

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G", NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
And
SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER

	I.T.A. No. 4028/DEL/2019	
	A.Y. : 2010-11	
TODAY REALTY PVT. LTD., C-28, G.F., PANCHSHEEL ENCLAVE, NEW DELHI - 110 017 (PAN: AACCT8999G)	VS.	ITO, WARD 25(3), NEW DELHI
(APPELLANT)		(RESPONDENT)

Assessee by : Sh. Manoj Kumar Patawari, CA
Department by : Ms. Ashima Neb, Sr. DR.

ORDER

PER H.S. SIDHU : JM

The assessee has filed this appeal against the impugned order dated 27.3.2019 passed by the Ld. Commissioner of Income Tax (Appeals-28), New Delhi.

2. The facts relating to the issue in dispute are that the assessee filed its return of income on 23.12.2010 declaring a loss of Rs. 37,642/-. The AO processed the same u/s. 143(1) of the Income Tax Act, 1961. Subsequently, during the assessment proceedings for AY 2012-13 and 2013-14, the AO noticed that the share application money was received by the assessee for which no details and supporting documents were furnished. The verification made by the AO by issuing notices u/s. 133(6) of the I.T. Act also lead to the facts that the share applicants were

untraceable or non-existent. Consequently, the AO treated the share application money in dispute from the unexplained sources and the case was reopened under section 147 of the I.T. Act by issuing notice u/s. 148 of the Act on 31.3.2017. But no return of income was filed in response to the notice u/s. 148 of the Act. AO also asked the assessee to produce those persons from whom the assessee has received the share application money, but the assessee failed to do so. After examining the details of share applicants, AO found that none of the share applicants were having the creditworthiness of investing the huge amount as share application money in the assessee company. As per AO, their identity and genuineness of transactions were also not proved. Keeping in view of the various decisions of the Hon'ble Delhi High Court, the AO treated the share application money in dispute as unexplained u/s. 68 of the I.T. Act as well as the commission expenses @3% on the share application money was also disallowed u/s. 69C of the Act. The amount in dispute of the share were added back to the income of the assessee and accordingly, the AO completed the assessment u/s. 143(3)/147 of the I.T. Act, 1961 vide order dated 22.12.2017. Aggrieved by the aforesaid order passed by the AO, the assessee filed the appeal before the Ld. CIT(A) who vide his impugned order dated 27.3.2019 dismissed the appeal of the assessee. Now the Assessee is aggrieved against the impugned order dated 27.3.2019 of the Ld. CIT(A) and filed the present appeal before the Tribunal.

3. At the time of hearing, Ld. Counsel for the assessee draw our attention towards the ground no. 2 & 3 raised by the Assessee in this Appeal and stated that he wants to argue only these legal grounds i.e. ground no. 2 & 3 which are reproduced as under:-

"2. That the Ld. CIT(A) has erred in law as well as on facts in confirming the addition made in the assessment order passed under section 143(3)/147 of the Act dated 22.12.2017 (impugned order) passed by the Ld. AO.

3. That the Ld. CIT(A) has erred in law as well as on facts in confirming the impugned order passed under section 143(3)/147 of the Act is without jurisdiction for want of issue of notice u/s. 143(2) of the I.T. Act, 1961 and thus void ab initio."

3.1 Ld. Counsel for the assessee stated that Ld. CIT(A) has wrongly confirmed the order of the AO passed u/s. 143(3)/147 of the Act dated 22.12.2017 which is without jurisdiction and for want of issue of notice u/s. 143(2) of the I.T. Act, 1961 and thus void ab initio. He further submitted that whenever the return in response to notice u/s. 144/148 is not filed then, the assessment has to be completed u/s. 144/148 of the Act. However in the case of the assessee the assessment has been

completed u/s. 143(3)/147 of the I.T. Act, then it is deemed that the return filed originally is accepted as return filed in response to notice under section 148 and it is mandatory to issue notice u/s. 143(2) of the I.T. Act, 1961. However, in the case of the assessee, no notice u/s. 143(2) of the Act has been issued by the AO and he completed the assessment in dispute u/s. 143(3)/147 of the Act which is invalid and void ab initio. To support his arguments, he relied upon the judgment of the Hon'ble Supreme Court of India in the case of ACIT vs. Hotel Blue Moon (2010) 321 ITR 362. He further stated that there are so many other cases wherein it has been laid down that the issue of notice u/s. 143(2) of the Act is mandatory and in the absence of such notice, assessment framed u/s. 143(3)/147 is invalid, void ab initio. Apart from the order of the Hon'ble Supreme Court of India in the case of ACIT vs. Hotel Blue Moon (2010) 321 ITR 362 in support of his arguments, he also relied upon the following case laws:-

- i) PCIT vs. Shri Jai Shiv Shankar Traders Pvt. Ltd. 383 ITR 448 (DHC).
- ii) CIT vs. CPR Capital Services Ltd. (2011) 330 ITR 43 (DHC).
- iii) Virendra Deve Dixit vs. ACIT (2011) 331 ITR 483 (All. HC).
- iv) CIT vs. Cebon India Ltd. (2012) 347 ITR 583 (P&H-HC).

- v) DCIT vs. Mahi Valley Hotels & Resorts
(2006) 287 ITR 360 (Guj. HC).
- vi) Sapthgiri Finance & Investments vs. ITO
(2012) (Mad. HC.)
- vii) Meenakshi Aggarwal vs. ITO ITA No.
4171/Del/2015 (Delhi ITAT).

3.2 Ld. Counsel for the assessee further requested that keeping in view of the law laid down by the Hon'ble Supreme Court of India in the case of ACIT vs. Hotel Blue Moon (Supra) which was followed by the various Hon'ble High Courts and ITAT, the assessment in dispute may be quashed.

3.3 Alternatively, Ld. Counsel for the assessee also argued that if the assessee failed to file the return in response to the notice u/s. 148(1) of the I.T. Act shall constitute default envisaged in clause (a) of section 144(1) of the Act and any such failure shall provide jurisdiction to the AO to make a best judgment assessment u/s. 144 of the Act. He submitted that in the present case the AO did not proceed with the assessment u/s. 144 /147 of the Act due to non-filing of the return in response to notice u/s. 148 of the Act. On the contrary, the AP proceeded that assessment u/s. 143(3)/147 of the I.T. Act and hence, it was mandatory to issue notice u/s. 143(2) of the Act. He submitted that on this account assessment in dispute is liable to be quashed. In support of his arguments, he relied upon the ITAT, Delhi decision in the case of Kush

Leasing (P) Ltd. Vs. ITO, Ward 5(3), New Delhi (2008) 20 SOT 337
(Delhi)

3.4 Ld. Counsel for the assessee finally stated that the Ld. First Appellate Authority has mentioned in the impugned order that inadvertently the AO has mentioned section 143(3)/147 of the Act due to typing mistake, though all the ingredients of section 144 of the Act are available in the assessment order. The mistake is bonafide and does not vitiate the assessment proceedings in view of the provisions of section 292B of the I.T. Act. He submitted that it is necessary to bring out the fact that no show cause notice was issued to the assessee before passing the alleged order u/s. 144/147 of the Act. Finally, Ld. Counsel for the assessee argued that the AO in his Remand Report has stated that the AO has committed this mistake in the assessment order AY 2011-12 as well as AY 2010-11, therefore, the provisions of section 292B of the Act is not applicable as the jurisdiction cannot be rectified by the procedural provisions. Section 292B of the Act does not empower the Act to act without jurisdiction and submitted that the aforesaid principle has been laid down by the Hon'ble Delhi High Court in the case of JCB India Ltd. VS. DCIT (2017) 398 ITR 189. He requested that keeping in view of the aforesaid argument, the assessment in dispute is without jurisdiction and may be quashed by treating the same as void ab initio.

4. On the contrary, Ld. DR relied upon the orders passed by the revenue authorities and stated that on the basis of various documentary evidences, the case of the assessee for the assessment year in dispute was reopened by issuing notice u/s. 148 of the Act and in response to the same assessee has not filed any return of income and the AO completed the assessment after adopting the prescribed procedure under the law. She further submitted that there is no requirement of issuance of notice u/s. 143(2) of the Act as there is no valid return of income filed by the assessee. She further submitted that assessee could raise this objection before the AO, which he has not raised. Therefore, the AO has passed the well reasoned order and Ld. CIT(A) has rightly confirmed the same. She further stated that in the well reasoned assessment order, inadvertently the AO has mentioned section 143(3)/147 of the I.T. Act, 1961 due to typing mistake, though all the ingredients of section 144 are available in the assessment order. The mistake is bonafide and does not vitiate the assessment in view of the provisions of section 292B of the I.T. Act.

5. We have heard both the parties and perused the records especially the order passed by the revenue authorities as well as the citation given by the Ld. Counsel for the assessee especially the landmark decision of the Hon'ble Supreme Court of India in the case of ACIT vs. Hotel Blue Moon (2010) 321 ITR 362 (SC) wherein, the Hon'ble Court has held as under:-

*HELD: "It is mandatory for the AO to issue notice u/s 143 (2).
The issuance and service of notice u/s 143 (2) is mandatory*

and not procedural. If the notice is not served within the prescribed period, the assessment order is invalid Reassessment-----Notice-----Assessee intimating original return be treated as fresh return---Reassessment proceedings completed despite assessee filing affidavit denying serviced of notice under section 143(2)----Assessing Officer not representing before Commissioner (Appeals) that notice had been issued---- Reassessment order invalid due to want of notice under section 143(2)--- Income-tax Act, 1961, ss. 143, 147, 148(1), prov.----ITO v. R.K. GUPTA [308 ITR 49 (Delhi)Tribu.,"

5.1 We further find that apart from the aforesaid decision of the Hon'ble Supreme Court of India in the case of ACIT vs. Hotel Blue Moon (Supra), the various High Courts/ Tribunal has declared assessment/reassessment as invalid on account of non-service of notice u/s. 143(2) of the Act.

DCIT vs. Indian Syntans Investments (P) Ltd. [(2007) 107 ITD 457 (Chennai)]

Validity of reassessment order - Non-service of notice under s.143(2) - "The amended Proviso to s.148 of the Income Tax Act 1961 was not applicable in case where the assessee was not served a notice under s.143(2) of the Act. The reassessment made in such a case was invalid S.143(2) and s.148 of the Income Tax Act 1961."

CIT vs. M/s Panorama Builders Pvt. Ltd. in Tax Appeal no. 435 of 2011 of Hon'ble Gujarat High Court

Issue Involved: "Whether non-issuance of the notice u/s 143(2) within the prescribed time, made the whole block assessment order null and void and bad in law, despite the assessee not having raised any objection before the passing of the assessment order and despite the provisions of section 292BB of the Act? "

Held: "In this case, Hon'ble High Court has held that section 292BB cures the defects in service of notice but section 292BB is 'confined to only

service of notice under this Act and this section does not apply to 'Issuance of notice' under the provisions of Act. It does not lay down that if a mandatory notice is required to be issued by the assessing officer and it has not been issued within the period of limitation fixed under the law, then such notice shall be deemed to have been issued within time.

It has been further held that resort cannot be taken by the Revenue to section 292BH to give a go-bye to mandatory requirement of issuance of notice within the statutory fixed by the proviso to section 143(2) of the Act."

CIT vs Rajeev Sharma 336 ITR 678, High court of Allahabad.

"In view of above submissions and case laws, it has been established that no notice u/s 143(2) was issued in the present case and therefore the impugned assessment is liable to be annulled."

M/s Sapthagiri Finance and Investments vs. ITO: TC(A). No. 159 of 2006 dated 17.07.2012 (Mad HC) [(2013) 90 DTR (Mad) 289]

Relevant para reproduced here under:

"13. As far as the present case is concerned, the provisions of Section 148 also uses the expression "so far as may be apply accordingly as if such return were a return required to be furnished under Section 139". Thus, understanding this provisions in the background of the decision of the Apex Court, on the facts available, we are of the view that in completing the assessment under Section 148 of the Act, compliance of the procedure laid down under Sections 142 and 143 (2) is mandatory. On the admitted fact that beyond notice under Section 142(1), there was no notice issued under Section 143(2), and in the light of the fact that the very basis of the reassessment was the failure on the part of the assessee in not disclosing the capital gains arising on the transfer of property for assessment and that admittedly the assessee had requested the officer to accept the original

return as a return filed in response to Section 148 of the Act, we hold that there was total failure on the part of the Revenue from complying with the procedure laid down under Section 143(2) of the Act, which is mandatory one as held by the Apex Court."

Alpine Electronics Asia Pte Ltd. vs. DGIT & Ors: [(2012) 341 ITR 247 (Del)

Held: "The service of notice u/s 143(2) within the statutory time limit is mandatory and is not an inconsequential procedural requirement. Omission to issue notice u/s 143 (2) is not curable and the requirement cannot be dispensed with. S. 143(2) is applicable to proceedings u/s 147 & 148."

JYOTI PAT RAM VS. ITO [(2005) 92 ITD 423 (Lucknow) - ShreeJai Shiv Shonhor Traders (P) Ltd. - A.Y. - 2008-09

"Reassessment order passed under section 143(3)/148 without issue of a valid notice under section 143(2) was illegal."

CIT vs. Pawan Gupta & Ors. [(2009) 318 ITR 322 (Del)

Hon'ble Delhi High Court held in Para 38 of the order observed as under:-

"Thus, we are of the clear view that where the assessing officer is not inclined to accept the return of undisclosed assessment filed by the assessee issuance of a notice under section 143(2) is a prerequisite for framing the block assessment order under chapter XIV B of the Income Tax Act, 1961. We are also of the view that if an assessment order is passed in such a situation without complying with section 143(2), it would be invalid and not be merely irregular."

RAJ KUMAR CHAWLA AND ORS. VS. ITO - (2005) 94 ITD 1 (Del)(SB)

Limitation for re-assessment- Service of notice u/s143(2) in time - A.Y.1995-96. "It was presumed by legal fiction that a return filed u/s 148 of the Income Tax Act 1961 would be treated as a return filed u/s 139 of the Act. The assessee had filed its return in response to a notice issued u/s 148 of the

Income Tax Act 1961. The service of notice u/s143(2) of the Act within 12 months of filing the return u/s 148 of the Act was mandatory, but the notice had been served beyond 12 months.

Therefore, as the re-assessment was barred by limitation, no re-assessment could be made u/s 143(3) r/w S.147 of the Act.- ITAT Delhi 'F' Special Bench."

5.2 As regards to the finding of the Ld. CIT(A) and the arguments advanced by the Ld. DR regarding bonafide mistake by the AO for wrongly mentioned the section i.e. 143(3)/147 should be read as 144/147. We have seen that the AO has passed the similar type of assessment order in AY 2010-11 and also mentioned the section 143(3)/147 of the Act where the assessee has not filed any return of income and he has also not issued any notice u/s. 143(2) of the I.T. Act in which we have declared the assessment as void ab initio by respectfully following the order of the Hon'ble Supreme Court of India in the case of ACIT vs. Hotel Blue Moon (2010) 321 ITR 362 (SC). Hence, we are of the view that this is not an oversight intentionally mistake committed by the AO. Even otherwise, the provisions of section 292B of the Act is not applicable as the jurisdiction cannot be rectified by the procedural provisions. Section 292B of the Act does not empower the Act to act without jurisdiction. This view is supported by the decision of the Hon'ble Delhi High Court in the case of JCB India Ltd. VS. DCIT (2017) 398 ITR 189.

6. Keeping in view of the facts and circumstances of the case as explained above as well as after going through the judgment of the Hon'ble Supreme Court of India in the case of ACIT vs. Hotel Blue Moon (Supra) and various decisions of the Hon'ble High Courts as well as

Tribunal, as aforesaid, we are of the considered view that in this case the AO has completed the assessment u/s. 143(3)/147 of the Act without issuing notice u/s. 143(2) of the Act which is mandatory as per the provisions of the Income Tax Act as well as the aforesaid judgment/decisions, wherein it has been held that in the absence of the notice u/s. 143(2) of the Act the assessment framed by the Assessing Officer is liable to be quashed. Hence, respectfully following the aforesaid judgment/decisions, we quash the assessment in dispute and subsequently order passed by the Ld. CIT(A) is also cancelled and allow the appeal of the assessee on the legal grounds. Since we have quashed the assessment on the legal grounds itself, the issues on merits have become academic.

7. In the result, the Appeal filed by the Assessee stands allowed.

Order pronounced on 22/07/2019.

Sd/-

**[B.R.R. KUMAR]
ACCOUNTANT MEMBER**

Date 22/07/2019

"SRBHATNAGAR"
Copy forwarded to: -

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

Sd/-

**[H.S. SIDHU]
JUDICIAL MEMBER**

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By Order,

Assistant Registrar,
ITAT, Delhi Benches