

IN THE INCOME TAX APPELLATE TRIBUNAL : JODHPUR BENCH : JODHPUR

BEFORE SHRI HARI OM MARATHA, JUDICIAL MEMBER AND
SHRI N.K. SAINI, ACCOUNTANT MEMBER.

ITA No.326/Jodh/2013
(A.Y. 2009-10)

ITO, Ward-1(2),
Udaipur.

Vs. Shri Bhuvanesh Maheshwari,
Prop. M/s. B. Maheshwari & Co.,
Opposite Surajpole, Udaipur.

(Appellant)

PAN No. ABFPM 0872 N
(Respondent)

Assessee by : None.
Department By : Shri R.H. Gohel- D.R.
Date of hearing : 31/10/2013.
Date of pronouncement : 31/10/2013.

ORDER

PER N.K.SAINI, A.M

This is an appeal by the department against the order dated 05/03/2013 of ld. CIT (A), Udaipur. During the course of hearing, nobody was present on behalf of the assessee nor adjournment was sought. We, therefore, proceeded *ex parte* qua the assessee after hearing the learned D.R. and the appeal is disposed off on merit. The only effective ground raised in this appeal reads as under:-

“1. On the facts and in the present circumstances of the case, the learned CIT(A) has earned in quashing the assessment order passed u/s. 143(3) of the Act despite the fact that notice u/s. 143(2) of the I.T. Act was duly served upon the assessee by way of personal service and through registered post despite the fact that another notice was also sent within the prescribed time, which has been totally ignored.”

2. Facts of the case in brief are that the assessee filed his return of income belatedly on 26/03/2010 showing taxable income of Rs. 6,03,414/-, which was processed under section 143(1) of the I.T. Act, 1961 (hereinafter referred to as “Act”, for short) on 05/04/2010. Since, it was survey case, so it was selected for scrutiny. The Assessing Officer observed that notice under section 143(2) of the Act was issued to the assessee on 23/09/2010 and thereafter also, other notices were issued under section 143(2) of the Act. The assessee stated that the notice under section 143(2) of the Act dated 23/09/2010 has not been received by him. The Assessing Officer, however, framed the assessment by invoking the provisions of section 144 of the Act by observing that the assessee for the reasons best known to him, had not complied with the terms of the notices. Ultimately, the assessment was framed at an income of Rs. 42,38,457/- by making the various additions.

3. Being aggrieved, the assessee carried the matter to the learned CIT(A) and stated that the assessment order passed was without jurisdiction, so, liable to be quashed being barred by limitation as the

notice under section 143(2) of the Act was not issued and served within the time allowed. The Assessing Officer objected the submissions of the assessee that the order passed under section 144 of the Act was liable to be quashed and also objected to admission of the additional evidences under Rule 46A of the Act.

The learned CIT(A) pointed out that as per the Assessing Officer, the notice under section 143(2) of the Act was served on the assessee on 24/09/2010 through Notice Server and the said notice was received on behalf of the assessee by one Shri Bherulal. Learned CIT(A) discussed the events relating to the issuance and service of notices under section 143(2) of the Act as stated by the Assessing Officer as under:-

Dt. of issue of notice	Date of service	Date of hearing	Served on	Remarks
03/03/2011	04/03/2011	16/03/2011	Sh. Bherulal	None attended
06/06/2011	08/06/2011	15/06/2011	Person not identified	None attended
12/07/2011	14/07/2011	26/07/2011	Sh. Bherulal	None attended
23/09/2011	28/09/2011	05/01/2011	Person not identified	None attended
07/10/2011	11/10/2011	18/10/2011	Person not identified	None attended
18/11/2011	24/11/2011	25/01/2011	Person not identified	Adjournment application filed

4. The assessee stated to the learned CIT(A) that no notice was served upon him. The assessee furnished an affidavit of Shri Bherulal to whom notice was claimed to have been served. In the said affidavit, Shri Bherulal stated on oath that he was not in service with the assessee after 12/11/2008 and was not in touch with the assessee and never had visited business place after leaving the services and that he had not received any notice from any government department in his name or in the name of the assessee. The assessee prayed to the learned CIT(A) that the assessment order passed without serving notice under section 143(2) of the Act, may be quashed and held invalid. Reliance was placed on the following case-laws:-

1. Hind Book House Vs. ITO 93 TTJ 0224 (Del. Trb.)
2. CIT Vs. Thayabali Mulla Jeevaji Kapasi [1976] 66 ITR 147. (SC)
3. R.L. Narang Vs. CIT 136 ITR 108(Del.)
4. Springer Verlag GMBH Vs. Dy. Director of Income Tax 97 TTJ 0269 (Del. Trb.)

5. Learned CIT(A) after considering the submissions of the assessee observed that as per the provisions of section 143(2) of the Act, the Assessing Officer should have served statutory notice under section 143(2) of the Act on or before 30/09/2010 as return of income was filed by the assessee on 6/03/2010. He further observed that the Assessing Officer

had not controverted the affidavit of Shri Bherulal filed by the assessee during the course of appellate proceedings, which was sent to the Assessing Officer for his comments. He, therefore, held that the notice under section 143(2) of the Act was served along with questionnaire to the assessee on 18/11/2011, which was barred by limitation prescribed under the provisions of section 143(2) of the Act. Accordingly, the assessment completed, on the basis of invalid notice under section 143(2) of the Act, was quashed. Now, the department is in appeal.

6. At the time of hearing, nobody was present on behalf of assessee neither any adjournment was sought. We, therefore, proceeded *ex parte* qua the assessee and have considered the submissions of learned D.R. along with material available on record.

7. The only contention of the learned D.R. was that since assessee participated in the assessment proceedings, therefore, as per the provisions of section 292BB of the Act, it was to be presumed that the statutory notice was received by the assessee and, therefore, learned CIT(A) was not justified in quashing the assessment order passed by the Assessing Officer.

8. We have considered the submissions of learned D.R. and carefully gone through the material available on record. In the present case, it is

an admitted fact that the Assessing Officer claimed to have served the notice under section 143(2) of the Act to one Shri Bherulal on 24/09/2010 fixing the date of hearing for 07/10/2010. On the contrary, Shri Bherulal in his affidavit stated that he was not in touch with the assessee and had also not received any notice after leaving the services on 12/11/2008. The contents of the affidavit were not controverted by the Assessing Officer. The notice under section 143(2) of the Act in this case was to be served on the assessee before 30/09/2010 whereas notice dated 07/10/2010 was received by the assessee first time on 11/10/2010 i.e. after the statutory time limit prescribed under section 143(2) of the Act for service of notice. On a similar issue, the Hon'ble Apex Court in the case of *ACIT & another Vs. Hotel Blue Moon (2010) 321 ITR 362* has held as under:-

“Section 158BC provides for enquiry and assessment. After the return is filed, clause (b) of section 158BC provides that the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and “the provisions of section 142, sub-sections (2) and (3) of section 143, section 144 and section 145 shall, so far as may be, apply”. This indicates that this clause enables the Assessing Officer, after the return is filed, to complete the assessment under section 143(2) by following the procedure like issue of notice under section 143(2)/142. This does not provide accepting the return as provided under section 143(3) only. If an assessment is to be completed under section 143(3) read with section 158BC, notice under section 143(2) should be issued within one year from the date of filing of the block return. Omission on the part of the assessing authority to issue notice under section 143(2) cannot be

a procedural irregularity and is not curable. Therefore, the requirement of notice under section 143(2) cannot be dispensed with.”

9. From the ratio laid down in the aforesaid referred to case, it is crystal clear that the omission on the part of assessing authority to issue notice under section 143(2) of the Act cannot be procedural irregularity and is not curable. Therefore, requirement of notice under section 143(2) of the Act cannot be dispensed with. In the present case, since the Assessing Officer failed to serve the notice under section 143(2) of the Act to the assessee within the stipulated time limit prescribed, therefore, learned CIT(A) rightly quashed the assessment framed by the Assessing Officer on the basis of invalid notice under section 143(2) of the Act. We do not see any merit in this departmental appeal.

10. In the result, appeal is dismissed.

(Order Pronounced in the Court on 31st October, 2013).

Sd/-

sd/-

(HARI OM MARATHA)
JUDICIAL MEMBER

(N.K.SAINI)
ACCOUNTANT MEMBER

Dated : 31st October, 2013.

vr/-

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The Id.CIT*
4. *The CIT(A)*
5. *The D.R*

Assistant Registrar,
ITAT, Jodhpur.