : Shri S.L. Kochar, Advocate, &
Shri Anil Kochar, Advocate, Id.ARs

Date of Hearing : 24-10-2017
Date of Pronouncement : 5th -01-2018

ORDER

Shri S.S.Viswanethra Ravi, JM:

This is appeal filed by the Revenue is directed against the order of the Id. Commissioner of Income-tax (A), XIX, Kolkata dated 09-01-2012 for the assessment year 1996-97. The cross objection is filed by the assessee.

2. There is delay of 08 days in filing the appeal of the revenue and the delay of 1495 days in filing the cross objection of the assessee.
3. First, we take up the revenue's appeal (ITA No. 566/Kol/2002 A.Y 1996-97)
4. The delay in filing of this revenue appeal is condoned after perusing the petition for condoning the delay and the appeal is admitted.

5. The Id. Counsel for the assessee relied on the Rule 27 of the ITAT Rules and submitted that the notice issued u/s. 148 of the Act was bad in law for the following reasons:-

a. *Initially notice was issued u/s. 148 of the Act dtd. 04-12-1998 and was served on the assessee on 09/02/1998. Without concluding these proceedings a second notice u/s. 148 of the Act dt. 26-03-1999 was purportedly issued to the assessee.*

b. *Notice u/s. 148 dt. 26-03-1999 is said to have been served by affixture on 28-04-1999 at the old/wrong address and hence, not a valid notice.*

c. *The second notice issued u/s. 148 of the Act was issued on 26-03-1999, whereas the AO states that he received the assessment records from the jurisdictional AO only in 2003 following restructuring in the department. Hence, these reasons recorded are without reference to the material available in the assessment record. Hence, there is non-application of mind. Hence, the notice is bad in law.*

6. That, the CIT-A in this case has not adjudicated this issue of validity of notice. Hence, it is deemed that the same is decided against the assessee. For this proposition, he relied on the order of ITAT, Chennai, 'D' Bench in the case of India Cements Ltd, in ITA No. 582/Mad/2005 for the A.Y 1996-97, reported in 121 TTJ 568 (Chennai), wherein it is held as follows:-

"It is settled position of law that if any issue is not adjudicated by an appellate authority, then it shall be deemed to have been decided against the appellant----- and he is entitled to agitate this point in appeal before the Tribunal even if appeal has not been filed. The Hon'ble ITAT, Chennai 'D' Bench in the case of Assistant Commissioner of Income-tax vs. India cements Ltd in order ITA No. 582/Mad/2005; for Assessment Yr. 1996-97, which is reported in 121 TTJ (Chennai) 568 have held as under:-

"It is settled position of law that if any issue is not adjudicated by an appellate authority, then it shall be deemed to have been decided against the appellant----- and he is entitled to agitate this point in appeal before the Tribunal even if appeal has not been filed." In view of the above decision rendered by the Hon'ble ITAT Chennai, it is submitted that the additional grounds raised are in order and the same deserve to be admitted for consideration by Hon'ble Tribunal."

7. The Id.DR opposed the contentions of the assessee and relied on the order of the AO and submitted that the CIT-A has wrongly deleted the addition.

8. After hearing the rival submissions, we find that the AO (ITO, Ward-1(1), Kolkata) vide F No. Wd-1(1)/2005-06/636 Dtd. 02-11-2004 has given a remand report to the Id. Commissioner of Income Tax, Appeal-VII, Kolkata. The Id. CIT-A, after receiving this remand report has not adjudicated the issue of (i) validity of notice issued u/s. 148 of the Act and (ii) the issue of limitation. In this remand report, the AO has acknowledged that prima facie it has been proved that the assessee had received a notice u/s. 148 dt. 4-12-1998 on 09-12-1998. While so there is no basis for issuance of second notice u/s. 148 on 26-03-1999 by the AO (ITO, W -1(1), Kolkata). When the proceedings that commenced on the issuing the first notice are still open, a second notice re-opening the assessment (which was not yet closed) cannot be given. This notice is bad in law.

9. Secondly, we find that the AO records that, he received the assessment record from the ITO, W-1(1), Kolkata only in 2003. While so, we do not understand how on 26-03-1999, a notice u/s. 148 of the Act was issued, by recording the reasons of re-opening, that the assessee's income liable to tax has escaped assessment. The AO cannot come in such conclusion without looking into the assessment records, the income declared by the assessee in the return of income filed and then studying the material facts based on which he records reasons for re-opening. Hence, the reasons for reopening recorded was based on mere surmises, as it was done without reference to the assessment records. Such reasons cannot be sustained. We also find that the AO records that a return, intimating change of address was filed by the assessee before the ROC [Registrar of Companies]. It is clear that the assessee's registered office was not at the place on which service of affixture was done by the Inspector of Income-tax.

When service is to be done by affixture, the minimum expected is that the Income-tax Inspector, who done this affixture, would enquire whether the assessee resides in this premises or not or whether this is the registered office of the assessee company. In this case, the affixture was done at a wrong address. Hence, the service of notice by affixture, by the Income-tax Inspector is bad in law. Thus, there is no valid notice of the second 148 notice. Hence, limitation is to be calculated from the first notice u/s. 148 of the Act. As the assessment order is passed beyond 31/3/2001, it is barred by limitation. For all these reasons, the assessment order is quashed as bad in law.

10. CO. No.12/Kol/2016 (ITA No.566/Kol/2012 A.Y 1996-97 (by the assessee).

11. The C.O was filed with the delay of 1495 days. The delay is not condoned. Hence, the same is dismissed as not admitted.

12. In the result, the appeal (ITA No. 566/Kol/2016) filed by the Revenue for the A.Y 1996-97 is dismissed and cross objection (C.O No. 12/Kol/2016) filed by the Assessee for the A.Y 1996-97 is dismissed.

Order pronounced in the open court on 5th -01-2018

Sd/-
J. Sudhakar Reddy
Accountant Member

Dated :5th -01-2018

Sd/-
S.S. Viswanethra Ravi
Judicial Member

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Revenue :Income Tax Officer, Ward 1(1), Room No. 5, P-7, Chowringhee Square, Kolkata-69.
2. Respondent/Assessee: M/s.Aminex Merchant Pvt. Ltd P-15, India Exchange Place, Extn, 2nd Floor, Todi Mansion, Kolkata-73.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata
/True Copy, By order Sr.PS, H.O.O, ITAT, Kolkata