

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

Before Shri D.T. Garasia (JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.6470/Mum/2013 - AY 2006-07

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| Dy. CIT 10(2), Mumbai | vs | M/s Mhatre Electronics Pvt Ltd, C/o Kalyaniwalla & Mistry LLP, Esplanade House, 2 nd Floor, 29, Hazarimal Somani Marg, Fort, Mumbai-400 001 PAN : AAACM3313P |
| APPELLANT | | RESPONDENT |

I.T.A No.6349/Mum/2013 - AY 2006-07

I.T.A No.7596/Mum/2013 - AY 2006-07

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| M/s Mhatre Electronics Pvt Ltd, C/o Kalyaniwalla & Mistry LLP, Esplanade House, 2 nd Floor, 29, Hazarimal Somani Marg, Fort, Mumbai-400 001 PAN : AAACM3313P | vs | ACIT, 10(2), Mumbai |
| APPELLANT | | RESPONDENT |

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| Assessee by | Shri Nitesh Joshi |
| Revenue by | Shri Akram Khan |

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| Date of hearing | 25-09-2017 |
| Date of pronouncement | 27-09-2017 |

ORDER

Per G Manjunatha, AM :

These are two appeals filed by the assessee, i.e. one quantum appeal and another penalty appeal and one appeal filed by the Revenue are directed

against separate, but identical orders of the CIT(A)-22, Mumbai dated 1-8-2013 and 4-10-2013 and it pertains to the Asst. year 2006-07. Since, facts are identical and issues are common, for the sake of convenience, these appeals were heard together and disposed off, by this common order.

2. The Brief facts of the case extracted from ITA. No. 6470/M/2013 are that the assessee company engaged in the business of trading in electronic goods has filed its return of income for the A.Y. 2006-07 on 12-6-2007 declaring total income of Rs. 2,43,92,967/-. The case was selected for scrutiny and statutory notices u/s 143(2) and 142(1) of the Act, were issued. The assessee neither appeared nor filed any details before the A.O. Therefore, the A.O. passed ex-parte assessment order u/s 144 of the Act, on 15-12-2008 determining the total income of Rs. 5,47,84,057/-, inter alia making additions/ disallowances towards purchases, Bad debts, commission, travelling expenses, miscellaneous expenses and liabilities.

3. Aggrieved by the assessment order, the assessee has preferred an appeal before the CIT(A). The assessee has filed certain additional evidences before the CIT(A). The CIT(A) forwarded additional evidences to the A.O. for his verification and comments. The assessee again did not appear before the A.O. to justify additional evidences. The CIT(A), based on the remand report dismissed appeal filed by the assessee and upheld addition made by the A.O.

The assessee carried the matter in further appeal before the ITAT. The ITAT, in ITA No. 773/M/2012 dt. 27-4-2012, restored the matter back to the CIT(A) and direct the CIT(A) to pass fresh order after obtaining remand report from the A.O. During the second round of litigation, the assessee has filed additional ground of appeal challenging validity of notice issued u/s 143(2) and contended that notice issued u/s 143(2) is barred by limitation and therefore, assessment order passed by the A.O. is bad in law and liable to be quashed. The assessee further contended that the assessee has filed return on 12-6-2007. As per the provisions of section 143(2) notice ought to have been issued on or before 30-6-2008. But, the A.O. has issued notice on 24-9-2008, which is clearly barred by limitation and hence consequent assessment proceedings is invalid and liable to be quashed. The assessee also challenged additions made by the A.O. on merits and filed elaborate written submissions. The CIT(A), for the detailed reasons recorded in his order dt. 1-8-2013 at para. 8.3, page No. 6 held that assessment order passed by the A.O. is bad in law as notice issued u/s 143(2) is clearly beyond 12 months from the month in which return of income is filed for the A.Y. 2006-07. The relevant finding of the CIT(A) is reproduced hereunder:-

“8.3 I have carefully considered the above submission of the appellant. To verify the technical objection of the appellant, the assessment record was called for. The return of income was filed

on 12.06.2007. The order sheet noting dtd.24.09.2008 by the AO indicate that the case was selected for scrutiny through CASS and notices u/s.143(2)/115WE(2) were generated through computer and issued. The notices were served on 26.09.2008. I find from the acknowledgement that the notices have been serviced on 26.09.2008. As per proviso to Sec.143(2)(ii), "no notice shall be served on the assessee after expiry of twelve months from the end of the month in which the return is furnished." As mentioned above, the return was furnished on 12.06.2007 and the notice u/s.143(2) should have been served by 30/06/2008 whereas the facts clearly indicates that notice u/s.143(2) was served beyond one year time limit i.e. on 26.09.2008 and hence, the notice issued was time barred. In view of this, the order passed by the AO is bad in law. However, during the course of appellate proceeding, the AR had submitted that the matter maybe considered on merits and accordingly, the issues raised in the appeal are adjudicated on merits."

4. The CIT(A), did not stop there and he proceed to pass order on merits and partly allowed appeal filed by the assessee, wherein he deleted addition made towards disallowance of purchases, disallowance of bad debts, adhoc disallowance of travelling expenses, miscellaneous expenses and addition towards liabilities. However, allowed partial relief towards disallowances of commission by allowing relief to the extent of Rs. 21,40,339/- and confirmed balance amount of Rs. 38,59,661/-. Thus, the CIT(A) partly allowed appeal filed by the assessee. Meanwhile, the A.O. levied penalty u/s 271(1)(c) for concealment of particulars of income. The CIT(A) for the detailed discussion in his order dated 4-10-2013, confirmed penalty levied by the A.O. to the extent

of addition confirmed towards commission and deleted penalty levied on all other additions/disallowances. Aggrieved by the CIT(A) orders, the assessee as well as the revenue are in appeal before us.

5. The Id. D.R. submitted that the Id. CIT(A) erred in holding that notice issued u/s 143(2) was bad in law without appreciating the facts that the law as on the date of issue of notice was very clear in as much notice u/s 143(2) shall be issued within six months from the end of the financial year in which the return is furnished. The Id. D.R. referring to the provisions of section 143(2) and pre amended and amended proviso explained that the amended proviso which came in to existence from 1-4-2008 shall be applicable for all notice issued on or after 1-4-2007. Since, the assessee has furnished belated return for the A.Y. 2006-07 in the financial year 2007, i.e. on 12-6-2007, notice u/s 143(2) can be issued on or before 30-9-2008. The A.O. issued notice u/s 143(2) on 24-9-2008 which is very much within time limit provided under law and hence, the findings of the CIT(A) is incorrect and it should be set aside.

6. The Id. A.R. for the assessee on the other hand, strongly supported order of the CIT(A) and findings to argue that the law is very clear inasmuch pre amended provisions of section 143(2) make it clear that notice u/s 143(2) shall be issued within 12 months from the end of the month in which return of income was filed. The A.R. further submitted that the assessee has filed return

on 12-6-2007. As per the pre amended proviso, notice ought to have been issued on or before 30-6-2008, whereas the A.O. has issued notice u/s 143(2) on 24-9-2008, which is clearly barred by limitation and hence, the CIT(A) was right in holding that notice is bad in law. The A.R. further referring to the decision of Hon, ble Allahabad High Court, in the case of Tulsi Food Products vs. DCIT (2016) 380 ITR 192(All), submitted that that issue has been considered by the Hon'ble High court and after considering pre amended and amended proviso to section 143(2) came to the conclusion that law should be applied is that in force in assessment year and as such the pre amended proviso to be applied for the A.Y. 2006-07. Therefore, his case is squarely covered by Hon'ble Allahabad High Court and also in accordance with spirit of law. The CIT(A) has rightly hold that notice issued is beyond time limit and his order should be upheld.

7. We have heard both the parties, perused materials on record and gone through the orders of authorities below. We also carefully considered provisions of section 143(2), pre amended proviso, amended proviso and case law relied upon by the Id. A.R. for the assessee. The only dispute is with regard to validity of notice issued u/s 143(2) of the Act. The assessee claims that notice issued u/s 143(2) is barred by limitation and hence, consequent assessment order is bad in law and liable to be quashed. Before, we go in to

the facts of the case, let us understand, proviso to section 143(2) before amendment and after amended w.e.f. 1-4-2008. The proviso before amendment by the finance Act, 2008 w.e.f. 1-4-2008, makes it clear that notice u/s 143(2) shall be issued within 12 months from the end of the month in which return was filed. The amendment proviso w.e.f. 01-04-2008 makes it clear that no notice shall be issued after the expiry of six months from the end of the financial year in which return was furnished. The Id. D.R. argued that the law stood in the statute book on the date of issue of notice shall be taken in to account and hence notice issued by the A.O. is as per the amended proviso to section 143(2), therefore it is well within the prescribed limits. In the given facts and circumstances of the case, the question that needs to be answered is whether pre amended or amended proviso to be considered for issue of notice u/s 143(2) for return of income filed for the assessment year prior to the amendment of proviso to section 143(2) w.e.f. 1-4-2008, by the finance Act, 2008. This controversy has been settled by the Hon'ble Allahabad High Court, in the case of Tulsi Food products vs. DCIT (2016) 380 ITR 192, wherein it was held that the law to be applied is that in force in assessment year. The Hon'ble court further observed that if there are two interpretations then one which is favourable to the assessee will have to be adopted. The relevant portion of the order is reproduced below:-

“ We have heard both the parties at length and gone through the material available on records.

From the perusal of the record, it appears that the proviso to section 143(2)(ii), prior to April 1, 2008 reads as under:

“Provided that no notice under clause (ii) shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished.”

Later, the said proviso after the Finance Act, 2008, with effect from April 1, 2008, was amended and the amended proviso reads as under:

“Provided that no notice under clause (ii) shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished.”

In the instant case, the return was filed on July 24, 2007. As per the then law, i.e. prior to the amendment, the period was twelve months from the end of the month in which the return is furnished. Twelve months means calendar months and certainly not assessment year.

Needless to mention that if there are two interpretations then the interpretation favourable to the assessee will have to be adopted as per the ratio laid down in the case of CIT v. Shaan Finance (P) Ltd (1998) 231 ITR 308 (SC).

Thus, the beneficial provision to assessee will have to be adopted.

Further, i the case of Jayakumari and Dilharkumari v.CIT (No.3) (1987) 165 ITR 792 (Karn), it was observed as under (page 795):

“Law to be applied is that in force in assessment year.- Though the subject of the charge is the income of the previous year, the law to be applied is that in force in the assessment year, unless otherwise stated or implied; and any amendment which is in force at the beginning of the relevant assessment year must govern the case though the amendment is made after the income underassessment is earned. In other words, the Income-tax Act as it stands amended on the 1st April of a financial year must apply to the assessment for that year.

That is also the view taken by the Gujarat High Court in Maneklal Vallabhdas Parikh’s case [1969] 72 ITR 637 (Guj).”

In the instant case, twelve months' period from the end of the month in which the return was filed, expires in July 31, 2008, so a notice was supposed to be served maximum on / or before August 1, 2008, but it was given on September 26, 2008. It is belated less than about two months. When the notice was issued after the expiry of the period of limitation, the effect of proceedings is void as per the ratio laid down by the Gujarat High Court in Deputy CIT v. Mahi Valley Hotels and Resorts [2006] 287 ITR 360 (Guj). It is well-settled that if any notice issued by the Department would become void for want of jurisdiction as per the ratio laid down in the case of CIT v. Kurban Hussain Ibrhimji Mithiborwala [1971] 82 ITR 821 (SC).

In view of the above, it appears that the impugned order / notice were issued by the Department were not within the period prescribed and it was barred by about less than two months, therefore, the same cannot be sustained in the eye of law.

In view of the above, the petition filed by the petitioner succeeds and allowed. The impugned order dated March 24, 2009, passed under section 144A of the Act, and the impugned notice dated September 26, 2008, passed under section 143(2) and section 115WD are set aside."

8. In this case facts are clear. The assessee has filed return for the A.Y. 2006-07 on 12-6-2007. As per the pre amended proviso, notice ought to have been issued on or before 30-6-2008. The A.O. has issued notice u/s 143(2) on 24-9-2008. Therefore, considering the facts of the case and also respectfully following Allahabad High Court decision in the case of Tulsi Food products vs. DCIT (2016) 380 ITR 192, we are of the view that notice issued u/s 143(2) is clearly barred by limitation and hence, consequent assessment order passed by the A.O. u/s 144 dt 15-12-2008 is hereby quashed. Since, we have quashed

assessment order on technical grounds other issues raised by the revenue on merits are merely becomes academic in nature and hence, not adjudicated.

9. In the result appeal filed by the Revenue in ITA.No. 6470/M/2013 is dismissed.

ITA. No. 6349/M/2013 and ITA.No. 7596/M/2013-Assessee

10. The assessee has filed appeal against order of the CIT(A) and challenged disallowance of commission sustained by the CIT(A) on merits. Since, we have already quashed assessment order passed by the A.O. u/s 144 dt 15-12-2008, all additions made by the A.O. in the assessment becomes infructuous and hence addition made by the A.O. and sustained by the CIT(A) towards commission is hereby deleted.

11. The assessee has filed appeal in ITA.No. 7596/M/2013 against order of the CIT(A), sustaining penalty levied by the A.O. towards commission. Since, we have already quashed assessment order passed by the A.O. u/s 144 dt 15-12-2008, all additions made by the A.O. in the assessment and consequent penalty levied u/s 271(1)(c) for concealment of income becomes infructuous. Hence, we direct the A.O. to delete penalty levied u/s 271(1)(c) of the Act.

12. In the result, appeals filed by the assessee in ITA. No. 6349/M/2013 and ITA.No. 7596/M/2013 are allowed.

Order pronounced in the open court on 27th September, 2017.

Sd/-

sd/-

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| (D.T. Garasia) | (G Manjunatha) |
| JUDICIAL MEMBER | ACCOUNTANT MEMBER |

Mumbai, Dt : 27th September, 2017

Pk/-

Copy to :

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

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai