

**IN THE INCOME TAX APPELLATE TRIBUNAL, CUTTACK BENCH,
CUTTACK**

**BEFORE SHRI N.S SAINI, ACCOUNTANT MEMBER AND SHRI ABY T.
VARKEY, JUDICIAL MEMBER**

ITA No.233/CTK/2016
Assessment Year : 2006-07

Sourav Alloys and Steel pvt Ltd., C/O. Tulsiyana Service Station, At: Laxmi Bazar, Angul.	Vs.	ACIT, Circle 1(1), Bhubaneswar.
PAN/GIR No. AAICS 3575 K		
(Appellant)	..	(Respondent)

Assessee by : Shri P.K.Mishra, AR
Revenue by : Shri Asit Kumar Mohapatra, CIT DR

Date of Hearing : 16 /02/ 2017
Date of Pronouncement : 17 /02/ 2017

ORDER

Per Bench

This is an appeal filed by the assessee against the order of CIT(A)-1, Bhubaneswar dated 31.3.2016, for the assessment year 2006-07.

2. In Ground No.3 of the appeal, the grievance of the assessee is that the CIT(A) erred in upholding the reassessment order passed u/s.147 of the Act when no notice u/s.143(2) of the Act was issued.

"5. Having carefully examined the orders of the lower authorities and the material available on record in the light of the rival submissions, we find that undisputedly notice under section 148 of the Act was issued on 18.3.2013 asking the assessee to file the return of income within a period of 15 days from the date of service of notice. Thereafter, vide letter dated 4.4.2013 the assessee has requested the Assessing Officer to treat the return filed on 30.3.2009 for assessment year 2008-09 as return filed in compliance to notice under section 148 of the Act dated 18.3.2013, meaning thereby the date of filing of the return in response to notice under section 148 of the Act can only be 4.4.2013, on which the assessee made a request to treat the original return filed as the return filed in compliance to the notice under section 148 of the Act. The provisions of section 143(3) of the Act are to be applied while completing the reopened assessment under section 147 of the Act. After 4.4.2013, no notice under section 143(2) of the Act was issued and the Assessing Officer has only issued notice under section 142(1) of the Act on 29.4.2013. However, the Assessing Officer has issued notice under section 143(2) of the Act on 19.3.2013 which is the next day from the issuance of notice under section 148 of the Act. The issuance of this notice could not meet the requirement of law. As per requirement of law, notice under section 143(2) of the Act is to be issued only after filing of the return of income and not before that.

6. We have also carefully examined the judgment of the Hon'ble Allahabad High Court in the case of ACIT vs. M/s Greater Noida Industrial Development Authority (supra), in which it has been held that to assume jurisdiction to frame assessment, the Assessing Officer is required to issue notice under section 143(2) of the Act and if the notice is not issued, the assessment framed consequent thereto is invalid and deserves to be quashed despite the fact that the assessee has joined the assessment proceedings. The Hon'ble High Court has also held that defect of non-issuance of notice under section 143(2) of the Act cannot be cured by taking recourse to the deeming fiction provided under section 292BB of the Act. The relevant observations of the Hon'ble High Court are extracted hereunder for the sake of reference: -

"10. In order to understand the controversy as to whether a notice under Section 143(2) of the Act is essential to be issued and served upon the assessee in reassessment proceedings it would be appropriate to refer to the said section. For facility, the provisions of Section 143(2) of the Act is extracted hereunder:

"Section 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 Assessing Officer 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

.....But Section 143(2) itself becomes necessary only 'where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under Section 143(2). However, if an assessment is to be completed under Section 143(3) read with Section 158-BC, notice under Section 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under Section 12 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under Section 143(2) cannot be dispensed with. "

14. The Supreme Court clearly held that omission on the part of the Assessing Officer is not a procedural irregularity and is incurable and, therefore, the requirement of notice under Section 143(2) of the Act cannot be dispensed with.

15. Similar view was held by a Division Bench of this Court in Commissioner of Income Tax II Lucknow Vs. Salarpur Cold Storage (P) Ltd. , (2014) 50 Taxman.Com.105, Commissioner of Income-tax, Faizabad Vs. Adarsh Travel Bus Service, (2012) 17 taxmann. Co 140(All.) as well as in Commissioner of Income-tax Vs. Mukesh Kumar Agrawal, 345 ITR 29 and Commissioner of Income -tax Vs. Rajeev Sharma, (2010) 192 Taxman 197 (All.).

15. In the light of the aforesaid decisions, it is apparently clear that the jurisdiction of the Assessing Officer to make an assessment under Section 143(3) (ii) of the Act is based on the issuance of a notice under Section 143(2)(ii) of the 13 Act. The proviso to clause (ii) of sub Section (2) of Section 143 clearly stipulates that a notice must be served on the assessee.

16. In the light of the aforesaid, we have to see as to whether the word "notice" specified in paragraph 16 of the Supplementary Affidavit is in fact a notice issued under Section 143 (2) of the Act. The learned counsel was directed to show the said notice from the original assessment records. The relevant notice was shown to the Court. The notice which has been mentioned in paragraph 16 of the Supplementary Affidavit is a notice dated 10.12.2013, which accompanies the questionnaire dated 10.12.2013. The last paragraph of the questionnaire indicates that the accompanying notice is being issued under Section 142(1) of the Act. From the said notice, it is clear that the notice which the appellant is asserting to be a notice under Section 143(2) is patently erroneous and mischievous. It is nothing else but a notice under Section 142(1) of the Act. The record does not indicate any other notice being issued, which could purport to be one under Section 143(2) of the Act. We are, therefore, of the opinion that from a perusal of the original 14 assessment record, we find that no notice under Section 143(2) of the Act was ever issued. 17. The submission of the learned counsel for the appellant that the assessee had participated in the reassessment proceedings and, therefore, cannot assert that the notice was

20. There is a clear distinction between "issue of notice" and "service of notice". In R.K.Upadhyaya Vs. Shanabhai P. Patel, 166 ITR 163, the controversy was that a notice under Section 148 was issued on 31.03.1970 i.e. the last date of limitation, which notice was served on the assessee on 03.04.1970, after the expiry of limitation. The High Court held that since the notice was served after the expiry of the period, the assessment order was invalid and had accordingly quashed the notice for reassessment issued under Section 147 of the Income Tax Act, 1961. The Supreme Court held that the scheme of 1961 Act in so far as the notice for reassessment was concerned was quite different than that contained under Section 34 of the Income Tax Act, 1922. The Supreme Court held that a clear distinction has been made between "issue of notice" and "service of notice" under the Act. The Supreme Court held that once a notice is issued within the period of limitation, the Income Tax Officer gets the jurisdiction to proceed to reassess and make the assessment order. The mandate of Section 148(1) of the Act is, that reassessment shall not be made until there has been a service of notice which is a condition precedent to making an order of assessment. The Supreme Court further held that the requirement of issue of notice is satisfied when a notice is actually issued and that service under the Act, 1961 is not a condition precedent to conferment of jurisdiction on the Income Tax Officer to deal with the matter but it is only a condition precedent to the making of the order of assessment. The Supreme Court held:

"Section 34, conferred jurisdiction on the Income-tax Officer to reopen an assessment subject to service of notice within the prescribed period. Therefore, service of notice within limitation was the foundation of jurisdiction. The same view has been taken by this Court in Janni v. Indu Prasad Bhat, 72 ITR 595 as also in C.I.T. v. Robert, 48 ITR 177. The High Court in our opinion went wrong in relying upon the ratio of 53 ITR 100 in disposing of the case in hand. The scheme of the 1961 Act so far as notice for reassessment is concerned is quite different. What used to be contained in section 34 of the 1922 Act has been spread out into three sections, being sections 147, 148 and 149 in the 1961 Act. A clear distinction has been made out between 'issue of notice' and 'service of notice' under the 1961 Act. Section 149 prescribes the period of limitation. It categorically prescribes that no notice under section 149 shall be issued after the prescribed limitation has lapsed. Section 148(1) provides for service of notice as a condition precedent to making the order of assessment. Once a notice is issued within the period of limitation, jurisdiction becomes vested in the Income-tax Officer to proceed to reassess. The mandate of section 148(1) is that reassessment shall not be made until there has been service. The requirement of issue of notice is satisfied when a notice is actually issued. In this case, admittedly, the notice was issued within the prescribed period of limitation as March 31, 1970, was the last day of that period. Service under the new Act is not a condition precedent to conferment of jurisdiction in the Income-tax Officer to deal with the matter but it is a condition precedent to making of the order

8. As we have quashed the reassessment order passed u/s.143(3)/147 dated 24.12.2010 while deciding ground No.3 of the appeal, the other grounds of appeal taken by the assessee have become infructuous and hence, dismissed.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 17 /02/2017 in the presence of parties.

Sd/-

(Aby T. Varkey)
JUDICIAL MEMBER

sd/-

(N.S Saini)
ACCOUNTANT MEMBER

Cuttack; Dated 17 /02/2017
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Sourav Alloys and Steel pvt Ltd.,
C/O. Tulsiyana Service Station, At: Laxmi Bazar,
Angul.
2. The respondent: ACIT, Circle 1(1), Bhubaneswar.
3. The CIT(A)-1, Bhubaneswar.
4. Pr.CIT-1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack