

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'C', BANGALORE**

**BEFORE SMT P. MADAHVI DEVI, JUDICIAL MEMBER
AND
SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER**

**ITA No.242 & 243(Bang) 2013
(Assessment years : 2006-07 & 2007-08)**

Shri G.N.Mohan Raju,
No.3-12, Ground Floor,
Jayashree Point Apartments,
Ali Askar Road,
Bangalore-560 002.
PAN No.AAPPG6536L

Appellant

Vs

The Income-tax Officer,
Ward-12(2),
Bangalore.

Respondent

**Assessee by : Shri Padamchand Khincha, CA
Revenue by : Dr. Shankar Prasad, JCIT**

Date of hearing : 07-10-2014

Date of pronouncement : 10-10-2014

ORDER

PER SHRI ABRAHAM P GEORGE, AM:

These are appeals filed by the assessee directed against the orders dated 21-12-2012 of CIT(A)-III, Bangalore for the impugned assessment years. The grounds taken by the assessee for both the years are identical and these are re-produced hereunder;

“1. The order passed by the ld.CIT(A)-III, Bangalore to the extent prejudicial to the appellant, is bad in law and liable to be quashed.

2. The ld.CIT(A)-III, Bangalore has erred in confirming the action of the AO in issuing notice under section 148 and assuming jurisdiction under Section 147. The condition precedent for the issue of notice under section 48 and assumption of jurisdiction under section 147 not being satisfied, the order passed by the AO is bad in law, void ab initio and liable to be quashed.

3. The ld.CIT(A)-III, Bangalore has erred in confirming the action of the AO in framing the assessment and passing the order under section 143(3) read with section 147 without serving notice under section 143(2). The appellant having not received notice under section 143(2), the assessment made and the order passed under section 143(3) read with section 147 is a nullity, bad in law and liable to be quashed. Section 143(2), the assessment made and the order passed under section 143(3) read with section 147 is a nullity, bad in law and liable to be quashed.

4.The ld.CIT(A)-III, Bangalore has erred in confirming the action of the AO in assessing the sum of Rs.1.00 Crore received under the share subscription and shareholder’s agreement under section 28(va) of the Act. On facts and in the circumstances of the case and law applicable, consideration received for the grant of ‘right of first refusal’ is not chargeable to tax.

5. The ld.CIT(A)-III, Bangalore has erred in confirming the levy of inte5rest under section 234B of the Act. On facts

and in the circumstances of the case and law applicable, interest under section 234B is not leviable. The appellant denies its liability to pay interest under section 234B.

6. In view of the above and other grounds to be adduced at the time of hearing, the appellant prays that the order passed by the ld.CIT(A)-III, Bangalore to the extent prejudicial to the appellant, be quashed.

Or in the alternative

i) Sum received under the share subscription and shareholders' agreement amounting to Rs.1.00 Crore be held as not chargeable to tax.

ii) Interest levied under section 234B be deleted.

2. As is clear from the above, one of the grounds raised by the assessee is non-service of notice u/s 143(2) of the IT Act, 1961 (in short 'The Act'). The learned counsel for the assessee submitted that assessee had filed returns for the impugned assessment years on 10-07-2007 and 15-07-2008 respectively. According to the learned AR, in the computation filed alongwith such returns a net capital receipt of Rs.97,80,000/- and Rs.3,85,67,825/- were specifically mentioned as exempt from income-tax.

3. As per the learned AR returns were initially processed u/s 143(1) of the Act. Thereafter, on 24-12-2009 notice u/s 148 of the Act were issued re-opening the assessment for the impugned assessment years. Further, as per the learned AR, an authorized representative of the assessee had appeared before the AO on 05-10-2010, and stated that the returns filed originally could be treated as returns filed pursuant to the

notices u/s 148 of the Act. Submission of the learned AR was that notices u/s 143(2) which was mandatory even in a re-opened assessment, were never issued. Learned AR submitted that even if such notices were issued these were prior to the appearance of the representative of the assessee on 05-10-10, and had no validity. Only on that date, assessee had requested the AO to treat the returns originally filed as pursuant to the notices issued u/s 148 of the Act. Relying on the decision of the Hon'ble Apex Court in the case of ACIT Vs Hotel Blue Moon 321 ITR 362(SC) the learned AR submitted that issue of a valid notice u/s 143(2) was mandatory even in a 148 proceedings. There being a failure to issue valid notice u/s 143(2) of the Act, as per the learned AR, proceedings culminating in the assessments dated 03-12-2010 were null and void. Further, as per the learned AR, though a notice under section 142(1) was issued by the AO on 05-10-2010, there was no notice issued u/s 143(2) of the Act for either of the years. Relying on the note sheet, forming part of the assessment record, copy of which has been filed by the learned DR, it was submitted by the learned AR that obviously, the notices claimed to have been issued by the revenue u/s 143(2) of the Act, were prior to 05-10-2010.

4. In reply, learned DR submitted that assessee pursuant to the section 148 notice dated 24-12-2009, dispatched on 30-12-2009 had not filed a return within the 30 days time period, prescribed in the said notice. Assessee having failed to do so, as per the learned DR, AO was well within his rights to treat the returns originally filed by the assessee to be the

returns filed in pursuance of notices u/s 148 of the Act. There was no need for any directions in this regard from the assessee. As per the learned DR, it was clear from the assessment records that the AO had dispatched on 23-09-2010 a notice u/s 143(2) dated 17-09-2010, by registered post. As per the learned DR the AO having treated the original returns filed by the assessee, as filed in pursuance to the notice issued u/s 148 of the Act, had rightly issued to notices u/s 143(2) of the Act. Therefore, as per the learned DR, assessee could not claim that no notice was ever issued u/s 143(2) at all. Relying on proviso to section 147 of the Act, learned DR submitted that income escaping assessment could be considered for assessment even in a case where there was failure on the part of the assessee to respond to a notice issued u/s 148 of the Act. Learned DR placed reliance on the judgment of the Hon'ble Madras High Court in the case of Areva T and D India Ltd.,Vs ACIT 294 ITR 233 and submitted that the requirement u/s 143(2) was only procedural in nature.

5. Adlibitum reply of the learned AR was that AO could not treat a return filed prior to issue of notice u/s 148 of the Act as a return filed by the assessee, pursuant to such notice unless and until assessee had given a direction or request on these lines. As per the learned AR, operation of Section 143(2) of the Act was with reference to a return filed by the assessee. The assessment for both the years, as per the learned AR was completed u/s 143(3) r.w.s.147 of the Act and not u/s 144 of the Act. Unless and until the assessee had either filed a return pursuant to the

notice u/s 148 of the Act or made a request for treating the earlier return filed by it to be one filed pursuant to notice u/s 148 of the Act. AO could not proceed with an assessment u/s 143(3) of the Act. As per learned AR there could be no presumption that a return filed prior to a notice issued u/s 148 of the Act is one under or in pursuance to such notice. Assessee had given the request to treat earlier returns filed by it as return filed pursuant to the notices u/s 148 of the Act, only on 05-10-2010 and subsequent to that date there was no issue of any notices u/s 143(2) of the Act. Further, according to him, requirements set out in Section 143(2) was not a procedural one, as held by the Hon'ble Delhi High Court in the case of M/s Alpine Electronics Asia PTE Ltd., Vs Director General of Income-tax & Others 341 ITR 247. Reliance was also placed on the decision of a Coordinate Bench of this Tribunal in the case of M/s Amit Software Technologies Pvt. Ltd., Vs ITO in ITA No.540(B)/2012 dated 07-02-2014. According to learned AR even section 292BB would not aid the revenue, in a case where there was no issue of notice u/s 143(2) of the Act, in accordance with the procedure laid down under the Act.

6. We have perused the orders and heard the rival contentions. There is no dispute that return originally filed by the assessee for both the years were only subject to a proceedings u/s 143(1) of the Act. The AO himself has stated in the assessment order that returns for both the years were processed u/s 143(1) of the Act, accepting the returned income. There is also no dispute that notices u/s 148 of the Act for both the years,

dated 24-12-2009, were dispatched to the assessee on 30-12-2009. From the verification of the assessment records, it is clear from that the AO had issued notices u/s 143(2) of the Act, and dispatched them to the assessee on 23-09-2010 by registered post with acknowledgement due. The notices dated 17-10-2009 and dispatched on 23-09-2010, have to be considered as served on the assessee, since these were sent by registered post.

7. This brings us to the crux of the issue i.e. whether notices under section 143(2) is mandatory in a reopened procedure and whether notices issued prior to the reopening would satisfy the requirement specified u/s 143(2) of the Act. That issue of a notice u/s 143(2) of the Act, is mandatory even in a re-assessment proceeding initiated u/s 148 of the Act has been clearly laid down by the Hon'ble Delhi High Court in the case of M/s Alpine Electronics Asia PTE Ltd., (supra). Hon'ble Delhi High Court had reached this conclusion after considering the decision of the Hon'ble Apex Court in the case of Hotel Blue Moon (supra). At para-24 of the judgment their Lordship has held that Section 143(2) was applicable to a proceedings u/s 147/148 also, since proviso to section 148 of the Act, granted certain specific liberties to the revenue, with regard to extension of time for serving such notices. No doubt, Hon'ble Madras High Court in the case of Areva T and D India Ltd.,(supra) had held that issue of notice u/s 143(2) was procedural in nature. However, Co-ordinate Bench in the case of M/s Amit Software Technologies Pvt. Ltd.,(supra) after considering

the decision of the Hon'ble Madras High Court as well as Delhi High Court had held that Section 143(2) of the Act, was a mandatory requirement and not a procedural one. Of course, in the case before us, a notice u/s 143(2) of the Act has been issued to the assessee, but on the date when such notice was issued viz., 23-09-2010 assessee had not filed any return pursuant to the reopening notice under section 148 of the Act. First instance when the assessee requested the AO to treat the returns originally filed by it as returns filed pursuant to the notices u/s 148 of the Act, was on 05-10-2010 which is clear from the narration in the order sheet which is reproduced here under;

“ Sri M.Srinivas Rao Mannan, CA appeared in response to notices issued u/s 143(2) & 142(1) and requested that the return of income filed originally shall be treated as return of income filed in response to notice u/s 148. He has been asked to explain as to why a sum of Rs.1,00,00,000/- (Rs. One Crore) received from Wifi Networks Pvt.Ltd., should not be treated as revenue receipt and taxed accordingly. The case is posted for final hearing on 20-10-2010 at 3.30 pm. No further adjournment will be granted. If no compliance is forthcoming on that day, assessment will be completed bringing to tax Rs.1.00 (Rs. One Crore) as revenue receipt as per the provisions of sec.28(va) of the Act.”

8. A look at Section 143(2) is called for at this juncture. It is reproduced hereunder;

“143(2) Where a return has been furnished under section 139, or in response to a notice under sub-section(1) of section 142, the AO shall-

i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim;

(Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003)

ii) notwithstanding anything contained in clause(1), if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under paid he tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his officer or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return.

(Provided that no notice under clause (ii) 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).

Once the original return filed by the assessee was subject to processing u/s 143(1) of the Act, the procedure of assessment pursuant to such a return, in our opinion came to an end, since AO did not issue any notice within the 6 months period mentioned in proviso to section 143(2)(ii). No doubt, if the

income has been understated or the income has escaped assessment, an AO is having the power to issue notice u/s 148 of the IT Act. Notice u/s 148 of the Act, issued to the assessee required it to file a return within 30 days from the date of service of such notice. There is no provision in the Act, which would allow an AO to treat the return which was already subject to a processing u/s 143(1) of the IT Act, as a return filed pursuant to a notice subsequently issued u/s 148 of the Act. However, once an assessee itself declare before the AO that his earlier return could be treated as filed pursuant to notice u/s 148 of the IT Act, three results can follow. Assessing Officer can either say no, this will not be accepted, you have to file a fresh return or he can say that 30 days time period being over I will not take cognizance of your request or he has to accept the request of the assessee and treat the earlier returns as one filed pursuant to the notice u/s 148 of the IT Act. In the former two scenarios, AO has to follow the procedure set out for a best of judgment assessment and cannot make an assessment under section 143(3). On the other hand, if the AO chose to accept assessee's request, he can indeed make an assessment under section 143(3). In the case before us, assessments were completed under section 143(3) read with section 147. Or in other words AO accepted the request of the assessee. This in turn makes it obligatory to issue notice u/s 143(2) after the request by the assessee to treat his earlier return as filed in pursuance to notices u/s 148 of the IT Act was received. This request, in the given case, has been made only on 05-10-2010. Any issue

of notice prior to that date cannot be treated as a notice on a return filed by the assessee pursuant to a notice u/s 148 of the Act. Or in other words, there was no valid issue of notice u/s 143(2) of the IT Act, and the assessments were done without following the mandatory requirement u/s 143(2) of the IT Act. This in our opinion, render the subsequent proceedings all invalid. Learned CIT(A) had only adjudicated on a position where there was no service of notices u/s 143(2) of the IT Act. He had not dealt with the scenario, where notice was issued prior to the filing of return by the assessee. We therefore, quash the assessment done for the impugned assessment years. Since the appeals of the assessee are allowed on its ground 3, other grounds are not adjudicated.

9. In the result, appeals of the assessee are allowed.

Order pronounced in the open Court on the 10th October, 2014.

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Bangalore:

D a t e d : 10-10-2014

am*

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A), Bangalore
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

Sd/-
(ABRAHAM P GEORGE)
ACCOUNTANT MEMBER

By order

AR, ITAT, Bangalore