

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**

Before Sh. N. K. Saini, AM and Sh. Kuldip Singh, JM

ITA No. 413/Del/2013 : Asstt. Year : 2006-07

Somlata Gahalaut, A-67, Sector-31, Noida-201301 (APPELLANT)	Vs	Income Tax Officer, Ward-9(1), New Delhi (RESPONDENT)
PAN No. AHCPG3400D		

**Assessee by : Sh. Ved Jain, Adv. &
Sh. Ashish Chadha, CA
Revenue by : Sh. Amit Jain, Sr. DR**

Date of Hearing : 19.04.2018

Date of Pronouncement : 23.04.2018

ORDER

Per N. K. Saini, AM:

This is an appeal by the assessee against the order dated 26.10.2012 of
1d. CIT(A)-XII, New Delhi.

2. Following grounds have been raised in this appeal:

“1. That in the facts and circumstances of the case the Ld CIT(A) had erred in upholding the Order of the Ld AO by which the Ld AO had rejected the explanation offered by the appellant by assuming an advance for a house property as deemed dividend under section 2(22).

2. That in the facts and circumstances of the case the appellant has been prejudiced as the Ld CIT (A) had erred by ignoring the additional evidence produced by the appellant.

3. That in the facts and circumstances of the case the addition of Rs,18,50,000/- is bad in law as the Ld

CIT(A) has failed to take note of the fact that the Ld AO did not adhere to the provision of section 2(22) while calculating the amount of accumulated profit.

4. That in the facts and circumstances of the case the Ld CIT(A) failed to appreciate that the Ld AO had not served any notice under section 143(2) which is mandatory for completing an assessment under section 143(3)/147.

5. That the appellant craves leave to raise/add/modify/delete a ground/s.”

3. Facts of the case in brief are that the assessee filed the original return of income on 28.03.2007 declaring an income of Rs.1,86,804/- which was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter referred to as the Act). Thereafter, the AO after recording the reasons issued the notice u/s 148 of the Act on 23.03.2011. The AO framed the assessment u/s 143(3)/147 of the Act on 23.12.2011 by making the addition of Rs.18,50,000/- u/s 2(22)(e) of the Act.

4. Being aggrieved the assessee carried the matter to the ld. CIT(A) and challenged the validity of the reopening. The submissions of the assessee are incorporated by the ld. CIT(A) in para 13 of the impugned order which read as under:

“13. That the assessment made by Ld. Assessing Officer is void and order passed need to be quashed on the ground that the assessment made u/s 143 (3) /147 has been made without issuing notice u/s 143 (2) which has been decided by the Hon'ble Supreme Court in the case of ACIT Vs Hotel Blue moon 321 ITR 362 (SC) wherein it has been held that "if an assessment is to be completed u/s 143(3) r.w.s. 158BC, notice u/s 143(2)

should be issued within one year from the date of block return. Omission on the part of assessing authority to issue notice u/s 143(2) cannot be procedural irregularity and the same is not curable and, therefore, the requirement of notice u/s 143(2) cannot be dispensed with." This is also been upheld by Hon'ble Delhi High Court in the case of CIT Vs Pawan Gupta and Ors. 318 ITR 322 (Del) wherein it was held-" If the assessment is framed u/s 143(3) either read with section 147 of the Act. Then it is mandatory to issue notice u/s 143(2). The issuance and service of notice u/s 143(2) is mandatory and not procedural."

5. It was further submitted that in response to the notice u/s 148 of the Act, the assessee filed a letter dated 27.10.2011 along with the copy of acknowledgment and stating the fact that the return filed be treated against the notice u/s 148 of the Act.

6. The ld. CIT(A), however, did not find merit in the submissions of the assessee by observing as under:

"I have perused the facts stated in the assessment order as well as the facts stated by the assessee in his submissions. The assessee in this ground has stated that the Assessing Officer has not recorded reasons along with notice u/s 148. However, there is nothing mentioned in law that is necessary that the recorded reasons are to be sent with the order. Hence, I am in agreement with Assessing Officer's view and uphold this ground.

.....
.....

I have perused the facts stated in the assessment order as well as the facts stated by the assessee in his submissions. In this ground the assessee has stated that the Assessing Officer has not issued any notice u/s

143(2) & 142(1) and order passed by the Ld. Assessing Officer u/s 143(3) is void. However on examination of the assessment record, it reveals that the Assessing officer has issued a notice u/s 143(2) & 142(1) dt. 12.10.2011 fixing the case for 19.10.2011 vide its ordersheet entry which is reproduced below:

17.10.2011

"Notice u/s 143(2) issued to the assessee for 19.10.2011 at 10.30 A.M."

The above said notice was sent at the address which is given in Form No. 35 filed by the assessee which is under:-

***Somlata Gahalaut,
A-67, Sector-31, NOIDA-201301.***

In views of the facts stated above, the contention of the assessee that the Assessing Officer has not issued notice u/s 143(2) & 142(1) is not acceptable as is evident from the assessment record. Hence, I am in agreement with the decision taken by the Assessing Officer and uphold this ground."

7. Now the assessee is in appeal. The ld. Counsel for the assessee submitted that the AO issued the notice u/s 143(2) of the Act on 12.10.2011 i.e. prior to the furnishing of return of income in response to the notice u/s 148 of the Act on 27.10.2011. It was contended that since the notice u/s 143(2) of the Act was issued by the AO prior to the furnishing of the return of income. Therefore, the subsequent assessment framed u/s 143(3) r.w.s. 147 of the Act was *void ab initio*. The reliance was placed on the following case laws:

➤ *DIT Vs Society for Worldwide Inter Bank Financial Telecommunications (2010) 323 ITR 249 (Del.)*

➤ *Pr. CIT Vs Jai Shiv Shankar Traders Pvt. Ltd. (2016)*
383 ITR 448 (Del.)

8. In his rival submissions, the ld. Sr. DR supported the impugned order passed by the ld. CIT(A) and reiterated the observations made therein.

9. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the AO issued the notice dated 12.10.2011 u/s 143(2) of the Act to the assessee. However, in response to the notice u/s 148 of the Act, the assessee intimated the AO vide letter dated 27.10.2011 that the earlier return filed u/s 139(1) of the Act may be treated as the return filed in response to the notice u/s 148 of the Act. Therefore, prior to the issuance of notice u/s 143(2) of the Act on 12.10.2011, there was no valid return of income filed by the assessee in response to the notice u/s 148 of the Act.

10. On a similar issue the Honøble Jurisdictional High Court in the case of DIT Vs Society for Worldwide Inter Bank Financial Telecommunications (2010) 323 ITR 249 (supra) held as under:

“that in the memorandum of appeal, the Revenue had stated that the return was filed by the assessee on March 27,2000 and the notice under section 143(2) was served upon the authorized representative of the assessee by hand when the authorized representative of the assessee came and filed return and that the date of the notice was mistakenly mentioned as March 23,2000. Even if it was true, the notice was served on the authorized representative simultaneously on his filing the return which clearly indicated that the notice was ready even

prior to the filing of the return. The provisions of section 143(2) make it clear that the notice could only be served after the Assessing Officer had examined the return filed by the assessee. Thus, even if the statement of the Assessing Officer was taken at face value, it would amount to gross violation of the scheme of section 143(2) of the Act.”

11. Similarly, the Honorable Jurisdictional High Court in the case of Pr. CIT Vs Shri Jai Shiv Shankar Traders Pvt. Ltd. (2016) 383 ITR 448 (supra) held as under:

“Pursuant to a scrutiny of the return filed by the assessee, the Assessing Officer issued notice under section 148 of the Income-tax Act, 1961 and another notice under section 143(2) requiring further information and fixing a date for the assessee to appear. The notices were not served on the assessee. A further notice under section 142(1) was issued with a returnable date. On the returnable date the assessee's authorized representative gave a statement that the original return filed should be treated as a return filed pursuant to the notice under section 148. An assessment order was passed making an addition of a sum as unexplained credits under section 68. The Commissioner (Appeals) dismissed the appeal of the assessee holding that sufficient opportunity was provided through questionnaires to support his return by documentary evidence and that non issuance of notice under section 143(2) did not invalidate the reassessment. The assessee's further appeal was allowed by the Tribunal holding that the order of reassessment was unsustainable as a notice was not issued by the Assessing Officer before the completion of reassessment.”

It has further been held as under:

that there was no legal infirmity in the order of the Tribunal. Subsequent to the statement of the assessee on the returnable date to treat the original return filed as a return filed pursuant to a notice under section 148, the Assessing Officer's failure to issue notice under section 143(2) invalidated the order of reassessment. No question of law arose."

12. A similar view has also been taken by the Honøble Jurisdictional High Court in the case Pr. CIT Vs Silver Line (2016) 383 ITR 455 (Del.) held as under:

"The proposal to reopen an assessment under section 147 of the Income-tax Act, 1961, is to be based on reasons to be recorded by the Assessing Officer. Such reasons have to be communicated to the assessee. Merely because the assessee participates in the proceedings pursuant to such notice under section 148 of the Act, it does not obviate the mandatory requirement of the Assessing Officer having to issue to the assessee a notice under section 143(2) of the Act before finalizing the order of reassessment. A reassessment order cannot be passed without compliance with the mandatory requirement of notice being issued by the Assessing Officer to the assessee under section 143(2). The requirement of issuance of such notice is a jurisdictional one. It does go to the root of the matter as far as the validity of the reassessment proceedings under section 147/148 of the Act is concerned.

Section 292BB was inserted in the Income-tax Act, with effect from April 1, 2008. It talks of the drawing of a presumption of service of notice on an assessee and is basically a rule of evidence. It introduces a fiction that once the assessee appears in any proceeding or has co-operated in any enquiry relating to assessment or reassessment it shall be deemed that any notice under any provision of the Act that is required to be served has been duly served upon him in accordance with the

provisions of the Act and the assessee in those circumstances would be precluded from objecting that a notice that was required to be served upon him under the Act was not served upon him or not served in time or was served in an improper manner. The failure of the Assessing Officer, in reassessment proceedings, to issue notice under section 143(2) of the Act, prior to finalizing the reassessment order, cannot be condoned by referring to section 292BB of the Act.”

13. We, therefore, by keeping in view the ratio laid down by the Honorable Jurisdictional High Court in the aforesaid referred to cases, are of the confirmed view that the reassessment framed by the AO u/s 143(3)/147 of the Act, in the present case, on the basis of the notice issued u/s 143(2) of the Act dated 12.10.2011 i.e. prior to the furnishing of return of income on 27.10.2011 in response to notice u/s 148 of the Act, was not valid. Accordingly, the same is quashed.

14. In the result, the appeal of the assessee is allowed.

(Order Pronounced in the Court on 23/04/2018)

Sd/-
(Kuldip Singh)
JUDICIAL MEMBER

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 23/04/2018

Subodh

Copy forwarded to:

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

ASSISTANT REGISTRAR