

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA NO.336/MUM/2013(A.Y.1996-97)
ITA NO.3612/MUM/2013(A.Y.1997-98)
ITA NO.337/MUM/2013 (A.Y.1998-99)

M/s. Bahar Builders,
C/o.Sajid Murghey Bushra Park,
TPS Plot No.524, 7-A/524
Bhawan Bungalow Area,
Panvel 410 206
PAN: AAafb 4606P

..... Appellant

Vs.

The ITO Ward 15(3)(2),
Matru Mandir, Grant Road,
Mumbai.

..... Respondent

Appellant by : Shri A.K.Sharma
Respondent by : Shri S.K.Jain

Date of hearing : 16/09/2019
Date of pronouncement : 15/10/2019

ORDER

PER VIKAS AWASTHY, JM:

These three appeals by the assessee involve identical legal issue and addition on merits have also been made on similar set of facts. Therefore, these appeals are taken up together for adjudication and are decided by this consolidated order.

ITA No.336/Mum/2013:

2. This appeal by the assessee is directed against the order of CIT(A) - 28, Mumbai dated 22/08/2012 for the assessment year 1996-97.

3. Shri A.K. Sharma appearing on behalf of the assessee submitted that assessment order has been passed under section 143(3) r.w.s. 254 of the Income Tax, 1961 (in short "the Act") without serving mandatory notice under section 143(2) of the Act on the assessee. The Ld. Authorized Representative submitted that though in the assessment order the Assessing Officer has mentioned that notice under section 143(2) dated 08/12/2009 was served on the assessee, however, no such notice was ever served on the assessee. The Ld. Authorized Representative pointed out that assessee had raised specific ground of non-service of statutory notice under section 143(2) of the Act in first appeal before the CIT(A). The CIT(A) after giving the finding that there is no direct evidence of service of notice under section 143(2) of the Act decided the issue against the assessee on the ground that the purpose of notice under section 143(2) has been served as the assessee had participated in the assessment proceedings. The Ld. Authorized Representative submitted that service of notice under section 143(2) of the Act is mandatory. In the absence of such notice the assessment framed is invalid and the subsequent proceedings arising therefrom are vitiated. In support of his submissions, the Ld. Authorized Representative placed reliance on the decision of the Co-ordinate Bench of the Tribunal in the case of Ramesh Salecha HUF vs. ITO in ITA No.3312/Mum/2015, assessment year 2011-12 decided on 25/10/2017.

4. On the other hand, Shri S.K.Jain appearing for the Department vehemently defended the findings of the CIT(A) on the issue of validity of assessment proceedings sans service of notice under section 143(2) of the Act on the assessee. The Ld. Departmental Representative submitted that as of now he is not in possession of the assessment folder to contend whether notice under section 143(2) was served on the assessee or not. The Ld. Departmental Representative further contended that a perusal of the impugned order would make it clear that the assessee participated in the assessment proceedings and had not raised any objection before the Assessing Officer on the issue of non-service of notice under section 143(2) of the Act. The Ld. Departmental Representative further submitted that assessee was given full opportunity of hearing by the Assessing Officer and CIT(A), hence, the principles of natural justice have not been violated. The Ld. Departmental Representative vehemently supporting the findings of CIT(A) prayed for dismissing the appeal of assessee.

5. We have heard rival sides and have perused the orders of the authorities below. Service of notice under section 143(2) of the Act is a mandatory condition before return of income of the assessee is taken up for scrutiny assessment/reassessment. Failure on the part of Assessing Officer to ensure issue and service notice under section 143(2) of the Act, before taking up the return of income for assessment would render the assessment/ reassessment proceedings void.

6. In the instant case we observe that the assessee in first appellate proceedings had taken specific ground before CIT(A) with respect to non-service of notice under section 143(2) of the Act. The CIT(A) observed that there is no direct evidence in support of the claim of the Department that notices under section 143(2) and 142(1) were served on the assessee. After having given finding of fact on non-service of statutory notice under section 143(2) of the Act, the CIT(A) upheld validity of assessment proceedings merely on the ground that the assessee participated in the assessment proceedings. The Hon'ble Apex Court in the case of Asst.CIT vs. Hotel Blue Moon, 321 ITR 362 held that no assessment could be made without issuing notice under section 143(2) of the Act. The Hon'ble Jurisdictional High Court in the case of Asstt.CIT vs. Geno Pharmaceuticals Ltd., 214 Taxman 83 (Bombay) upholding the decision of Tribunal held that notice under section 143(2) is mandatory and in the absence of service of such notice, the Assessing Officer cannot proceed to make an inquiry on the return filed.

7. The Hon'ble Supreme Court of India in the case of Laxmandas Khandelwal reported as 108 taxmann.com 183(SC) held that failure on the part of Assessing Officer to issue notice under section 143(2) would make the assessment invalid. The notice under section 143(2) for completion of regular assessment is a statutory requirement and non-issuance of notice is not a curable defect under the provisions of section 292BB of the Act. As regards application of provisions of section 292BB of the Act, the Hon'ble Court held:-

"9. According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid

even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.”

In the present case, the Department has not been able to show service of notice at all. It is not the case of the Revenue that notice under section 143(2) was served at one of the addresses of the assessee. It is a case of absence of service of notice on the assessee.

8. Thus, in view of the fact that the Revenue has not been able to rebut the contentions of the assessee that notice under section 143(2) has not been served and in the light of law laid down by the Hon'ble Apex and Hon'ble Jurisdictional High Court we find merit in the contentions of the Id.Authorized Representative of the assessee. The assessment order framed under section 143(3) of the Act without service of notice under section 143(2) of the Act is bad in law and subsequent proceedings arising there from are hence, vitiated. Consequently, the impugned order is set-aside and the appeal of the assessee is allowed on this legal ground alone.

9. Since, we have accepted the appeal of assessee on legal issues, travelling to merits of the addition would be purely an academic exercise. Hence, we are not taking up the grounds raised on merits of the addition.

ITA NO.3612/MUM/2013 (A.Y. 1997-98) & ITA NO.337/MUM/2013 (A.Y.1998-99)

10. These appeals by the assessee are directed against orders passed by the CIT(A)-26 dated 28/02/2013 for A.Y 1997-98 and CIT(A)- 28 dated

28/02/2012 for A.Y.1998-99, respectively. In these appeals assessee has assailed validity of assessment order on the ground of non-service of notice under section 143(2) of the Act. At the time of hearing of the appeals, both the sides were unanimous in stating that in appeals for the assessment years 1997-98 and 1998-99 the issues raised and facts are similar to assessment year 1996-97. Thus, the decision rendered in appeal for assessment year 1996-97 shall apply *mutatis mutandis* to the appeals for assessment years 1997-98 and 1998-99.

11. In the result, all the appeals by the assessee are allowed as above.

Order pronounced in the open court on Tuesday, the 15th day of October, 2019.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, Dated 15/10/2019
Vm, Sr. PS(O/S)

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai