IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F' NEW DELHI

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA No. 3403/Del/2013
AY: 2004-05

Rajit Syntex Pvt. Ltd.,	**vs**	**Income Tax Officer,**
430, Sector 28,		**Ward 15(2), New Delhi.**
Noida, UP-201 301		
(PAN: AACCR0963N)		
(Appellant)		**(Respondent)**

Appellant by: Shri Ved Jain, CA
Respondent by: Shri Ashis Chandra Mohanty, Sr.DR

Date of hearing: 27.04.2016
Date of pronouncement: 29.04.2016

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

The present appeal has been preferred by the assessee against the impugned order dated 11.03.2013 passed by the Ld. CIT (A)-XVIII, New Delhi, wherein for assessment year 2004-05, the First Appellate Authority has primarily rejected the assessee's contention that the omission on the part of the Assessing Officer to issue notice u/s 143(2) of the Income Tax Act, 1961 is not a mere procedural irregularity and the same is not curable.

2. The assessee filed its return of income on 30.04.2004. Notice u/s 148 of the Act was issued on 28.03.2011 and

thereafter, the income was assessed at Rs.11,34,435/-. It is the assessee's contention that no notice u/s 143(2) of the Act was issued to the assessee subsequent to the issue of notice u/s 148. It has been the assessee's stand that non-issuance of notice to an assessee, as prescribed in the Act, is not only a procedural irregularity and that in absence of the issuance of statutory notice u/s 143(2) of the Act, the assessment order passed by the Assessing Officer is bad in law and void ab initio. The assessee raised this issue before the Ld. CIT (A) also. However, the Ld. CIT (A), while adjudicating the issue, relying upon the judgement of the Hon'ble Delhi High Court in the case of Madhya Bharat Corporation Ltd. 337 ITR 389 (Del), held that the non-issuance of notice u/s 143(2) of the Act did not make the assessment invalid. On merits also, the Ld. CIT (A) dismissed the grounds of appeal of the assessee. Now, the assessee is in appeal before us and has raised as many as 12 grounds of appeal but ground no. 5 being germane to the entire issue at hand is being taken up first. The ground reads as under:-

> *"5. On the facts and circumstances of the case, the ld. CIT(A) has erred both on facts and in law in confirming the reopening despite the fact that the same is bad and liable to be quashed having been made*

without the issue of statutory notice u/s 143(2) of the Act."

3. At the outset, Ld. AR submitted that the judgment of the Hon'ble Delhi High Court in the case of Madhya Bharat Corporation (supra), which had been relied upon by the Ld. CIT(A), has since been reversed by the Hon'ble High Court in a Review Petition vide order dated 17.08.2011. The Ld. AR submitted that therefore, now this issue is covered by the judgment of the Hon'ble Delhi High Court in the case of Pr. CIT vs Shri Jay Shankar Traders (P) Ltd. 282 CTR 435 (Del). He submitted that in view of the binding precedent of the Hon'ble Delhi High Court's judgment, the entire proceedings ought to be quashed.

4. The learned Departmental Representative submitted that a mere technical default, if at all, cannot vitiate the entire reassessment proceedings and submitted that on merits, the Department has a very strong case. He relied on the orders of the authorities below and submitted that the additions have been legally made and the non-issuance of a notice should not come in the way of tax administration.

5. We have heard the rival submissions and carefully perused the relevant material placed on record. It is seen that the Ld. CIT (A) has discussed and dealt the issue in para 4.1 of the impugned order as under:-

> *"4.1 I have carefully considered the re-assessment order and the submissions filed by the appellant. The appellant has objected regarding non-issue of notice u/s 143(2) after issue of notice under section 147 of the Act. In the re-assessment order, the Assessing Officer has not made any reference to issue of notice under section 143(2), however, it is apparent from the assessment order that enough opportunities have been provided to the appellant by issue of statutory notices and vide order sheet entries to which the assessee has complied with by filing reply dated 27.10.2011 and 31.10.2011. No objection has been raised by the Authorized Representative during assessment proceedings in compliance with the notices. Further, in regard to non-issue of notice under section 143(2), reliance is* ***placed on the decision of*** *the Hon'ble Delhi High Court in the case of Commissioner of Income Tax-II vs Madhya Bharat Energy Corpn. Ltd. passed on 11 July, 2011 in* ***Income Tax Act, 1961*** *No.950/2008."*

6. Thus, it is undisputed that the Department accepts the contention of the assessee that the notice u/s 143(2) was not issued at all. In the present appeal before us also, the Department did not controvert this claim of the assessee. The Hon'ble Delhi High Court in the case of Pr. CIT-08 vs Shri Jai Shiv Shankar Traders (In I.T.A. No. 519/ 2015 in order dated

14.10.2015) has dealt with the issue at length. The relevant paragraphs are reproduced as under:-

> *"6. The AO then proceeded to pass an assessment order on 31st December, 2010 whereby, inter alia, an addition of Rs.1 crore was made to the income of the Assessee under Section 68 of the Act as unexplained credits. In the appeal before the Commissioner of Income Tax (Appeals), the Assessee, inter alia, raised the issue that in the absence of a notice under Section 143(2) of the Act the order of re-assessment was invalid. The CIT (A) negatived the above contention holding that no specific notice was required to be issued under Section 143(2) of the Act and that questionnaires dated 11th November, 2003 and 21st January, 2004 issued by the AO had provided the Assessee's sufficient opportunity to support his return by documentary evidence. Secondly, it was held that non issue of notice under Section 143(2) did not render the reassessment invalid.*
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> *7. The Assessee's further appeal has been allowed by the ITAT by the impugned order. Relying, inter alia, on the decision of the Supreme Court in ACIT v. Hotel Blue Moon (2010) 321 ITR 362 and a plethora of judgments of the High Courts, the ITAT concluded that for completing the assessment under Section 148 of the Act compliance with the procedure under Section 143 (2) was mandatory. It was held that if notice was not issued to the Assessee before completion of the re-assessment, then such reassessment was not sustainable in law.*
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> *8. When this appeal was first listed before this Court on 29 th July, 2015 reliance was placed by Ms Suruchi Aggarwal, learned Senior Standing counsel for the*

Revenue on the decision of this Court in 'Commissioner of Income Tax v. Madhya Bharat Energy Corporation Ltd. (2011) 337 ITR 389) Del which purported to hold that non-issue of notice under Section 143(2) of the Act on an Assessee prior to completion of the reassessment would not be fatal to the reassessment. She also sought to distinguish the decision in ACIT v. Hotel Blue Moon (supra) on the ground that it pertained to a block assessment.

9. Dr Rakesh Gupta, learned counsel appearing for the Assessee, at the outset drew the attention of this Court to an order passed by this Court on 17th August, 2011 in Review Petition No.441/2011 in ITA No.950/2008 (CIT v. Madhya Bharat Energy Corporation) whereby this Court reviewed its main judgment in the matter rendered on 11th July 2011 on the ground that the said appeal had not been admitted on the question concerning the mandatory compliance with the requirement of issuance of notice under Section 143(2) of the Act. In its review order, this Court noted that at the time of admission of the appeal on 17 th February, 2011 after noticing that in the said case that no notice under Section 143(2) had ever been issued, the Court held that no question of law arose on that aspect. The upshot of the above discussion is that the decision of this Court in CIT v. Madhya Bharat Energy Corporation (supra) is not of any assistance to the Revenue as far as the issue in the present case is concerned.

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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) (Del), this Court invalidated a reassessment proceeding 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(2) to lead on to the passing of the assessment. In the circumstances, with no notice issued u/s 143(2) 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."

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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."

7. Respectfully following the ratio of judgment of the Hon'ble Delhi High Court in the case of Pr. CIT-08 vs Shri Jai Shiv Shankar Traders Pvt. Ltd. (supra), we quash the entire reassessment proceedings by holding that the non-issuance of the statutory notice u/s 143(2) in the instant case is an incurable defect and therefore the entire reassessment proceedings were bad in law and void *ab initio.* Ground no. 5 of the assessee's appeal is accordingly allowed and in view of our findings on this ground, the other grounds are dismissed as having become *in fructuous.*

8. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the Open Court on 29th April, 2016.

Sd/-	**Sd/-**
(L.P. SAHU)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: the 29th of April, 2016
'GS'

Copy forwarded to: -

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

By Order

ASSTT. REGISTRAR