

आयकर अपीलीय अधिकरण, मुंबई "जे" खंडपीठ
Income-tax Appellate Tribunal "J" Bench Mumbai
सर्वश्री राजेन्द्र, लेखा सदस्य एवं पवन सिंह, न्यायिक सदस्य
Before S/Sh. Rajendra, Accountant Member & Pawan Singh, Judicial Member
आयकर अपील सं./I.T.A./3314/Mum/2015, निर्धारण वर्ष/Assessment Year: 2011-12

Mohd. Zammer Cutterwala 93, Morland Road, Arabs Stable Mumbai-400 008. PAN:AAAPC 7090 E	Vs.	ACIT, -17 (3) R.No.614, 6ht Floor Piramal Chambers, Lalbaug, Parel Mumbai-400 012.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Ms. Arju Garodia-DR
Assessee by: Shri Rakesh Joshi-AR

सुनवाई की तारीख / **Date of Hearing: 18/08/2017**
 घोषणा की तारीख / **Date of Pronouncement: 15/09/2017**

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश
Order u/s.254(1) of the Income-tax Act, 1961 (Act)

लेखा सदस्य राजेन्द्र के अनुसार/ PER RAJENDRA, AM:

Challenging the order dated 04/03/2015, of the CIT(A)-32, Mumbai the assessee has filed a present appeal. Assessee- an individual, engaged in the business of manufacturing of for pipe lines, hand tools, wire cutter etc., filed its return of income on 17/10/2011, declaring the total income of Rs.20.14 lakhs. Subsequently, a revised return was filed on 08/05/2012, declaring income at Rs.87.24 lakhs. The A.O, completed the assessment u/s. 143(3) of the Act, on 21/ 01/ 2013, determining his income at Rs.1.88 crores.

2. Vide his application dtd.20.06.2017, the assessee has filed additional ground of appeal stating that same were of legal nature, that as per Rule 11 of the ITAT Rules, 1963 same should be admitted. Before us, the Authorised Representative (AR) reiterated the submission that are part of the application made by the assessee. The Departmental Representative (DR) left the issue of admitting additional grounds of appeal to the discretion of the bench. We find that the additional ground raised by the assessee, goes to the root of the matter and does not require verification of the facts. Therefore, we take on record the additional ground, raised by assessee.

BRIEF FACTS:

3. The assessee has filed the original return in the month of October, 2011. Later on, a revised return was filed on 08/05/2012, wherein he claimed a deduction of Rs.1.01 crores u/s. 54G of the

Act. Initially the return was processed u/s.143(1) of the Act. As the AO was of the opinion that the taxable income of the assessee had escaped taxation;so,he issued a notice u/s.148 of the Act to the assessee.Vide his letter,dated 27/11/2012,the assessee stated that the return filed on 08/05/2012 should be taken as having being filed in response to notice issued to him.

4.The first ground of the appeal and the additional ground deal with validity of the reassessment proceedings.During the course of hearing before us,the AR stated that the AO had not provided him the copy of the reasons recorded for issuing notice u/s. 148 of the Act, that the reopening the assessment was bad in law,that the AO had not issued the notice u/s. 143(2) of the Act, that the assessment passed by the AO was void ab-initio in absence of the 143(2) notice. He stated that the assessee had requested for the copy of the reason recorded, that the AO did not supply him the copy till the assessment was over,that before the expiry date of notice to be issued u/s. 143(2)of the Act,the AO had issued the notice u/s. 148 of the Act. He referred to the cases of Geno Pharmaceuticals Ltd. (84 CCH 117) of the Hon'ble Bombay High Court, Super Spinning Mills Ltd.(129 TTJ 305)Vardhman Holdings Ltd. (69 Taxman.com 376),Jai Shiv Shankar Trader Pvt.Ltd.(94 CCH 55)Videsh Sanchar Ltd. (340 ITR 66)and G. Entertainment Enterprises Ltd. (ITA/7005/Mum/2012,AY.2006-07,dated18/10/2016).The DR supported order of First Appellate Authority(FAA) and relied upon case of Madhya Bharat Energy Corporation Ltd. (ITA no. 950 of 2008).

5.We have heard rival submission and perused the material before us. In our opinion,it would be useful to decide issue of validity of reassessment proceeding before adjudicating the merit of the case.During the course of hearing,the Bench had asked the DR to produce the assessment records along with the evidence of service of notice issued u/s.143(2) of the Act. The DR had intimated the AO concerned to send the assessment records for verification purposes.But,till the last date of hearing,assessment records were not produced by the AO proving the service of notice u/s. 143(2) of the Act or supplying of reasons recorded for initiating the proceedings u/s. 147 of the Act.

We find that the assessee had raised specific ground about non supply of reasons while filling the appeal before the FAA.Ground no. 1 filed by the assessee talks of non-furnishing the reasons recorded inspite of written request made.In the statement of facts the assessee had mentioned that the AO did not communicate the reasons recorded for reopening. Page no. 16 of paper book is

the letter of the assessee, dated 20/07/2012. In that letter, he had requested the AO to provide in the reasons for issuing reassessment notice. The FAA had taken note of the objection raised by the assessee about of the validity of the reassessment proceedings, but had not dealt with it. As per settle principles of taxation jurisprudence the AO is required supply of the reasons recorded to the assessee after it files a return of income. In case the assessee object to the reassessment proceeding the AO.s have to disposed off the objections raised by them in a separate order. The failure of the AO supply of the copy of the reasons is fatal to the entire reassessment proceeding. In the case of Videsh Sanchar Ltd.(supra),the Hon'ble Jurisdictional High Court has held that if the reasons recorded for reopening of the assessment were not furnished to the assessee till the completion of the re-assessment,the reassessment order would be invalid.The Bombay High Court,in the case of Jay Shiv Shankar Trader Pvt. Ltd.(supra) has held that non issuance of notice u/s. 143(2)of the Act,would invalidate the notice issued to the assessee and the assessment completed in pursuance of the notice.We would like to refer to the case of G. Entertainment Enterprises Ltd., (supra)and reproduce that relevant portion of the order.It reads as follow:

“3.The assessee had filed an application,vide its letter dated,11/08/2016,for admission of additional grounds.It was argued that the additional grounds were legal in nature and did not require new documents or evidences.In the additional grounds the assessee had raised two issues namely non-issuance of notice u/s.143(2) of the Act and initiation of reassessment proceeding on the basis of audit objections that were not accepted the AO himself.

4.During the course of hearing before us,the Authorised Representative(AR) argued that additional grounds raised by the assessee were purely legal ground and no new facts,other than those already on record,were required to be considered.He relied upon the case of NTPC (229 ITR 383).He further contend ed that the AO had not issued notice u/s.143 (2) of the Act, that non-issue of notice during the re-assessment proceedings made the assessment order ab initio avoid.He referred to the case of Kanchanjunga Impex Pvt.Ltd. (ITA/6057/Mum/2013-AY.2002-03,dated 23/09/2015).

5.The Departmental Representative(DR)objected to admission of additional grounds and contended that the assessee had never raised those grounds during the assessment proceed -ings or the appellate proceedings,that it attended the hearing and submitted information on various occasions, that even by filing the appeal before the Tribunal it had not raised the issue with regard to notice, that no new ground could be taken before the Tribunal for the first time.She referred to the cases of NTPC (supra), Aravali Engineers Private Ltd. (237 CTR 312), Vision Inc. (208 taxman 153), Madhya Bharat Energy Corporation (337 ITR 389) Jayprakash Singh (219 ITR 737).She stated that the AO had informed that on perusal of the records it was found that certain documents were not available on the file,namely-letter of objection to the reopening filed by the assessee, disposal of objection by the AO, notice u/s. 143 (2) and original the assessment order u/s.143 (3)r.w.s.147,order sheet of the hearing/the assessment proceedings,that the records were old, that no cognizance of nonavailability of notice u/s.143 (2) could be taken that non-availability of notice could not be constructed to conclude that no notice u/s.143 (2)was issued in 2011 by the AO, that the assessee had not raised the ground about the audit objections before the AO or the FAA, that any fact brought out by the audit party was a valid ground for reopening the assessment. She relied upon the case of Somdutt Builders Private Ltd.(98 ITD 78), PVS Beedies Private Ltd.(237 ITR 13) and Rajesh Jhaveri Stockbrokers Private Ltd.(161 taxman 316), that AO had deliberated over the issue once it was pointed out by the revenue audit, that the fact that tax was not deducted u/s. 194C of the Act from the file of some other assessee, that the information was not available before the AO at the time of original assessment,that it was a new tangible information which came to the

notice of the AO subsequently, that the provisions of section 194C were applicable to the facts of the case under consideration.

6. In his rejoinder, the AR stated that provisions of section 292BB were applicable from 01/04/2008, that the cases relied upon by the Department were distinguishable on facts, that no notice u/s. 143 (2) was issued by the AO, that the assessee had raised a purely legal issue emanating from facts on record, that the AO vide his letter, dated 07/05/201, had opposed the audit objections and had requested the audit party to drop the same, that even after opposing the said audit objections, he proceeded to reopen the case of the assessee. The AR relied upon the case of *Purity Techtexiles P.Ltd.* (325 ITR 459) and argued that the assessment was passed under the dictates of the audit party, that AO had not formed any independent opinion, that it was a case of change of opinion.

7. We have heard the rival submissions and perused the material before us. We find that the assessee had raised more additional grounds before the Tribunal and same were not agitated before the AO/FAA. Both the additional grounds, in our opinion, are purely legal grounds. In the case of *NTPC (supra)*, the Hon'ble Supreme Court had held as under:

“Under section 254 of the Income-tax Act, 1961, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. There is no reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. The Tribunal should not be prevented from considering questions of law arising in assessment proceedings, although not raised earlier. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) is too narrow a view to take of the powers of the Tribunal.

Undoubtedly, the Tribunal has the discretion to allow or not to allow a new ground to be raised. But where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.”

8. Clearly, the Tribunal can admit a particular issue arising from the facts on record even though same was not raised before the lower authorities. In the case of *Aravali Engineers Private Ltd. (supra)* the Hon'ble Punjab and Haryana High Court had held that a question of fact could not be allowed to be raised for the first time before the Tribunal. In our opinion, both the issues raised by the assessee before the Tribunal are purely legal issues.

9. In our opinion, non-issuance of notice u/s. 143(2) of the Act is not in irregularity or a procedural lapse but it is a jurisdictional defect which is non-curable. As the issue emanates from the facts available on the record, so, in our opinion the assessee cannot be prevented from raising the additional ground about non-issuance of notice. Rest of the cases relied upon by the DR do not directly deal with the issue of notice u/s. 143 (2) of the Act.

9.1. We find that sufficient time was allowed by the Tribunal to the departmental authorities to produce the evidence of issue of notice and service of the same on the assessee. The AO himself has intimated that notice u/s. 143(2) along with the order sheet were not available. In absence of the evidence of issue of notice we are of the opinion that the assessment order passed by the AO was not a valid order. We would like to refer to the matter of *Geno Pharmaceuticals Ltd.* (214 Taxman 83) of the Bombay High Court. In that case the Hon'ble Court has held that notice u/s. 143(2) is mandatory and in absence of such service the AO cannot proceed to make an inquiry on the return filed in compliance with notice issued u/s. 148.”

In our opinion by not issuing the 143 notice and not supplying the recorded reasons to the assessee, the AO has committed fatal errors as far as validity of the assessment is concerned . Accordingly, we hold that order passed by the AO was not a valid order.

5. As we have declared the order of the AO was invalid, so, we are not adjudicating the other ground of appeal raised by him. As a result, appeal filed by the assessee stands allowed

As a result, appeal filed by the assessee stands allowed.
फलतः निर्धारित अधिकारी द्वारा दाखिल की गई अपील मंजूर की जाती है.

Order pronounced in the open court on 15th September, 2017.
आदेश की घोषणा खुले न्यायालय में दिनांक 15 सितंबर, 2017 को की गई।

Sd/-

Sd/-

(पवन सिंह /Pawan Singh)

(राजेन्द्र / RAJENDRA)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक/Dated : 15.09.2017.

Jv.Sr.PS.

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

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR “ J ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अधि.मुंबई
- 6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.