

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G", NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI J.S. REDDY, ACCOUNTANT MEMBER

	I.T.A.No.1068/Del/2013	
	A.Y. : 2008-09	
Shri Jai Shiv Shankar Traders Pvt. Ltd., 602, Madhuban Building, 55, Nehru Place, New Delhi – 110 019 (PAN: AAKCS3632D)	VS.	ITO, Ward 8(3), New Delhi
(APPELLANT)		(RESPONDENT)

Assessee by : Dr. Rakesh Gupta & Sh.
Ashwani Taneja, Advocates
Department by : Sh. B.R.R. Kumar, Sr. DR

Date of Hearing : 12-02-2015

Date of Order : 18-02-2015

ORDER

PER H.S. SIDHU : JM

The Assessee has filed the present appeal against the impugned order dated 31/10/2012 passed by the Ld. Commissioner of Income Tax (Appeals)-XI, New Delhi on the following grounds:-

1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad both in the eye of law and on facts.
2. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the assessment under Section 147 read with Section 148 of the Act as the same has been passed without proper service of statutory notice under Section 148 of the Act.

3. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the reopening of the assessment and consequently making reassessment without complying with the statutory conditions prescribed under Section 147 read with Section 148 of the Act.
4. On the facts and circumstances of the case, the CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the reassessment proceedings are bad in law and on facts as the reasons recorded for reopening the assessment do not meet the requirements of Section 147 of the Act.
5. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the order passed by the AO despite the fact that the same has been passed without issue of statutory notice under section 143(2) of the Act.
6. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming addition of Rs.1,00,00,000/- on account of unexplained cash credit.
7. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition which was made by the AO despite the assessee bringing all material and evidences on record.
8. That the addition made by the CIT(A) is bad in law as the appellant has submitted all evidences in support of its contention which also stood confirmed in the cross verification carried on by the Assessing Officer.
9. That the addition has been made without there being any adverse material and any contradiction or error in the evidences submitted by the assessee.
10. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the reassessment order is bad both on facts and in law as the same has been made on the basis of material collected at the back of the assessee without giving

assessee an opportunity to rebut the same in violation of statutory provision of section 142(3) of the Act.

11. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition of Rs.1 ,00,00,000/- on the basis of statement of a person without giving assessee an opportunity to cross-examine the same in gross violation of principles of natural justice.
12. That the applicant craves leave to add, amend or alter any of the Grounds of appeal.

2. The facts in brief are that the return of income in this case was filed on 16.9.2008 declaring income of Rs. 14,151/-. AO initiated the assessment proceedings u/s. 147 of the I.T. Act, 1961, by issue of notice u/s. 148 on 30.3.2010 and the assessee was asked to file the return of income within 30 days. The notice was received back unserved. Further notices u/s. 142(1) dated 21.10.2010 fixing the case for 29.10.2010 on which issue and again notice u/s. 142(1) dated 10.12.2010 fixing the case for 16.12.2010 was issued by the AO. In response to the same Authorised Representative of the assessee appeared and stated that return filed on 16.9.2008 may be treated as filed, subsequent to the notice u/s. 148 of the Act, Assessee has also filed various documentary like PAN, Share Application Money, Affidavit, Bank Account copy of M/s Bhavani Portfolio (P) Ltd., the share applicant company, before the AO. After considering the reply filed by the assessee and the documentary evidence supporting the claim of the assessee, the AO completed the assessment and made the addition of Rs. 1 Crore to the income return filed by the assessee as unexplained credit u/s. 68 of the I.T. Act and AO completed the assessment on 31.12.2010 u/s. 143(3)/147 of the I.T. Act, 1961.

3. Aggrieved with the aforesaid order dated 31.12.2010, assessee filed the Appeal before the Ld. CIT(A), who impugned order dated 31.10.2012 dismissed the Appeal of the Assessee.

4. Against the aforesaid order dated 31.12.2010 passed by the Ld. CIT(A), assessee is in appeal before the Tribunal.

5. At the time of hearing Ld. Counsel of the assessee argued only on the issue involved in ground no. 5 relating to non-service of notice u/s. 143(2) of the I.T. Act. Ld. Counsel of the assessee stated that the assessment order has been passed without issuing the notice u/s. 143(2) of the I.T. Act. He stated that this Bench can peruse the assessment order and the record which clearly shows that the AO has not even issued the notice u/s. 143(2) of the I.T. Act before completion of the assessment in dispute. He submitted that the assessee has filed his written submissions on this issue before the Ld. First Appellate Authority but has also rejected the request of the assessee in routine manner by stating that non-issue of notice u/s. 143(2) does not render the reassessment. Finding of the Ld. CIT(A) is contrary to the law and the facts and circumstances of the present case as well as the decision of the Hon'ble Supreme Court of India in the case of ACIT & Anr. Vs. Hotel Blue Moon [2010] 321 ITR 362 (SC) wherein the Hon'ble Supreme Court has held that the issue of notice u/s. 143(2) of the I.T. Act is mandatory and not procedural. If the notice is not served within the prescribed period, the assessment order is invalid. He further submitted that the Ld. CIT(A) has ignored the order of the Hon'ble Supreme Court of India (Supra) and passed the impugned order which is contrary to law and facts on file and deserve to be cancelled.

5.1 Ld. Counsel of the assessee further stated that there are plethora of judgments passed by the Hon'ble Supreme Court of

India; Hon'ble Jurisdictional High Courts and the various Hon'ble High Courts wherein the Hon'ble Courts held that non-service of the notice u/s. 143(2) of the I.T. Act, the reassessment made in such cases is invalid. He requested that on this ground the assessment in dispute as well as the impugned order passed by the Ld. CIT(A) may be declared invalid, void abnatio. In support of his contention Ld counsel of the assessee cited following relevant judgments:-

- ACIT & anr. Vs. Hotel Blue Moon (2010) 321 ITR 362 (SC)
- DIT vs. Society for Worldwide InterBank Financial Telecommunications in ITA No. 441 of 2010 (Delhi High Court) (2010) 323 ITR 249
- CIT vs. Pawan Gupta & Ors. [2009] 318 ITR 322 (Delhi High Court).
- M/s Sapthagiri Finance and Investments vs. ITO : TC(A) No. 159 of 2006 dated 17.7.2012 (Madras High Court) [2013] 90 DTR 289.
- Alpine Electronics Asia Pte Ltd. vs. DGIT & Ors. [2012] 341 ITR 247 (Del.)
- Raj Kumar Chawla and Ors. vs. ITO (2005) 94 ITD 1 (Del), ITAT, Special Bench, New Delhi
- DCIT vs. Indian Syntans Investments (P) Ltd. [2007] 107 ITD 457.
- CIT vs. M/s Panorama Builders Pvt. Ltd. in Tax Appeal NO. 435 of 2011 of Hon'ble Gujarat High Court.

- CIT vs. Rajeev Sharma 336 ITR 678 of High Court of Allahabad.

6. Ld. DR relied upon the order passed by the Ld. CIT(A) and stated that the Ld. First Appellate Authority has passed a well reasoned order on the basis of the records and as per the provisions of law, therefore, the impugned order may be upheld by dismissing the Appeal filed by the Assessee.

7. We have heard both the parties and perused the relevant records especially the order passed by the Revenue Authorities alongwith the documentary evidence filed by the assessee in the shape of Paper Book containing pages 1 to 179 attaching therewith the various documentary evidence supporting the claim of the assessee as well as the various decision rendered by the Hon'ble Supreme Court and Hon'ble High Court on the legal issue in dispute. No doubt assessee has raised 12 grounds of appeal in which the assessee challenged the non-service of the notice u/s. 148 dated 30.3.2010 which was received back unserved. In support of his contention he has also cited various decisions. Assessee has also challenged the addition in dispute on merit also by producing various documentary evidence supporting its claim before the Revenue Authority as well as before us in the shape of Paper Book, but he argued only on the issue involved in ground no. 5. Keeping in view of the facts and circumstances of the present case and the arguments raised by the Ld. AR, we are of the view that the issue raised in ground No. 5 regarding the non-issuance of notice u/s. 143(2) of the I.T. Act which goes to the root of the matter, can be taken up first and decide according to the facts and circumstances of the case laws cited by the Ld. Counsel of the assessee.

7.1 We have also perused the assessment order dated 31.12.2010 passed by the Assessing Officer u/s. 143(3)/147 of the I.T. Act. For the sake of convenience, we are reproducing the aforesaid assessment order as under:-

“Return of income in this case was filed on 16.9.2008 declaring income of Rs. 1415/-. Assessment proceedings were initiated u/s. 147 of the I.T. Act, by issue of notice u/s. 148 on 30.3.2010.

The assessee was asked to file return of income within 30 days in response to notice u/s. 148 of the I.T. Act, 1961 issued on 30.3.2010. The notice was received back unserved. Further notice u/s. 142(1) dated 21.10.2010 fixing the case for 29.10.2010 was issued and again notice u/s. 142(1) dated 10.12.2010 fixing the case for 16.12.2010 was issued.

On 16.12.2010 the compliance was made through Sh. PK Mangal, AR of the assessee and he stated that return filed on 16.9.2008 may be treated as filed in response to notice u/s. 148 of the I.T. Act. Subsequently details as PAN, Share Application Form, Affidavit, Bank A/c copy of M/s Bhavani Portfolio (P) Ltd., the Share Applicant Company, were filed.

As per the information available, the assessee has received credits of Rs. 60 lakhs each from M/s Bhavani Portfolio (P) Ltd. and M/s Rishab Shoes (P) Ltd. The assessee was specifically required to give details of transaction made during the year with these companies vide notice u/s. 142(1) dated 21.10.2010. Further the assessee was asked to produce the Principal Officers of

the companies from whom share application money was received during the year.

Further, the share applicant companies were vide notice u/s. 133(6) dated 30.11.2010 required to give details of transaction made with the assessee, sources of transaction, copy of account of assessee company in their Books and copy of returns of share applicants with complete enclosures. Reply from M/s Bhavani Portfolio P Ltd. dated 27.12.2010 has been received and placed on record.

With regard to share application money of Rs. 60 lakhs from M/s Rishab Soes P Ltd., the assessee company has filed an affidavit dated 16.12.2010 from its Director Shri Tarun Aggarwal, stating that the company has not entered into any transaction with M/s Rishab Shoes (P) Ltd.. The said fact was also confirmed by the Director of the said company vide his letter dated 8.12.2010.

In this case an information was received from the DIT(Inv.), New Delhi that Sh. Tarun Goyal has created a number of private limited companies and firms for providing accommodation entries. The Directors of these companies were his employees who worked in his office as peons, receptionists etc. All the documents were got signed from these employees. "A number of Bank accounts in various banks were opened in the names of these companies and his employees, in which huge cash deposits were made. Later cheques were issued to various beneficiaries, disguising the whole

transaction as genuine. All the companies floated by Sh. Tarun Goyal are not carrying out any genuine activity and are merely being used to provide accommodation entries. Hence, all the companies of Sh. Tarun Goyal are 'bogus'. All the companies are operating from the office of Sh. Tarun Goyal from 13/34, WEA, Arya Samaj Road, Karol Bagh, New Delhi and at his former office viz. 203, Dhaka Chambers, 2069/39, Naiwala Karol Bagh, New Delhi.

At the time of search on 15.9.2008 in the premises of Sh. Tarun Goyal, the statement on oath of the employees present at the premises of Sh. Tarun Goyal were recorded. These include Sh. Pramod Kumar, his peon, Sh. Harpreet Singh, Accountant. In their statements they stated that they were mere employees of Sh. Tarun Goyal and they were signing various documents related to many companies at his behest, as and when asked by Sh. Tarun Goyal.

The assessee informed that it had received share application money of Rs. 1 crores during the year from M/s Bhavani Portfolio P Ltd. the said fact was also confirmed by M/s Bhavani Portfolio P Ltd. vide its letter dated 27.12.2010 wherein a confirmation alongwith copy of ITR and Bank statement were filed by it. However, the assessee has not discharged its onus cast on it u/s. 68 of the I.T. Act, 1961 by producing the Principal Officers of the company as was required u/s. 142(1) of the I.t. Act by this office on 10.12.2010.

The assessee company is private limited company. In the case of such companies, there is close and proximate relationship between the promoters / directors and such companies are not allowed to accept subscriptions or deposits from the general public. As such, there should have been no difficulty on the part of the assessee to produce somebody from the said entity.

In the light to above discussions it is quite evidenced that the assessee has received amount of share capital / share premium of Rs. 1,00,00,000/- from M/s Bhavani Portfolio P Ltd. through bogus transaction, where in fact no real transactions took place. The creditworthiness and genuineness of share applicants is not proved as the assessee failed to discharge its onus or providing the genuineness and creditworthiness of the person who claimed to be the share holder of the assessee company.

In view of the failure on the part of assessee to produce the Principal Officer of M/s Bhavani Portfolio P Ltd. the share applicant companies, the share transaction cannot be treated as genuine.

Therefore, an addition of Rs. 1 crores is made u/s. 68 of the I.T. Act, 1961 as unexplained credits in the books of the assessee.

Since the assessee has introduced an amount of Rs. 1 crore as cash credit in its books and could not explain the above transaction, penalty proceedings u/s. 271(1)(c) of the I.T. Act, 1961 are being initiated for filing inaccurate particulars of income.

With these remarks, the income of the assessee is computed as under:-

Income of assessee *14,151/-*

Add: unexplained credit as discussed *1,00,00,000/-*

Above

Total income *1,00,14,151/-*

Assessed at Rs. 1,00,14,151/-. Issue necessary forms. Charge interest as per law. Initiate penalty proceedings u/s. 271(1)(c) of the I.T. Act, 1961 separately."

7.2 Keeping in view of the aforesaid assessment order, we are of the view that the AO has not issued notice u/s. 143(2) of the I.T. Act which is mandatory. We are also of the view that in completing the assessment u/s. 148 of the Act, compliance of the procedure laid down u/s. 142 and 143(2) is mandatory. As per record, we find that there was no notice issued u/s. 143(2) of the I.T. Act which is very much essential for reassessment and it is a failure on the part of the AO for not complying with the procedure laid down in section 143(2) of the I.T. Act. If the notice is not issued to the assessee before completion of the assessment, then the reassessment is not sustainable in the eyes of law and deserve to be cancelled. In view of above facts circumstances of the present case, the issue in dispute raised in ground no. 5 relating to non service of the mandatory notice u/s. 143(2) of the Act is decided in favor of the assessee by declaring the assessment order dated 31.12.2010

passed u/s. 143(3) / 147 of the I.T. Act as invalid. Our view is supported by the various judgments of the Hon'ble Supreme Court, Hon'ble Jurisdictional High Court, other High Courts and Special Benches decision of the ITAT. The relevant portion of the various judgments of the Hon'ble Courts are reproduced as under:-

ACIT & Anr. vs. Hotel Blue Moon: [(2010) 321 ITR 362 (SC)]

HELD: "It is mandatory for the AO to issue notice u/s 143 (2). The issuance and service of notice u/s 143 (2) is mandatory and not procedural. If the notice is not served within the prescribed period, the assessment order is invalid Reassessment-----Notice-----Assessee intimating original return be treated as fresh return---Reassessment proceedings completed despite assessee filing affidavit denying serviced of notice under section 143(2)---- Assessing Officer not representing before Commissioner (Appeals) that notice had been issued---- Reassessment order invalid due to want of notice under section 143(2)--- Income-tax Act, 1961, ss. 143, 147, 148(1), prov.----ITO v. R.K. GUPTA [308 ITR 49 (Delhi)Tribu.,"

DIT vs. SOCIETY FOR WORLDWIDE INTERBANK FINANCIAL TELECOMMUNICATIONS in ITA 441 OF 2010 (Delhi High Court) [(2010) 323 ITR 249]

"The notice u/s 143(2) was issued on 23-03-2000 while the return was filed on 27-03-2000. Even if it was issued on 27-03-2000 without examining the return, it was invalid. The notice was invalid and so was the assessment."

DCIT vs. Indian Syntans Investments (P) Ltd. [(2007) 107 ITD 457 (Chennai)]

Validity of reassessment order - Non-service of notice under s.143(2) - "The amended Proviso to s.148 of the Income Tax Act 1961 was not applicable in case where the assessee was not served a notice under s.143(2) of

the Act. The reassessment made in such a case was invalid S.143(2) and s.148 of the Income Tax Act 1961."

CIT vs. M/s Panorama Builders Pvt. Ltd. in Tax Appeal no. 435 of 2011 of Hon'ble Gujarat High Court

Issue Involved: "Whether non-issuance of the notice u/s 143(2) within the prescribed time, made the whole block assessment order null and void and bad in law, despite the assessee not having raised any objection before the passing of the assessment order and despite the provisions of section 292BB of the Act? "

Held: "In this case, Hon'ble High Court has held that section 292BB cures the defects in service of notice but section 292BB is 'confined to only service of notice under this Act and this section does not apply to 'Issuance of notice' under the provisions of Act. It does not lay down that if a mandatory notice is required to be issued by the assessing officer and it has not been issued within the period of limitation fixed under the law, then such notice shall be deemed to have been issued within time.

It has been further held that resort cannot be taken by the Revenue to section 292BH to give a go-bye to mandatory requirement of issuance of notice within the statutory fixed by the proviso to section 143(2) of the Act."

CIT vs Rajeev Sharma 336 ITR 678, High court of Allahabad.

"In view of above submissions and case laws, it has been established that no notice u/s 143(2) was issued in the present case and therefore the impugned assessment is liable to be annulled."

M/s Sapthagiri Finance and Investments vs. ITO: TC(A). No. 159 of 2006 dated 17.07.2012 (Mad HC) [(2013) 90 DTR (Mad) 289]

Relevant para reproduced here under:

"13. As far as the present case is concerned, the provisions of Section 148 also uses the expression "so far as may be apply accordingly as if such return were a return required to be furnished under Section 139". Thus, understanding this provisions in the background of the decision of the Apex Court, on the facts available, we are of the view that in completing the assessment under Section 148 of the Act, compliance of the procedure laid down under Sections 142 and 143 (2) is mandatory. On the admitted fact that beyond notice under Section 142(1), there was no notice issued under Section 143(2), and in the light of the fact that the very basis of the reassessment was the failure on the part of the assessee in not disclosing the capital gains arising on the transfer of property for assessment and that admittedly the assessee had requested the officer to accept the original return as a return filed in response to Section 148 of the Act, we hold that there was total failure on the part of the Revenue from complying with the procedure laid down under Section 143(2) of the Act, which is mandatory one as held by the Apex Court."

Alpine Electronics Asia Pte Ltd. vs. DGIT & Ors: [(2012) 341 ITR 247 (Del)]

Held: "The service of notice u/s 143(2) within the statutory time limit is mandatory and is not an inconsequential procedural requirement. Omission to issue notice u/s 143 (2) is not curable and the requirement cannot be dispensed with. S. 143(2) is applicable to proceedings u/s 147 & 148."

JYOTI PAT RAM VS. ITO [(2005) 92 ITD 423 (Lucknow) - Shreejai Shiv Shonhor Traders (P) Ltd. - A.Y. - 2008-09

"Reassessment order passed under section 143(3)/148 without issue of a valid notice under section 143(2) was illegal."

CIT vs. Pawan Gupta & Ors. [(2009) 318 ITR 322 (Del)

Hon'ble Delhi High Court held in Para 38 of the order observed as under:-

"Thus, we are of the clear view that where the assessing officer is not inclined to accept the return of undisclosed assessment filed by the assessee issuance of a notice under section 143(2) is a prerequisite for framing the block assessment order under chapter XIV B of the Income Tax Act, 1961. We are also of the view that if an assessment order is passed in such a situation without complying with section 143(2), it would be invalid and not be merely irregular."

RAJ KUMAR CHA WLA AND ORS. VS. ITO - (2005) 94 ITD 1 (Del)(SB)

Limitation for re-assessment- Service of notice u/s143(2) in time - A.Y.1995-96. "It was presumed by legal fiction that a return filed u/s 148 of the Income Tax Act 1961 would be treated as a return filed u/s 139 of the Act. The assessee had filed its return in response to a notice issued u/s 148 of the Income Tax Act 1961. The service of notice u/s143(2) of the Act within 12 months of filing the return u/s 148 of the Act was mandatory, but the notice had been served beyond 12 months.

Therefore, as the re-assessment was barred by limitation, no re-assessment could be made u/s 143(3) r/w S.147 of the Act.- ITAT Delhi 'F' Special Bench."

8. In the background of the aforesaid discussions and precedents relied upon, we are of the considered view that the AO has not issued any notice u/s 143(2) of the I.T. Act to the assessee. During

the entire assessment proceedings, the assessment order in dispute is invalid, void ab initio and against the provisions of the law and the impugned order is not sustainable in the eyes of law and hence, we cancel the same by accepting the appeal filed by the Assessee.

9. In the result, the appeal of the Assessee is allowed.

Order pronounced in the Open Court on 18/02/2015.

Sd/-
[J.S. REDDY]
ACCOUNTANT MEMBER

Sd/-
[H.S. SIDHU]
JUDICIAL MEMBER

Date 18/02/2015
"SRBHATNAGAR"

Copy forwarded to: -

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

TRUE COPY

By Order,

Assistant Registrar, ITAT, Delhi Benches