

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM

आयकरअपीलसं/I.T.A. No.5067/Mum/2019
(निर्धारणवर्ष / Assessment Year: 2010-11)

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आयकरअपीलसं/I.T.A. No.5066/Mum/2019
(निर्धारणवर्ष / Assessment Year: 2011-12)

Rameshkumar Tagraji Jain 96/100, Maruti Mandir Marg, 5 th , Kumbharwad Lane, Mumbai 400 004	बनाम/ Vs.	ITO-19(3)(1) 2 nd Floor, Matru Mandir, Tardeo, Mumbai-400007.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGPJ9261Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	None
Revenue by:	Shri Bharat Andhale

सुनवाईकी तारीख / Date of Hearing: 14/03/2023
घोषणा की तारीख /Date of Pronouncement: 10/04/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

These are appeals preferred by assessee against the order of Ld. Commissioner of Income Tax (Appeals)-7, Mumbai [hereinafter "the Ld. CIT(A)"] dated 19.06.2019 for AY 2010-11 and 2011-12.

2. Though *none* appeared for the assessee, written submission dated 13.03.2023 has been placed before me and from perusal of the same it is noted that the assessee is mainly aggrieved by the orders of the Ld. CIT(A) who has not decided the legal issue raised by the assessee before him. [i.e. assessment framed without issuance of notice u/s 143(2) of

the Income Tax Act, 1961(hereinafter "the Act") is bad in law]. From the written submission it is discerned that the assessee had filed his return of income for both years u/s 139(1) of the Act; and later on the case of the assessee was reopened for both AY's by issuance of the notice u/s 148 of the Act. Pursuant to receipt of notice u/s 148 of the Act, the assessee had requested the AO to treat the original return filed as return filed in response to the notice u/s 148 of the Act (which fact has been acknowledged by the AO in both assessment orders).The legal issue raised by the assessee is that after reopening the assessment u/s 147 of Act, the AO ought to have issued the mandatory notice u/s 143(2) of the Act before framing the assessment u/s 143(3)/147 of the Act. According to assessee, the AO failed to issue notice u/s 143(2) of the Act for both the assessment years (AY 2010-11 and 2011-12) which legal issue had been raised before the Ld. CIT(A) which fact is discernible from page no 4 of the impugned orders, wherein the Ld. CIT(A) has reproduced the same (ground no. 1) which reads as under.

"Ground No 1: Validity of the reassessment and order passed:

1. That the learned AO has erred in law and facts by issuing notice under section 147 and further the ld.AO has erred in law in not following the procedure of the reassessment thereof and therefore the order passed by the ld.AO is required to be quashed. In this regard it is most respectfully submitted as under:-

a) That the learned AO has not given the reasons for the reassessment along with the notice issued under section 148 of the Act.

b) That the learned AO has not provided the copy of the approval granted under section 151 of the Act.

c). That from the perusal of the assessment order it is evident that no notice under section 143(2) of the Act has been issued though the return of income has been filed and the order under section 143(3) of the Act has been passed".[Emphasis given by me]

3. Further it is noted that Ld. CIT(A) in the impugned order have even reproduced the case law which assessee was relying upon in respect to this grounds of appeal [Ground No.1 (c) against the effect of non-issuance of notice u/s 143(2) of the Act, which vitiates the order framed u/s 143(3) r.w.s 147 of the Act as bad in law by citing the decision of the Hon'ble Bombay High Court in ACIT Vs Geno pharmaceuticals Limited (2013) 32 taxmann.com 162 (Bombay)] at page no 5 which reads as under;

"3. Non-issue of notice under section 143(2) of the act does not give jurisdiction for the assessment. It is hereby stated that when no notice under section 143(2) of the Act, which is a jurisdictional notice, is issued to the assessee in response to return filed under section 148 of the Act, the assessment framed is invalid and bad in law. In this regard reliance is placed on the judgment of Jurisdictional Hon'ble Bombay High Court in case of ACIT vs. Geno Pharmaceuticals Ltd. (2013) 32 taxmann.com 162 (Bombay) wherein the High Court has held that notice u/s. 143(2) is mandatory and in absence of such service AO cannot proceed to make an inquiry on return filed in compliance with notice issued u/s. 148."

4. In the written submission, the assessee has also cited few more case laws on this legal issue which are as under:-

(a) ACIT Vs Geno Pharmaceuticals Limited (214 Taxman 83)(2013) (Bom)

(b) A M Muthiah Vs DCIT (ITA No.1101/Mum/2014) dated 11/12/2017.

(c) Sajjan Kumar Aggarwal Vs ITO (ITA No.307/Mum/2019) dated 31/1/2020

(d) Visa Chemical Industries Vs ACIT (ITA No.3902/Mum/2018) dated 16/7/2019.

5. Therefore, according to the assessee, the re-assessment order framed by the AO after reopening the assessment was bad in law for the omission on the part of AO not to have issued the mandatory notice u/s 143(2) of the Act. Per contra Ld. DR fairly conceded that Ld. CIT(A) even though has reproduced the written of submission wherein the assessee had specifically assailed the action of the AO (Non-issuance of notice u/s 143(2) of the Act), however, he didn't deliberate on this legal issue. Therefore, he requested that the matter/issue may restored back to the file of the Ld. CIT(A) for examination of the question of fact as to whether the AO had issued notice u/s 143(2) of the Act before framing of the re-assessment order in both assessment years [AY 2010-11 & AY 2011-12].

6. Having heard the Ld. DR and after perusal of the written submission placed before me, it is noted that the assessee during the first appellet proceeding before Ld. CIT(A) had filed the written submission mainly assailing the validity of the action of the AO to have framed the reassessment order without issuance of mandatory notice u/s 143(2) of the Act and cited the case laws in support of the legal issue discussed (supra). Thus it is noted that the assessee has raised this legal issue before the Ld. CIT(A) and challenged the validity of reassessment orders framed u/s 143(3)/147 of the Act without issuance of mandatory notice u/s 143(2) of the Act. On careful reading of assessment order it is noted that AO has not made any mention of issuance/serving of notice u/s 143(2) of the Act on the assessee before framing of re-assessment order. Having said so, however, as noted (supra), Ld. CIT(A) has not adjudicated this specific legal issue. Therefore, I am inclined to set-aside the impugned order of Ld CIT(A) and restore the appeal back to his file. With a direction to first of all examine the re-assessment records and record a finding of fact as to whether the AO during the re-assessment proceedings had issued/served the notice u/s

issued/served the notice u/s 143(2) of the Act on assessee before he framed the re-assessment order u/s 143(3)/147 of the Act and thereafter, adjudicate the legal issue raised by the assessee in the light of the case laws cited by assessee (supra). Needless to say that assessee should be given proper opportunity of hearing before passing the order on the legal issue and in accordance to law.

7. In the result appeals filed by the assessee are allowed for the Statistical Purpose.

Order pronounced in the open court on this 10/04/2023.

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 10/04/2023.

Vijay Pal Singh, (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि ,आयकर अपीलीय अधिकरण ,मुंबई / DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण ,मुंबई / ITAT, Mumbai**