

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI
BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER
AND
SMT SUCHITRA KAMBLE, JUDICIAL MEMBER
I.T.A .No.-1545/DEL/2012 & ITA No. 4289/Del/2012
(ASSESSMENT YEAR-2007-08)

Pooran Singh C/o. K. L. Aneja, Advocate, Flat No. 92C/BW/SB, Shalimar Bagh New Delhi BANPS196B (APPELLANT)	Vs	ITO Ward-1, Shamli, Distt. Muzaffarnagar Uttar Pradesh (RESPONDENT)
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Appellant by	Dr. Rakesh Gupta & Sh. Somil Agrawal, Advs.
Respondent by	Sh. Raman Kant Garg, Sr. DR

Date of Hearing	03.03.2016
Date of Pronouncement	17.05.2016

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the assessee against the orders dated 13/12/2011 and 11.06.2012 passed by CIT(A), Muzaffarnagar.

2. ITA No. 1545/DEL/2012 is contested by assessee sought admission of additional ground of appeal, vide application dated 26/2/2015. The said additional ground was admitted on 29/10/2015. The additional ground is as follows:-

“1. That having regard to the fact and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not quashing the reassessment order framed by Ld. A.O on the ground that notice u/s 143(2) has not been issued during the course of assessment proceeding and thus assessment order is bad in law.”

ITA No. 4289/Del/2012 was filed by the assessee in respect of the penalty confirmed by the CIT(A) under Section 271(1)(c).

3. The assessee has made an application under Right to Information Act 2015 dated 24/11/2005. In respect of said application, the ITO gave the reply ITO/ Chief Public Information Officer(CPIO) gave the information vide letter dated 8/12/2005 in the said letter, it was stated that:-

(i) A notice u/s 143(2) of the Income Tax Act, 1961 with respect to your case for A.Y 2007-08 is not available with original case record.”

4. The assessee is an individual deriving income from agriculture and long term capital gain. Return declaring income at Rs.79,370/- along with agricultural income of Rs.3,50,000/- was filed on 30/9/2008. Subsequently the A.O initiated action u/s 147 by way of issue of notice u/s 148 of the Act.

5. The assessee after inspecting the records also raised objection against issue of notice u/s 148 of the Act. It was submitted by the assessee that he was 76 years of age and had been regularly filing return of income for last several years and was regularly showing agricultural income which was accepted by the department. The agricultural land was received through Will of his late father long time back. It was argued that the notice u/s 148 was issued by the then A.O without following the procedure laid down under the law and on principles of equity in as much as no attempt had ever been made to find out the truth in the alleged complaint wherein it was mentioned that the assessee did not own any residential house in Shamli and was earning huge money from agriculture, nor there was any document on record to suggest that there had been any attempt to find out the genuineness of the complaint. As per the assessee, the notice was issued u/s 148 due to mere change of opinion and just to get the case under scrutiny, despite normal time for scrutiny having lapsed. It was prayed that legality of the issuance of notice u/s 148 be decided so as to avoid continuity of litigation and valuable time of the departmental authorities as well as of the professionals. The A.O disposed off the objections vide letter dated 11/11/2010. According to the A.O notice u/s 148 was issued on the ground that the assessee had shown capital gain at Rs.56,34,965/- and the amount of Rs.17,85,000/- was claimed exempt u/s 54B of the Act on account of purchase of agricultural land. As per Section 54B the exemption was allowable from transfer

of a capital asset being land which in the two year immediately preceding the date on which the transfer took place was being used by the assessee or a parent of his for agricultural purposes. Since the land in question was sold in small plots to different persons and as such the land was not being used for agricultural purposes immediately preceding the date on which transfer took place and therefore exemption u/s 54B was not allowable to the assessee and to that extent of Rs.17, 85,000/-, there was escapement of income by omission on the part of the assessee to disclose all material facts necessary for assessment. Further, there was information with the department that the assessee had made wrong claim of exemption of Rs.14,19,000/- being cost of construction of new residential house on plot in Mohalla Panarisan, Shamli whereas the assessee was not having house there.

6. The A.O has made disallowance of Rs.14,19,000/-in respect of exemption u/s 54F and Rs.17,85,000/- in respect of exemption u/s 54B. The assessee went in appeal before the CIT (Appeals). The CIT (A) upheld the order. On the issue of non-issuance of notice under 148, the CIT (A) dismissed the appeal of the assessee.

7. The Ld. AR submitted that no assessment record was brought by the Ld. DR and there is no evidence that notices u/s 143(2) has been issued to the assessee. The Ld. AR also relied on the jurisdiction High Court judgment in case of Pr. CIT Vs. Shri Jai Shiv Shankar Traders Pvt. Ltd. (ITA No. 519/2015 dated

14.10.2015). In light of this, the assessment proceedings itself is bad in law and the assessment order may be set aside and quashed.

8. The Ld. DR relied on the order of the Assessing Officer and Ld. CIT (A)'s.

9. We heard both the parties and perused the records. We first take up the jurisdictional issue raised in the additional ground. It is well settled that notice should have been issued under Section 143(2) of the Act within the prescribed time for assuming jurisdiction to assess the income under Section 143(3) r.w.s. 148 of the Act. In this case no notice was admittedly issued under Section 143(2) of the Act. This is clear from the reply under RTI given by the Assessing Officer. The Ld. DR has also not produced any records to demonstrate that notice under Section 143(2) was issued in this case. The Hon'ble Delhi High Court in case of Pr. CIT Vs. Shri Jai Shiv Shankar Traders Pvt. Ltd. (ITA No. 519/2015 dated 14.10.2015) held as under:

12. The narration of facts as noted above by the Court makes it clear that no notice under Section 143(2) of the Act was issued to the Assessee after 16th December 2010, the date on which the Assessee informed the AO that the return originally filed should be treated as the return filed pursuant to the notice under Section 148 of the Act.

13. In DIT v. Society for Worldwide Interbank Financial Telecommunications (2010) 323 ITR 249 (Del), this Court invalidated an reassessment proceedings after noting that the notice under Section 143(2) of the Act was not issued to the Assessee pursuant to the filing of the return. In other words, it was held

mandatory to serve the notice under Section 143(2) of the Act only after the return filed by the Assessee is actually scrutinised by the AO.

14. The interplay of Sections 143 (2) and 148 of the Act formed the subject matter of at least two decisions of the Allahabad High Court. In CIT v. Rajeev Sharma (2011) 336 ITR 678 (All.) it was held that a plain reading of Section 148 of the Act reveals that within the statutory period specified therein, it shall be incumbent to send a notice under Section 143(2) of the Act. It was observed:

“the provisions contained in sub-Section (2) of Section 143 is mandatory and the legislature in their wisdom by using the word 'reason to believe' had cast a duty on the Assessing Officer to apply mind to the material on record and after being satisfied with regard to escaped liability, shall serve notice specifying particulars of such claim. In view of the above, after receipt of return in response to notice under Section 148, it shall be mandatory for the AO to serve a notice under sub-Section 2 of Section 143 assigning reason therein. In absence of any notice issued under sub-Section 2 of Section 143 after receipt of fresh return submitted by the Assessee in response to notice under Section, the entire procedure adopted for escaped assessment, shall not be valid.”

15. In a subsequent judgment in CIT v. Salarpur Cold Storage (P.) Ltd. (2014) 50 Taxmann.com 105 (All) it was held as under:

“10. Section 292 BB of the Act was inserted by the Finance Act, 2008 with effect from 1 April 2008. Section 292 BB of the Act provides a deeming fiction. The deeming fiction is to the effect that once the assessee has appeared in any proceeding or cooperated in any enquiry relating to an assessment or reassessment, it shall be deemed that any notice under the provisions of the Act, which is required to be served on the assessee, has been duly served upon him in time in accordance with the provisions of the Act. The assessee is precluded from taking any objection in any proceeding or enquiry that the notice was (i) not served upon him; or (ii) not served upon him in time; or (iii) served upon him in an improper manner. In other words, once the deeming fiction comes into operation, the assessee is precluded from raising a challenge about the service of a notice, service within time or service in an improper manner. The proviso to Section 292 BB of the Act, however, carves out an exception to the effect that the Section shall not apply where the assessee has raised an objection before the completion of the assessment or reassessment. Section 292 BB of the Act cannot obviate the requirement of complying with a jurisdictional condition. For the Assessing Officer to make an order of assessment under Section 143 (3) of the Act, it is necessary to issue a notice under Section 143 (2) of the Act and in the absence of a notice under Section 143 (2) of the Act, the assumption of jurisdiction itself would be invalid.”

16. In the same decision in *v. Salarpur Cold Storage (P.) Ltd.* (supra), the Allahabad High Court noticed that the decision of the Supreme Court in *ACIT v. Hotel Blue Moon* (supra) where in relation to block assessment, the Supreme Court held that the requirement to issue notice under Section 143(2) was mandatory. It was not "a procedural irregularity and the same is not curable and, therefore, the requirement of notice under Section 143(2) cannot be dispensed with."

17. The Madras High Court held likewise in *Sapthagiri Finance & Investments v. ITO* (2013) 90 DTR 289 (Mad). The facts of that case were that a notice under Section 148 of the Act was issued to the Assessee seeking to reopen the assessment for AY 2000-01. However, the Assessee did not file a return and therefore a notice was issued to it under Section 142 (1) of the Act. Pursuant thereto, the Assessee appeared before the AO and stated that the original return filed should be treated as a return filed in response to the notice under Section 148 of the Act. The High Court observed that if thereafter, the AO found that there were problems with the return which required explanation by the Assessee then the AO ought to have followed up with a notice under Section 143(2) of the Act. It was observed that:

"Merely because the matter was discussed with the Assessee and the signature is affixed it does not mean the rest of the procedure of notice under Section 143(2) of the Act was complied with or that on placing the objection the Assessee had waived the notice for further processing of the reassessment proceedings. The fact that on the notice issued u/s 143(2) of the Act, the assessee had placed its objection and reiterated its earlier return filed as one filed in response to the notice issued u/s 148 of the Act and the Officer had also noted that the same would be considered for completing of assessment, would show that the AO has the duty of issuing the notice under Section 143(3) to lead on to the passing of the assessment. In the circumstances, with no notice issued u/s 143(3) and there being no waiver, there is no justifiable ground to accept the view of the Tribunal that there was a waiver of right of notice to be issued u/s 143(2) of the Act."

18. As already noticed, the decision of this Court in *CIT v. Vision Inc.* proceeded on a different set of facts. In that case, there was a clear finding of the Court that service of the notice had been effected on the Assessee under Section 143 (2) of the Act. As already further noticed, the legal position regarding Section 292BB has already been made explicit in the aforementioned decisions of the Allahabad High Court. That provision would apply insofar as failure of "service" of notice was concerned and not with regard to failure to "issue" notice. In other words, the failure of the AO, in re-assessment proceedings, to issue notice

under Section 143(2) of the Act, prior to finalising the re-assessment order, cannot be condoned by referring to Section 292BB of the Act.

19. The resultant position is that as far as the present case is concerned the failure by the AO to issue a notice to the Assessee under Section 143(2) of the Act subsequent to 16th December 2010 when the Assessee made a statement before the AO to the effect that the original return filed should be treated as a return pursuant to a notice under Section 148 of the Act, is fatal to the order of re-assessment.

20. Consequently, there is no legal infirmity in the impugned order of the ITAT. No substantial question of law arises. The appeal is dismissed.

Thus in light of the jurisdictional High Court judgment, the notice issued under Section 148 of the Act is bad in law.

10. ITA No. 4289/Del/2012 is in respect of penalty and the same is consequential to the quantum appeal which is decided in favour of the assessee. Thus the penalty appeal of the assessee does not survive.

11. In result, ITA No. 1545/DEL/2012 is allowed and ITA No. 4289/Del/2012 is disposed of.

The order is pronounced in the open court on 17th of May, 2016.

Sd/-

**(J. SUDHAKAR REDDY)
ACCOUNTANT MEMBER**

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 17/05/2016

*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)

5.

DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

		Date	
1.	Draft dictated on	04/03/2016	PS
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8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		