IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : F : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.2061/Del/2012
Assessment Year : 2001-02

Rishav Prakash Jain, 2683/85, Gali Pattey Wali, Naya Bazar, New Delhi.	Vs.	ITO, Ward-30(4), New Delhi.

PAN: AAGPJ5075N

(Appellant)		(Respondent)
Assessee by	:	Dr. Rakesh Gupta & Shri Somil Aggarwal, Advocates
Revenue by	:	Shri Surender Pal, Sr. DR

Date of Hearing : 11.02.2019
Date of Pronouncement: 18.02.2019

ORDER

PER R.K. PANDA, AM:

This appeal by the assessee is directed against the order dated 19th March, 2012 of the CIT(A)-25, New Delhi, relating to assessment year 2001-02.

2. The assessee, apart from challenging the various additions made in the assessment order, has challenged the validity of reassessment proceedings. However, the assessee has also filed an additional ground which reads as under:-

> "That having regard to the facts and circumstances of the case, reassessment order framed u/s 147/143(3) is bad in law for want of jurisdiction in as much as notice u/s 143(2) has not been issued and served in accordance with law after the filing of return."

3. The ld. counsel for the assessee, referring to various decisions including the decision of the Hon'ble Supreme Court in the case of *NTPC Ltd. vs. CIT reported in 229 ITR 383 (SC),* submitted that the above ground is purely a legal ground and goes to the root of the matter and does not require fresh facts to be investigated and therefore, should be admitted. Referring to the information received under RTI Act, the ld. counsel for the assessee submitted that in the instant case, no notice u/s 143(2) of the Act was issued subsequent to filing of the return by the assessee in response to notice u/s 148 of the IT Act. Only notice u/s 142(1) of the Act was issued and served on the assessee. Therefore, in view of the various decisions including the decision of jurisdictional High Court in the following cases the assessment order has to be quashed:-

(i) PCIT vs. Silverline & Anr (2016) 383 ITR 455 (Del); and

(ii) PCIT vs. Jai Shiv Shankar Traders Pvt. Ltd. (2016) 383 ITR 448 (Del).

4. He also relied on various other decisions to the proposition that in absence of notice u/s 143(2), the reassessment order cannot be passed. Therefore, the reassessment order in the present case is legally unsustainable.

5. The ld. DR, on the other hand, strongly objected to the admission of the additional ground raised by the assessee. He submitted that the reliance on the

decision of the Hon'ble Supreme Court in the case of NTPC is wrong because the decision is more than 20 years old and in the mean time the provisions of section 292BB were introduced in the statute. The assessee in the instant case has participated in the assessment proceedings as well as appeal proceedings before the CIT(A). Therefore, raising this ground at this juncture is not correct.

6. So far as the validity of reassessment proceedings in absence of non-service of notice u/s 143(2) is concerned, the ld. DR, relying on the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Madhya Bharat Energy Corporation Ltd. (2012) 337 ITR 389 (Del)*, submitted that non-issue of notice u/s 143(2) of the Act to an assessee prior to completion of reassessment would not be fatal to the reassessment. Referring to the decision of the Punjab & Haryana High Court in the case of *Josh Builders & Developers (P) Ltd. vs. PCIT (2016) 389 ITR 314 (P&H),* he submitted that similar proposition has been laid down in the aforementioned case. He accordingly submitted that mere non-service of notice u/s 143(2) will not invalidate the reassessment proceedings.

7. The ld. counsel for the assessee in his rejoinder submitted that the Hon'ble Delhi High Court in the case of PCIT & Anr vs. Silverline & Anr (supra) has considered the objection of the Revenue before the Tribunal for not permitting the assessee to raise the point concerning non-issuance of notice u/s 143(2) of the Act for the first time in the appeal before the ITAT. Similarly, the Hon'ble Delhi High Court in the case of Jai Shiv Shankar Traders Pvt. Ltd. (supra) has considered the decision of Madhya Bharat

Energy Corporation Ltd. (supra) and relying on various decisions it has been held that failure by the Assessing Officer to issue a notice to the assessee u/s 143(2) of the Act subsequent to 16th December, 2010 when the assessee made a statement before the Assessing Officer to the effect that the original return filed should be treated as a return pursuant to a notice u/s 148 of the Act is fatal to the order of the reassessment. He accordingly submitted that both the issues raised by the ld. DR i.e., non-admission of the additional ground raised before the Tribunal for the first time challenging the non-issuance of notice u/s 143(2) and the decision in the case of Madhya Bharat Energy Corporation Ltd. (supra) are decided against the Revenue. Therefore, the reassessment order passed by the Assessing Officer without complying with the mandatory requirement of notice being issued by the Assessing Officer to the assessee u/s 143(2) is legally unsustainable.

8. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also considered the various decisions cited before us. It is an admitted fact that in response to the notice u/s 148 dated 28th March, 2008 the assessee, vide letter dated 9th May, 2008 has requested the Assessing Officer to treat the return already filed as return filed in response to notice u/s 148. It is also an admitted fact that no notice u/s 143(2) of the Act was issued subsequent to the filing of the return by the assessee in response to the notice u/s 148 of the IT Act. The information supplied by the Assessing Officer to the assessee in response to the RTI application reads as under:-

" In response to the application filed by the applicant dated 17.01.2018 and received in this office on 19.01.2018 the following information is furnished.
S.no. 1. No remand report was passed by this office.
S.no. 2. No rejoinder was filed by the assessee.
S.no.3. No notice u/s 143(2) of the I.T Act was issued subsequent to the submission of ITR filed by the assessee in response to notice u/s 148 of the I.T Act. However, notice u/s 142(1) of the Income Tax Act, was issued on 19.08.2008 & 24.11.2008 which was served on 21.08.2008 & 28.11.2008 respectively."

9. It is also an admitted fact that the assessee for the first time before the Tribunal raised an additional ground challenging the validity of the reassessment order in absence of issue of notice u/s 143(2) of the IT Act. We find the Hon'ble Delhi High Court in the case of Silverline & Anr (supra), on the issue of admission of additional ground as well as failure to issue a notice u/s 143(2) of the IT Act, 1961 and failure to serve such notice on an assessee and the application of provisions of section 292BB, has observed as under:-

"12. The Court first proposes to consider the question as to whether in terms of the proviso to Section 292BB of the Act, the Assessee was precluded, at the stage of the proceedings before the ITAT, from raising a contention regarding failure of the AO to issue a notice under Section 143(2) of the Act. The legal position appears to be fairly well settled that Section 292BB of the Act talks of the drawing of a presumption of service of notice on an Assessee and is basically a rule of evidence. In Commissioner of Income Tax v. Parikalpana Estate Development (P.) Ltd. (supra) in answering a similar question, the Court referred to its earlier decision in Commissioner of Income Tax v. Mukesh Kumar Agrawal (2012) 345 ITR 29 (All.) and pointed out that Section 292BB of the Act was a rule of evidence which validated service of notice in certain circumstances. It introduces a deeming fiction that once the Assessee appears in any proceeding or has cooperated 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. It was held that Section 292BB of the Act is a rule of evidence and it has nothing to do with the mandatory requirement of giving a notice and especially a notice under Section 143(2) of the Act which is a notice giving jurisdiction to the AO to

frame an assessment. The decision of the Allahabad High Court in Manish Prakash Gupta v. Commissioner of Income Tax (supra) is also to the same effect.

13. In Pr. CIT v. Shri Jai Shiv Shankar Traders Pvt. Ltd. (supra), this Court has also discussed the distinction between a failure to 'issue' notice and a failure to 'serve' a notice on an Assessee. It was held, after noticing the decisions of the Allahabad High Court in Commissioner of Income Tax v. Rajeev Sharma (2011) 336 ITR 678 and Commissioner of Income-tax-II, Lucknow v. Salarpur Cold Storage (P.) Ltd. [2014] 50 taxmann.com 105 (All.) and the decision of the Madras High Court in Sapthagiri Finance & Investments v. Income Tax Officer (2013) 90 DTR (Mad) 289), that Section 292 BB of the Act would apply insofar as failure of 'service' of notice was concerned and not with regard to the failure to 'issue' notice. In other words, the failure of the AO, in re-assessment proceedings, to issue notice under Section 143(2) of the Act, prior to finalising the re-assessment order, cannot be condoned by referring to Section 292BB of the Act.

14. Consequently, the Court does not find merit in the objection of the Revenue that the Assessee was precluded from raising the point concerning the non-issuance of notice under Section 143 (2) of the Act in the present case in view of the proviso to Section 292BB of the Act.

15. The Court also finds merit in the contention of the Assessee that in any event as far as AYs 2005-06 to 2007-08 is concerned, Section 292BB of the Act would not apply since it is prospective in its application, i.e., applicable from AY 2008-09 onwards. The legal position in this regard appears to be well settled as explained in CIT v. Kuber Tobacco Producers P. Ltd. (supra) and Commissioner of Income Tax v. Mohammad Khaleeq (supra).

16. As regards the objection of the Revenue to the ITAT permitting the Assessee to raise the point concerning non-issuance of notice under Section 143(2) of the Act for the first time in the appeal before the ITAT, the Court is of the considered view that in view of the settled legal position that 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. It raises a question of law as far as the present cases are concerned since it is not in dispute that prior to finalisation of the reassessment orders, notice under Section 143(2) of the Act was not issued by the AO to the Assessee. With there being no fresh evidence or disputed facts sought to be brought on record, and the issue being purely one of law, the ITAT was not in error in permitting the Assessee to raise such a point before it. This finds support in the decision of the Supreme Court in National Thermal Power Co. Ltd. v. Commissioner of Income Tax (supra) and the decision of this Court in Gedore Tools (P) Ltd. v. Commissioner of Income Tax (supra).

10. Similarly, so far as the mandatory requirement of notice u/s 143(2) of the Act is concerned, the Hon'ble High Court in the said decision, from para 20 onwards, has observed as under:-

> "20. The proposal to reopen an assessment under Section 147 of the Act is to be based on reasons to be recorded by the AO. Such reasons have to be communicated to the Assessee. However, 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 AO having to issue to the Assessee a notice under Section 143(2) of the Act before finalising the order of the reassessment.
>
> 21. In this context reference may be made to the decision of the Madras High Court in Sapthagiri Finance & Investments v. Income Tax Officer (supra) where again the Assessee did not file a return pursuant to Section 148 of the Act. The AO then issued a notice to it under Section 142(1) of the Act. The Assessee thereafter appeared before the AO and stated that the original return filed should be treated as the return filed in response to the notice under Section 148 of the Act. In those circumstances, the High Court observed that if there was some explanation that was required to be offered by the Assessee, notwithstanding the above submission made by it, the AO ought to have issued a notice under Section 143(2) of the Act. The Madras High Court observed:
>
> > "Merely because the matter was discussed with the Assessee and the signature is affixed it does not mean the rest of the procedure of notice under Section 143(2) of the Act was complied with or that on placing the objection the Assessee had waived the notice for further processing of the reassessment proceedings. The fact that on the notice issued u/s 143(2) of the Act, the assessee had placed its objection and reiterated its earlier return filed as one filed in response to the notice issued u/s 148 of the Act and the Officer had also noted that the same would be considered for completing of assessment, would show that the AO has the duty of issuing the notice under Section 143(3) to lead on to the passing of the assessment. In the circumstances, with no notice issued u/s 143(3) and there being no waiver, there is no justifiable ground to accept the view of the Tribunal that there was a waiver of right of notice to be issued u/s 143(2) of the Act."
>
> 22. The decisions of the Allahabad High Court in Commissioner of Income Tax v. Rajeev Sharma (supra) and Commissioner of Income-tax-II, Lucknow v. Salarpur Cold Storage (P.) Ltd. (supra) also reiterate the above legal position. As far as this Court is concerned, the decision in Director of Income Tax v. Society

For Worldwide Interbank Financial Telecommunications (2010) 323 ITR 249 (Del) and the recent decision in Pr. CIT v. Shri Jai Shiv Shankar Traders Pvt. Ltd. (supra) hold likewise.

23. With the legal position being abundantly clear that a reassessment order cannot be passed without compliance with the mandatory requirement of notice being issued by the AO to the Assessee under Section 143(2) of the Act, the ITAT was in the present case right in concluding that the reassessment orders in question were legally unsustainable."

11. Similarly, the Hon'ble Delhi High Court, after considering the earlier decision in the case of Madhya Bharat Energy Corporation Ltd. (supra), has held that failure by the Assessing Officer to issue a notice to the assessee u/s 143(2) of the Act after the assessee files the return in response to notice u/s 148 is fatal to the order of reassessment. The relevant observation of the Hon'ble High Court from para 12 onwards read as under:-

"8. When this appeal was first listed before this Court on 29 th July, 2015 reliance was placed by Ms Suruchi Aggarwal, learned Senior Standing counsel for the Revenue on the decision of this Court in 'Commissioner of Income Tax v. Madhya Bharat Energy Corporation Ltd. (2011) 337 ITR 389) Del which purported to hold that non-issue of notice under Section 143(2) of the Act on an Assessee prior to completion of the reassessment would not be fatal to the reassessment. She also sought to distinguish the decision in ACIT v. Hotel Blue Moon (supra) on the ground that it pertained to a block assessment.

9. Dr Rakesh Gupta, learned counsel appearing for the Assessee, at the outset drew the attention of this Court to an order passed by this Court on 17th August, 2011 in Review Petition No.441/2011 in ITA No.950/2008 (CIT v. Madhya Bharat Energy Corporation) whereby this Court reviewed its main judgment in the matter rendered on 11th July 2011 on the ground that the said appeal had not been admitted on the question concerning the mandatory compliance with the requirement of issuance of notice under Section 143(2) of the Act. In its review order, this Court noted that at the time of admission of the appeal on 17 th February, 2011 after noticing that in the said case that no notice under Section 143(2) had ever been issued, the Court held that no question of law arose on that aspect. The upshot of the above discussion is that the decision of this Court in CIT v. Madhya Bharat Energy Corporation (supra) is not of any assistance to the Revenue as far as the issue in the present case is concerned.

10. Ms Aggarwal nevertheless urged that notwithstanding the above position, the decision of this Court in CIT v. Vision Inc. (2012) 73 DTR 201 (Del) would apply. The said judgment held that since on the facts of that case the Assessee had been properly served with the notice under Section 143(2) of the Act within the statutory time limit prescribed under the proviso thereto, the ITAT should not have set aside the re-assessment in toto. Ms Aggarwal placed reliance on Section 292BB of the Act and urged that the Assessee having not raised any objection about non service of the notice under Section 143(2) of the Act either at any time before the AO or prior to, or during the reassessment proceedings, the Assessee was precluded from raising such an objection in the subsequent stages of the proceedings.

11. Dr Rakesh Gupta for the Assessee on the other hand placed reliance on a large number of decisions of the High Courts apart from the decision of the Supreme Court in ACIT v. Hotel Blue Moon (supra). He submitted that the failure to issue a notice under Section 143(2) of the Act subsequent to the Assessee having informed the AO that the return originally filed should be treated as the return filed pursuant to the notice under Section 148 of the Act, was fatal to the order of re-assessment.

12. The narration of facts as noted above by the Court makes it clear that no notice under Section 143(2) of the Act was issued to the Assessee after 16th December 2010, the date on which the Assessee informed the AO that the return originally filed should be treated as the return filed pursuant to the notice under Section 148 of the Act.

13. In DIT v. Society for Worldwide Interbank Financial Telecommunications (2010) 323 ITR 249 (Del), this Court invalidated an reassessment proceedings after noting that the notice under Section 143(2) of the Act was not issued to the Assessee pursuant to the filing of the return. In other words, it was held mandatory to serve the notice under Section 143(2) of the Act only after the return filed by the Assessee is actually scrutinised by the AO.

14. The interplay of Sections 143 (2) and 148 of the Act formed the subject matter of at least two decisions of the Allahabad High Court. In CIT v. Rajeev Sharma (2011) 336 ITR 678 (All.) it was held that a plain reading of Section 148 of the Act reveals that within the statutory period specified therein, it shall be incumbent to send a notice under Section 143(2) of the Act. It was observed:

> "the provisions contained in sub-Section (2) of Section 143 is mandatory and the legislature in their wisdom by using the word 'reason to believe' had cast a duty on the Assessing Officer to apply mind to the material on record and after being satisfied with regard to escaped liability, shall serve notice specifying particulars of such claim. In view of the above, after receipt of return in response to notice under Section 148, it shall be mandatory for the AO to serve a notice under sub-Section 2 of Section 143 assigning reason therein. In absence of any notice issued under sub-Section 2 of Section 143 after receipt of fresh return submitted by the

> Assessee in response to notice under Section, the entire procedure adopted for escaped assessment, shall not be valid."

15. In a subsequent judgment in CIT v. Salarpur Cold Storage (P.) Ltd. (2014) 50 Taxmann.com 105 (All) it was held as under:

> "10. Section 292 BB of the Act was inserted by the Finance Act, 2008 with effect from 1 April 2008. Section 292 BB of the Act provides a deeming fiction. The deeming fiction is to the effect that once the assessee has appeared in any proceeding or cooperated in any enquiry relating to an assessment or reassessment, it shall be deemed that any notice under the provisions of the Act, which is required to be served on the assessee, has been duly served upon him in time in accordance with the provisions of the Act. The assessee is precluded from taking any objection in any proceeding or enquiry that the notice was (i) not served upon him; or (ii) not served upon him in time; or (iii) served upon him in an improper manner. In other words, once the deeming fiction comes into operation, the assessee is precluded from raising a challenge about the service of a notice, service within time or service in an improper manner. The proviso to Section 292 BB of the Act, however, carves out an exception to the effect that the Section shall not apply where the assessee has raised an objection before the completion of the assessment or reassessment. Section 292 BB of the Act cannot obviate the requirement of complying with a jurisdictional condition. For the Assessing Officer to make an order of assessment under Section 143 (3) of the Act, it is necessary to issue a notice under Section 143 (2) of the Act and in the absence of a notice under Section 143 (2) of the Act, the assumption of jurisdiction itself would be invalid."

16. In the same decision in v. Salarpur Cold Storage (P.) Ltd.(supra), the Allahabad High Court noticed that the decision of the Supreme Court in ACIT v. Hotel Blue Moon (supra) where in relation to block assessment, the Supreme Court held that the requirement to issue notice under Section 143(2) was mandatory. It was not "a procedural irregularity and the same is not curable and, therefore, the requirement of notice under Section 143(2) cannot be dispensed with."

17. The Madras High Court held likewise in Sapthagiri Finance & Investments v. ITO (2013) 90 DTR 289 (Mad). The facts of that case were that a notice under Section 148 of the Act was issued to the Assessee seeking to reopen the assessment for AY 2000-01. However, the Assessee did not file a return and therefore a notice was issued to it under Section 142 (1) of the Act. Pursuant thereto, the Assessee appeared before the AO and stated that the original return filed should be treated as a return filed in response to the notice under Section 148 of the Act. The High Court observed that if thereafter, the AO found that there were problems with the return which required explanation by the Assessee then the AO ought to have followed up with a notice under Section 143(2) of the Act. It was observed that:

> "Merely because the matter was discussed with the Assessee and the signature is affixed it does not mean the rest of the procedure of notice under Section 143(2) of the Act was complied with or that on placing the objection the Assessee had waived the notice for further processing of the reassessment proceedings. The fact that on the notice issued u/s 143(2) of the Act, the assessee had placed its objection and reiterated its earlier return filed as one filed in response to the notice issued u/s 148 of the Act and the Officer had also noted that the same would be considered for completing of assessment, would show that the AO has the duty of issuing the notice under Section 143(3) to lead on to the passing of the assessment. In the circumstances, with no notice issued u/s 143(3) and there being no waiver, there is no justifiable ground to accept the view of the Tribunal that there was a waiver of right of notice to be issued u/s 143(2) of the Act."
>
> 18. As already noticed, the decision of this Court in CIT v. Vision Inc. proceeded on a different set of facts. In that case, there was a clear finding of the Court that service of the notice had been effected on the Assessee under Section 143 (2) of the Act. As already further noticed, the legal position regarding Section 292BB has already been made explicit in the aforementioned decisions of the Allahabad High Court. That provision would apply insofar as failure of "service" of notice was concerned and not with regard to failure to "issue" notice. In other words, the failure of the AO, in re-assessment proceedings, to issue notice under Section 143(2) of the Act, prior to finalising the re-assessment order, cannot be condoned by referring to Section 292BB of the Act.
>
> 19. The resultant position is that as far as the present case is concerned the failure by the AO to issue a notice to the Assessee under Section 143(2) of the Act subsequent to 16th December 2010 when the Assessee made a statement before the AO to the effect that the original return filed should be treated as a return pursuant to a notice under Section 148 of the Act, is fatal to the order of re-assessment.
>
> 20. Consequently, there is no legal infirmity in the impugned order of the ITAT. No substantial question of law arises. The appeal is dismissed."

12. Since, in the instant case, admittedly, no notice u/s 143(2) of the Act was issued and served on the assessee after the return in response to notice u/s 148 of the Act was filed by stating that the original return filed may be treated as return filed in response to notice u/s 148, therefore, the reassessment order passed by the Assessing Officer is not sustainable in law. We, therefore, accept the additional ground raised by the

assessee and quash the order passed u/s 143(3)/147 for non-issuance of notice u/s 143(2) of the Act which is mandatorily required. The additional ground raised by the assessee is accordingly allowed. Since the assessee succeeds on this legal ground, the other grounds being academic in nature are not being adjudicated.

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

The decision was pronounced in the open court on 18.02.2019.

Sd/-	Sd/-
(SUCHITRA KAMBLE) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMFBER

Dated: 18th February, 2019

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi