आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR

श्री रमेश सी शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 504/JP/2016
निर्धारण वर्ष/Assessment Year : 2007-08

I.T.O., Ward 3(1), Jaipur.	बनाम Vs.	Shri Hans Raj Sharma, S/o- Sh. Mohru Ram, Kanak Pura, Sirsi Road, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AKIPB 7268 D		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

प्रत्याक्षेपण/C.O. No. 20/JP/2016
(Arising out of आयकर अपील सं./ITA No. 504/JP/2016)
निर्धारण वर्ष/Assessment Year 2007-08

Shri Hans Raj Sharma, S/o- Sh. Mohru Ram, Kanak Pura, Sirsi Road, Jaipur.	बनाम Vs.	I.T.O., Ward 3(1), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AKIPB 7268 D		
प्रत्याक्षेपक/Objector		प्रत्यर्थी/Respondent

राजस्व की ओर से/ Revenue by: Shri Ashok Khanna (JCIT) &
Shri R.A. Ojha (A.O.)
निर्धारिती की ओर से/ Assessee by: Shri Himanshu Goyal &
Ms. Praniti Agarwal (CAs).

सुनवाई की तारीख/ Date of Hearing: 25/03/2019
उदघोषणा की तारीख/Date of Pronouncement : 09/04/2019

आदेश/ ORDER

PER: R.C. SHARMA, A.M.

This is an appeal filed by the revenue and the cross objection filed by the assessee against the order of ld. CIT(A)-I Jaipur dated 15/02/2016

for the A.Y. 2007-07 in the matter of order passed U/s 143(3) read with Section 147 of the Income Tax Act, 1961 (in short, the Act).

2. First, we take up the appeal filed by the department wherein the revenue has raised following grounds of appeal:

> *"1. Whether on the facts and circumstances of the case and in law, the ld. CIT(A) has erred in allowing relief in respect of addition made by the A.O. on account of unexplained bank deposits on the basis of additional evidences, which were never submitted before the A.O. despite providing various opportunities by A.O.*
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> *2. Whether on the facts and circumstances of the case and in law the ld. CIT(A) has erred in allowing relief in respect of addition made by the A.O. on account of unexplained bank deposits on the basis of additional evidences which were admitted without satisfying the conditions mentioned in Rule 46A of the IT Rules, 1962."*

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee is an agriculturist. During the year under consideration, the assessee sold agricultural land jointly owned by four brothers. The case of the assessee was reopened on the basis of information that the assessee had sold agricultural land which was valued by the Sub-Registrar at an amount higher than the sale consideration mentioned in the sale deed. The A.O. issued notice U/s 148 and in reply to the same, the assessee filed return declaring income from agriculture and bank interest. Since as per the opinion of the assessee, the said agricultural land was not a capital asset within the meaning of Section 2(14) of the Act, hence no transaction of sale of agricultural land was shown

in the return filed in pursuance to the notice U/s 148 of the Act. During the course of reassessment proceedings, the A.O. found that the assessee had sold agriculture land to a party named Megha Colonisers and received a sum of Rs. 55,00,000/ - (1/4th Share) on account of advance against such land. The AO made the addition of the said amount stating that the appellant has been unable to explain the source of said credit and thus considering the same as unexplained credit in the bank account of the assessee.

4. By the impugned order, the ld. CIT(A) deleted by the addition after observing as under:

> *"(iii) I have duly considered the above contention of the appellant and found merit in it. It is evident from the sale deed dated 19.05.2007, executed by the appellant along with his three brothers in favour of M/s Megha Colonisers that cheque No. 968599 dated 14.03.2007 amounting to Rs. 55 Lac was provided by M/s Megha Colonizers to the appellant and the same was credited into the Bank of Baroda bank account of the appellant on 15.03.2007. Further, the appellant has also filed a confirmation from M/s Megha Colonisers in this regard. Therefore, looking to the totality of facts and circumstances, it is held that there was no justification for making the addition of Rs. 55 lac and thus the same cannot be sustained, hence deleted."*

5. Now the revenue is in further appeal before the ITAT.

6. We have considered the rival contentions and carefully gone through the orders of the authorities below and found from the record that the ld. CIT(A) has deleted the addition after calling a remand report from the A.O. wherein the ld. CIT(A) found that the assessee has filed all the relevant documents to justify its case like confirmation from the purchaser, bank statement of purchaser highlighting the said transaction and copy of sale deed of the said land. We found that after calling a remand report and the rejoinder from the assessee, the ld. CIT(A) has recorded a detailed finding to the effect that the sale deed dated 19/5/2007 was executed by the assessee alongwith his three brothers in favour of M/s Megha colonizers and payment was received through cheuqe No. 9685599 dated 14/3/2007 amount to Rs. 55.00 lacs. This amount was credited in the bank account of the assessee maintaining in Bank of Baroda on 15/3/2007. The confirmation from M/s Megha colonizers was also filed, which is placed on record. We do not find any contravention of Rule 46A of the IT Rules in so far as the ld. CIT(A) has already given opportunity to the A.O. by calling a remand report and after seeing all the documents filed before him to the A.O. for his remand report and after considering the same, the ld. CIT(A) has deleted the addition of Rs. 55.00 lacs. Accordingly, we do not find any error or illegality in the impugned order of the ld. CIT(A).

7. Moreover, the tax effect in the appeal filed by the revenue is less than Rs. 20.00 lacs, therefore, in view of the CBDT Circular No. 3/2018 dated 11th July, 2018 (F No. 279/Misc. 142/2007-ITJ(Pt) instructing the authorities below that departmental appeal should not be filed before ITAT where the demand/tax effect does not exceed Rs. 20 lacs, therefore, in view of the above CBDT circular, the appeal of the revenue is not maintainable and deserves to be dismissed.

8. Now we take the C.O. filed by the assessee, wherein following grounds have been taken:

> *"1. That under the facts and circumstances of the case, the whole proceedings of assessment and liable to be quashed as the notice U/s 148 of the IT Act, 1961 has been issued without proper sanction of the JCIT of the range which is in violation of sub-section (2) of Section 151 of the IT Act, 1961 rendering such notice to be illegal and hence whole proceedings are liable to be quashed.*
>
> *2. That under the facts and circumstances of the case whole proceedings of assessment are liable to be quashed as the A.O. made the assessment without issuing notice U/s 143(2) of the Act.*
>
> *3. That under the facts and circumstances of the case, the ld. CIT(A) has erred in sustaining the action of the A.O. in treating the lands sold by the assessee as capital assets in place of agricultural lands.*
>
> *4. That under the facts and circumstances of the case, the ld. CIT(A) has erred in sustaining the action of the A.O. in not allowing the deduction U/s 54B in connection with an agricultural land purchased for Rs. 70,00,000/-.*
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> *5. That under the facts and circumstances of the case, the ld. CIT(A) has erred in sustaining the action of the A.O. in not allowing the deduction U/s 54F for purchase of residential house at Nirman Nagar, Jaipur for Rs. 81,44,000.*

6. *That under the facts and circumstances of the case, the ld. CIT(A) has erred in ignoring and not considering details filed by the assessee which go to the root of the case.*

7. *That the assessee craves leave to add, amend, alter, withdraw any of the grounds of appeal before the hearing."*

9. Grounds taken in the C.O. with regard to validity of notice U/s 148 without sanction U/s 151(2) and framing of assessment U/s 143(3) without issue of notice U/s 143(2) are purely legal ground, therefore, can be admitted for the first time at Tribunal level in terms of decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 97 Taxman 358 (SC).

10. The first ground of the C.O. raised by the assessee relates to issue of notice U/s 148 of the Act without providing sanction of the JCIT of the Range which is in violation of Section 151(2) of the Act and such notice to be illegal and hence whole proceedings are liable to be quashed.

11. As the allegation of the assessee was that the reasons recorded by the A.O. and reopening thereof has not been sanctioned by the JCIT, the Bench asked the department to demonstrate the same by producing case records, we found that the department could produce just covering letter stating that the sanction is attached whereas sanction was not attached with the same. The bench precisely asked entire sanction which the department failed to produce. In support of the contention that without proper sanction U/s 151(2) of the Act, before issue of notice U/s 148 of

the Act renders such notice to be illegal, the ld AR relied on the following judicial pronouncements:

(i) Sunil Agarwal vs ITO Ward1(3)(3), ITAT Delhi

(ii) CIT Jabalpur vs S. Goyanka Lime and Chemical Ltd. Supreme Court of India

(iii) ITO Ward 17(4) vs M/s Virat Credit & Holdings Pvt. Ltd.

12. We have considered the rival contentions and carefully gone through the orders of the authorities below. It is clear that in respect of issue raised by the assessee. Specific query was raised by the Bench on 16/10/2017, 19/09/2018 and 15/11/2018 giving time to the department for producing the case record to substantiate proper sanction by the JCIT of the Range U/s 151(2) of the Act. However, even after expiry of more than seventeen months when the case was again fixed on 25/3/2019, the department could not produce the evidence of sanction having been issued U/s 151(2) of the Act. Accordingly, considering the judicial pronouncements referred above and applying to the facts of the case, we do not find any merit in the notice issued U/s 148 of the Act without obtaining sanction by the JCIT of the Range U/s 151(2) of the Act.

13. The assessee has also challenged the framing of assessment without issue of notice U/s 143(2) of the Act. Our attention was also invited to acknowledgement of return filed for A.Y. 2007-08 on 13th March 2015 with ITO, Ward 3(1), Jaipur alongwith computation of income.

14. We have considered the rival contentions and found from the record that the assessee filed its return of income in response to the notice u/s 148 of the Act on 13.03.2015. The AO had concluded the assessment without issuing notice under section 143(2) of the Act after the return was filed by the assessee in response to notice under section 148 of the Act. The AO after receiving the return of the appellant filed in pursuance to notice u/s 148 of the Income Tax Act, 1961 did not issue notice u/s 143(2) of the Act which is sine qua non for assuming jurisdiction to assess the case. This is a grave error which is even not rectifiable u/s 292BB of the Act and hence order so passed lacks proper authority with the AO and hence the order so passed deserves to be declared void ab initio. In case of reassessment proceedings also once the assessee furnishes his return, same is considered as a return required to be furnished u/s 139 and for proceeding further in a case of return filed u/s 139 the AO is supposed to issue notice u/s 143(2) for assuming jurisdiction to assess the case. In case of non-issuance of such vital notice no assessment can be framed by the AO as the same lacks authority for the same. Further such vital defect cannot be cured even by resorting to the provisions of section 292BB as the provisions of section 292BB are applicable in those cases where notice was issued but not served. In the present case since no notice was ever issued and hence such defect cannot be cured.

15. Thus, it is clear that the AO had concluded the reassessment considering the Return of Income filed by the assessee on 13.03.2015 but failed to issued notice u/ s 143(2) of the Act in order to process the said return. The department was precisely asked by the Bench on 16/10/2017, 19/09/2018 and 15/11/2018 to substantiate the issue and service of notice U/s 143(2) of the Act, but the same could not be produced even on the specific query by the bench. Without issue of notice U/s 143(2) completing the reassessment proceedings are liable to be quashed in view of the following judicial pronouncements:

(i) **ACIT v/s Hotel Blue Moon 321 ITR 362 (SC)** wherein it was held by the Hon'ble SC that issuance of notice u/s 143(2) is mandatory even in block assessments.

(ii) **CIT v/s Salarpur Cold Storage 50 taxmann.com 105 (All. HC):** For framing order u/ s 143(3) it is necessary to issue a notice u/ s 143(2) of the Act, and in absence of notice u/s 143(2) the assumption of jurisdiction itself would be invalid.

(iii) **Travancore Diagnostics P Ltd. v/s ACIT 390 ITR 167 (Kerela HC):** Omission to issue notice u/s 143(2) is incurable defect even u/s 292BB of the Income Tax Act, 1961.

(iv) **PCIT - 08 v/s Jai Shiv Shankar Traders P Ltd. 383 ITR 448 (Delhi):** Issue of notice u/s 143(2) is not a procedural requirement and is mandatory and completion of assessment without issue of notice u/s 143(2) is fatal to the assessment. In this case return was filed after issuance of notice u/s

142(1) and since no notice was issued u/s 143(2) the assessment was held to be invalid.

(v) **ITO v/s Neeraj Goel (ITAT Delhi Bench SMC)** : Assumption of jurisdiction to frame an assessment or non-assumption of jurisdiction to frame an assessment goes to the root of the judicial act of framing an assessment order and in event of non-assumption of jurisdiction u/s 143(2) of the Act to frame an assessment the act of the assessing officer in framing an assessment order without issuing notice u/s 143(2) cannot be saved under the provisions of section 292B of the IT Act, 1961 or under section 292BB of the IT Act, 1961 and therefore the assessment order so framed will be void ab initio.

(vi) **Kamla Devi Sharma v/s ITO (ITAT, Jaipur Bench):** In this case decided on 06.02.2018 this Hon'ble Bench discussed all the above orders and reached on the conclusion that non-issue of notice u/s 143(2) in reassessment proceedings, prior to finalizing reassessment order cannot be condoned by referring to section 292BB and is fatal to the order of reassessment.

16. Applying the proposition of law laid down in the above judicial pronouncements, we do not find any merit in the assessment so framed U/s 143(3) without issue of notice U/s 143(2) of the Act.

17. We have already decided the main ground of reassessment being null and void in absence of issue of notice U/s 143(2) of the Act and also issue of notice U/s 148 without proper sanction U/s 151(2) of the Act, the

other ground raised but the assessee are not being touched. Hence, the C.O. of the assessee is allowed in terms indicated hereinabove.

18. In the result, appeal of the revenue is dismissed and the C.O. of the assessee is allowed in terms indicated hereinabove.

Order pronounced in the open court on 09th April, 2019.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Sd/-
(रमेश सी शर्मा)
(RAMESH C SHARMA)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 09th April, 2019
*Ranjan
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- The I.T.O., Ward 3(1), Jaipur.
2. प्रत्यर्थी / The Respondent- Shri Hans Raj Sharma, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 504/JP/2016 & C.O. 20/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar