

IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA (SMC) BENCH: AGRA

BEFORE SHRI A. D. JAIN, JUDICIAL MEMBER

I.T.A No. 74/Agra/2016
(ASSESSMENT YEAR-2007-08)

Naresh Chandra Agarwal, Gwalior. PAN No.ABVPA0276E (Assessee)	ITO, -Ward 3 (1), Gwalior. (Revenue)
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Assessee by	Shri Mahesh Agarwal, AR
Revenue by	Shri Waseem Arshad, Sr.DR.

Date of Hearing	23.10.2017
Date of Pronouncement	26.12.2017

ORDER

This is assessee's appeal for assessment year 2007-08, taking the following grounds:

1. *That under the facts and circumstances of the case and in law, the ld. CIT(A) has erred to uphold the validity of assessment dated 13.12.2010 passed Under section 143(3)/ 148 of the Act.*
2. *That under the facts and circumstances and in law the notice dated 04/02/2010 issued Under section 148 was bad in law, illegal and without application of independent and own mind of the AO and consequently the assessment dated 13.12.2010 is also bad and illegal.*
3. *That on the facts and circumstances of the case and in law the assessment Under section 148 is also bad and illegal as the statutory*

conditions and procedure prescribed under the statute have not been complied with.

4. *That the assessment order dated 13/12/2010 being bad and illegal was liable to be set aside.*

5. *That notwithstanding the above,*

a) *Ld. CIT(A) has erred in law and on facts to confirm the addition of Rs.17,75,000/-, being capital contributed in cash by the assessee in partnership firm, as income from undisclosed sources.*

b) *That while confirming the impugned addition Ld CIT(A) grossly failed to appreciate that source of such capital contribution was fully explained by the appellant and that in the case of firm alleged capital to the tune of Rs.16,50,000/-was accepted as fully explained by the Ld CIT(A) also.*

c) *That the order of Ld CIT(A) while confirming the addition of Rs.17,75,000/- is vitiated in law as the same is badly affected by extraneous considerations and is based entirely on surmises, conjectures and suspicion.*

6. *That the orders of the authorities below be set aside and the impugned addition of Rs.17,75,000/- be deleted.*

2. Ground No. 3 has been modified by taking the following modified ground no. 3:

“That the impugned assessment is also bad and illegal on account of non-compliance with the law and procedural prescribed under the Act. No notice statutorily required under section 143(2) was issued before completing the assessment which refers the assessment void ab initio and bad in law.”

3. In respect of Ground No. 3, the Id. Counsel for the assessee has submitted that the requirement of a notice under section 143(2) of the I.T. Act, before assessment is made under section 148 of the Act thereof, is a mandatory requirement, which goes to the root of valid jurisdiction and non-issuance of such notice would render the assessment, as in the present case, without jurisdiction and invalid.

4. Per contra, the Id. DR has submitted that the return was filed very late, i.e., almost ten months beyond the period of thirty days, as provided in the notice issued under section 148 of the Act and that so, it is a non est return.

5. I have heard both the parties and have perused the material on record. It remains undisputed that no notice under section 143(2) of the Act was issued before passing of the assessment order dated 13.12.2010, under sections 143(3)/148 of the Act. The Department's case is that notice under section 148 was issued on 04.02.2010. It was served on 18.02.2010. It was only by way of reply dated 06.12.2010, that the assessee sought the return originally filed on 31.03.2009 to be considered as a return filed in response to the notice under section 148 of the

Act. The reply was filed almost ten months after the service of the notice under section 148 of the Act. As such, the return is a non est / void return, which may be treated as such. 'CIT vs. Raman Chettiar', 1965 AIR 1031 (SC) has been relied on to contend that filing of a valid return is a pre-condition for the issuance of a notice under section 143(2) of the Act.

6. I, however, find myself unable to subscribe to the stand taken by the Department. A perusal of the assessment order shows that the return has been taken by the AO as a valid return. Even the CIT(A) has not made any observation to the contrary. Now, it is trite that neither party can be allowed to improve its case, much less make out an entirely new one, before the Tribunal. The scope of an appeal cannot be widened. The Tribunal can deal only with that part of the order of the lower Authority, which has been made the subject matter of the appeal before the Tribunal. It is not permissible for the Tribunal to adjudicate a question which does not form part of the appeal. It has no jurisdiction to base its decision on a question which was not the subject matter of dispute at any stage of the proceedings and is not the subject matter of the appeal. It has no power to enlarge the scope of the appeal before it by permitting the parties, or any one of them, to ask for a relief which was never the subject matter of the assessment proceedings or the first appeal.

7. 'ACIT vs. Redex Protech Ltd.', passed by the Ahmedabad Bench of the Tribunal in ITA No. 824/Ahd/2004, for A.Y. 1996-97 (copy placed on record), dated 23.01.2009, is of no help to the Department. In that matter, the AO had not entertained the revised return filed by the assessee, which, as noted, is not the case herein.

8. The proposition in 'Ram Chandra' (supra) is also not applicable here, the AO as well as the Id. CIT(A) in the present case having not called in question the return filed by the assessee in response to the notice under section 148 of the Act.

9. Likewise, neither 'Jagmohan Ram Ram Chandra vs. CIT', 1993 CTR (All) 153, nor 'Jain Bros. & Others vs. The Union of India & Others', 1970 AIR 778 (SC), referred to by the Department, furthers its cause.

10. In 'ACIT vs. M/s Hotel Blue Moon', 321 ITR 362 (SC), the question before the Hon'ble Supreme Court was whether service of notice under section 143(2) of the IT Act in time is a prerequisite for framing the block assessment under Chapter XIV-B of the Act. It was, inter alia, held that even for the purposes of Chapter XIV-B of the Act, the provisions of sections 142, 143(2) and 143(3) are applicable and no assessment can be made without issuing a notice under section 143(2) of the Act.

11. In ‘U.P. State Industrial Development Corporation Ltd. (UPSIDC) vs. CIT’, (copy placed on record), vide order dated 11.07.2016, passed in Income Tax Appeal No.11/2015, the Hon’ble Allahabad High Court was dealing with the question whether the Tribunal was justified in holding that non-issue of notice under section 143(2) of the Act would not vitiate the assessment made by the assessing Authority, since the assessee had filed a return under section 148 of the Act after expiry of the period prescribed in law. Taking note of ‘Hotel Blue Moon’ (supra), the Hon’ble High Court observed that in the case, the Hon’ble Supreme Court was considering the applicability and effect of section 143(2) of the Act in the context of Chapter XIV-B of the Act, which includes section 158BC. The Hon’ble High Court noted the Hon’ble Supreme Court to have categorically held that it is mandatory on the part of the AO to issue notice under section 143(2) and omission thereof is incurable since it is not a mere procedural irregularity, but a jurisdictional error (Para 14 of the judgment). The Hon’ble High Court, in para 21 of their judgment, has held as follows:

“21. Therefore, the question that return filed was within or beyond time prescribed under section 139 or has been filed after notice issued under section 148 or filed earlier after expiry of period under section 139 of the Act is not relevant to determine the question whether Assessing Officer can proceed to make assessment under section 143(3) without issuing notice under section 143(2). The provision being mandatory,

Assessing Officer cannot proceed to make assessment without issuing notice under section 143(2) of the Act, 1961”.

12. In ‘CIT vs. Kalpaka Transport Co. Ltd.’, 287 ITR 15 (Ker), notice under section 148 of the Act was issued on 17.01.1994. It was also served on 17.01.1994. The assessee sent letter dated 05.02.1994 to the AO, requesting that the return already filed be treated as filed in response to the notice under section 148 of the Act. This letter was received in the AO’s Office on 07.02.1994. The AO treated the date of filing of return in response to the notice under section 148, as 07.02.1994 and levied interest under section 234A upto February 1994, which was upheld by the Hon’ble High Court. So, the return was, keeping in view the provisions of section 234A, held filed after the due date, as provided therein. No finding of the return being beyond time stands recorded by the Authorities below in the present case.

13. In ‘M/s Bharat Sewa Sansthan vs. DCIT, Circle-1(1) Lucknow’, order (copy placed on record) dated 23.09.2014, in ITA No. 244/LKW/2003 for A.Y. 1993-94, the issue of the AO and the CIT(A) having accepted the return as a valid return and thereby the Department being incapable of trying to improve its case before the Tribunal by contending that the return was a non est/void return, was not present.

14. On facts, it is seen that it is patent on record that the assessee had filed, in response to the notice under section 147 of the Act, a reply before the AO. This

reply is dated 15.11.2010. A copy thereof has been appended at pages 17 and 18 of the assessee's paper book. In this reply, the assessee, inter alia, contended as follows:

“In the instant case, no income has escaped assessment in the case of the assessee as the Ld. A.O. has herself treated such cash contributions as unexplained income of the firm. Thus, the question of escapement of income does not arise in the assessee's case when a stand has been taken by the same AO that the income itself does not relate to the assessee. Thus, the proceedings u/s.148 of the Income Tax Act, 1961 in the assessee's case are invalid.

Further, Ld. A.O. had herself stated that the cash contributions made by the assessee be treated as unexplained cash credits in the hands of the firm and now is of the opinion that the such contributions are cash credits introduced by the assessee and mat the same be taxed in the hands of the assessee as well, i.e. the same income be taxed twice which is not allowed as per law. Thus, it terms of section 147 the notice issued u/s.148 is barred by limitation as there is no escapement of income and no failure on the part of the assessee to disclose fully and truly all material facts and the initiation of proceedings u/s 147 is based on mere 'change of opinion' which is not permissible in law. In fact, now the AO believes that the income relates to the assessee and not to the firm and there is no iota of evidence that

the same is unexplained which again is based on mere opinion and assumptions.”

And:

“Thus, as is evident from the above, the very initiation of proceedings u/s 147 in the assessee’s case is bad in law as there is inherent lack of jurisdiction at the end of the Assessing Officer.”

15. On receipt of the aforesaid reply of the assessee, the AO responded by way of letter dated 22.11.2010, (The vernacular at APB 19 and the true translation at APB 20). This short letter, for ready reference is reproduced hereunder:

“Sub: In relation to the Income Tax Proceedings for AY 2007-08 - U/s 148

In this connection kindly refer to your letter dated 11/11/2010 and 15/11/2010.

In response to your letter dated 11/11/2010 you have been provided with the copy of reasons recorded U/s 148. From the issues raised in your letter dated 15/11/2010 the only fact emerges that your only contention is that when in the case of M/s Prestressed Concrete Industries for AY 2007-08, Rs. 17,75,000/- deposited as cash by Shri Naresh Agarwal towards fresh capital has been added U/s 68 as income from undisclosed sources in the hands of the firm then very same income cannot be added again in the hands of the assessee. In

this respect it is clarified that against the order of the Assessing Officer firm has filed an appeal before the CIT (Appeal) Gwalior which is still pending before the CIT (Appeals) Gwalior. Thus, on one side you have not accepted the Order passed by the assessing officer and CIT (Appeal) has also not given his decision on the same. Therefore, to keep the matter live and keeping in view the interest of revenue action initiated U/s 147 is quite justified. The basis on which action U/s 147 was initiated in the assessee's case, upon enquiry of the same it is proved that, the assessee could not explain the source of Rs.17,75,000/- cash deposited, in the firm M/: Prestressed Concrete Industries, in the shape of capital. This fact that the assessee deposited! in the shape of capital is accepted by the assessee himself and is also clear from the records' of the firm. Therefore, in the case of the assessee, assessment proceedings initiated U/s 147 is absolutely correct and justified. Therefore, in view of the above mentioned facts you are requested that you file your return of income in response to notice U/s 148 dated 04/02/2010 which is properly served upon you on 16/02/2010 and produce information and clarification called U/s 142(1).

For this purpose proceedings of your case are fixed for 06/12/2010 at 11.00 AM. Notice U/s 142(1) is enclosed for compliance.”

16. Thus, it is evident that initially, in response to the notice under section 147, instead of filing a return, the assessee filed the aforesaid reply dated 15.11.2010. Therein, the assessee objected to the initiation of reassessment proceedings in his

case on the basis mentioned in the said letter dated 15.11.2010, i.e., in short, that the amount of Rs.17,75,000/- stood added in the case of the firm, i.e., M/s Prestressed Concrete Industries, in which, the assessee is a partner, whereas according to the reasons recorded for re-opening of the assessment in the assessee's case, income had escaped assessment on account of own cash introduced by the assessee as capital contribution amounting to the aforesaid Rs.17,75,000/- in the said firm.

17. In the letter dated 22.11.2010, i.e., the AO's counter-reply to the assessee's aforesaid reply, the AO specifically asked the assessee to file his return in response to the notice under section 148 of the Act. The case was fixed for the purpose, for 06.12.2010. A notice under section 142(1) of the Act was also sent alongwith the said letter.

18. From the above facts, it is lucidly evident that the non-filing of the return by the assessee in response to the notice under section 148 of the Act was duly and initially taken into consideration by the AO in the light of the reply filed by the assessee and it was thereupon that the AO, responding to the said letter of the assessee, vide his letter (supra) dated 22.11.2010, justified the issuance of the notice under section 147 of the Act in the assessee's case. It was in continuation thereof that the AO asked the assessee to file a return of income in response to the notice so issued, fixing the case for 06.12.2010. It was on this very date that the

assessee, vide the letter, as mentioned by the Department, sought the return originally filed to be accepted as a return filed in response to the notice issued under section 148 of the Act. 'Raman Chettiar' (supra) stands duly complied. However, no notice under section 143(2) has been issued.

19. In view of the above facts, the objection taken by the Department that the return filed in the case of the assessee is a belated return or, in any case, a much delayed return, is not sustainable. It is, accordingly, rejected.

20. Then, otherwise too, even independent of the case laws discussed, another aspect of the matter requires to be gone into. The Department says that the return is a non-est or void return, meaning that according to the Department, the return, having been filed much beyond the period of 30 days, as stated in the notice under section 148 of the Act, is a return void ab initio. If for the sake of argument it be taken as to be, the submission of the Department would require to be entertained and considered, irrespective of the taxing Authorities having accepted it as a valid return. However, this is not found to be the case. Section 234A(3) of the Act provides for levy of interest in the case of a delayed return. That being so, the Act itself does not envisage a delayed return to be an invalid, or non-est, or void return.

21. In 'Hotel Blue Moon' (supra), it has been held that where the AO, in repudiation of the return filed, proceeds to make inquiry, non-issuance of a notice under section 143(2) of the IT Act would be fatal. In the present case, it is

undisputed that the AO made inquiry pursuant to the return filed and so, 'Hotel Blue Moon' (supra) is squarely applicable.

22. In view of the above, Ground No. 3 is accepted. It is held, respectfully following 'Hotel Blue Moon' (supra), that no notice under section 143(2) of the Act having been issued by the AO before completing the assessment, the assessment so framed is bad in law. The assessment, accordingly, is set aside and cancelled. The order under appeal is reversed. Nothing further survives for adjudication.

23. In the result, the appeal is allowed.

Order pronounced in the open court on 26/12/2017.

Sd/-
(A.D. JAIN)
JUDICIAL MEMBER

Dated 26/12/2017

AKV

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR