

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'A', KOLKATA
[BEFORE SHRI P.M. JAGTAP, VICE-PRESIDENT (KZ) & SHRI S.S. GODARA, JM]**

**ITA No. 130/Kol/2018
Assessment Year: 2011-12**

D.C.I.T, CIRCLE - 4(2) Kolkata.....Appellant
4TH Floor, Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata - 700 069.

M/s. Sudarshan Paper & Board Pvt. Ltd.....Respondent
27, Brabourne Road, R. No. 311,
Kolkata - 700 001.
[PAN : AAHCS 1241 F]

**C.O. No. 32/Kol/2018
(Arising out of ITA No. 130/Kol/2017)
Assessment Year: 2011-12**

M/s. Sudarshan Paper & Board Pvt. Ltd.....Cross-Objector
27, Brabourne Road, R. No. 311,
Kolkata - 700 001.
[PAN : AAHCS 1241 F]

D.C.I.T, CIRCLE - 4(2) Kolkata.....Respondent
4TH Floor, Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata - 700 069.

Appearances by:

Dr. A.K. Nayak, CIT (DR) appearing on behalf of the Revenue
Shri S.M. Surana, Advocate appearing on behalf of the Assessee

Date of concluding the hearing : September 09, 2019

Date of pronouncing the order : October 23, 2019

ORDER

PER P.M. JAGTAP, VICE-PRESIDENT (KZ)

This appeal is preferred by the Revenue against the order of Ld. CIT(A) - 2, Kolkata dated 07.11.2017 and the same is being disposed of along with the Cross-Objection filed by the assessee being C.O. No. 32/Kol/2018.

2. The assessee in the present case is a company which is engaged in the business of trading in paper and paper board. The return of income for the year under consideration was filed by it on 26.09.2011 declaring a total income of Rs. 66,90,718/-. In the assessment originally completed u/s 143(3) vide an order dated 25.03.2014, the total income of the assessee was determined by the AO at Rs. 1,91,58,490/-. The said assessment was subsequently reopened by the AO and a notice u/s 148 was issued by him on 30.06.2014 after recording the reasons. In reply, a letter was filed by the assessee on 09.07.2014 stating that the return originally filed by it on 26.09.2011 may be treated as the return filed in response to notice issued u/s 148. Thereafter the reassessment was completed by the AO u/s 147/144 of the Income Tax Act, 1961 vide an order dated 11.03.2016 wherein he made the following additions to the total income of the assessee:

<i>i. Disallowance of foreign travel expenses</i>	<i>Rs. 2,54,922/-</i>
<i>ii. Addition on account of conversion charges</i>	<i>Rs. 6,87,129/-</i>
<i>iii. Disallowance u/s 14A read with Rule 8D</i>	<i>Rs. 28,092/-</i>
<i>iv. Disallowance of commission</i>	<i>Rs. 1,14,51,971/-</i>
<i>v. Addition of unsecured loans u/s 68</i>	<i>Rs. 7,83,94,915/-</i>
<i>vi. Disallowance of sales promotion, sample and travelling expenses</i>	<i>Rs. 11,69,129/-"</i>

3. Against the order passed by the AO u/s 147/144, an appeal was preferred by the assessee before the Ld. CIT(A) challenging the validity of the said assessment made by the AO as well as disputing all the additions made in the said assessment on merit. The validity of the assessment was challenged by the assessee on the ground that the same was made by the AO without issuing notice u/s 143(2) of the Act which was mandatory. The Ld. CIT(A) found merit in the

submissions made by the assessee in support of its case on this issue and after extracting the said submissions in his impugned order, he quashed the assessment made by the AO u/s 147/144 of the Act by treating the same as *void ab initio* for the following reasons given in his impugned order:

"I find that , it is admitted position that notice u/s 143(2) of the Act was not issued within the prescribed time i.e. within six months from the end of the year in which the return was filed. I find that the Hon'ble Apex Court in the case of Hotel Blue Moon (supra) has held that procedure of section 143(2) is mandatory and to be followed in an assessment, Hon'ble Apex Court held as under (summarized):

- *While notice u/s 143(2) is not necessary if the AO accepts the return as filed, the notice within the prescribed time is mandatory if the AO proposes to make an assessment u/s 158BC r.w.s. 143(3). Omission to issue notice u/s 143(2) is not a procedural irregularity and the same is not curable and, the requirement of notice u/s. 143(2) cannot be dispensed with. If the intention of the legislature was to exclude the provisions of s.143 (2), legislature would have indicated that*
- *In Circular No.717 dated 14.8.1995 the CBDT has directed that the AO "shall proceed to determine the undisclosed income of the block period and the provisions of s. 142, sub-section (2) and (3) of s. 143 and s. 144 shall apply accordingly". This circular clarifies the requirement of law in respect of service of notice u/s. 143(2). The circular is binding on the department though not on the Court.*

In view of the above admitted facts that no notice u/s. 143(2) of the Act was issued during the proceedings pending u/s. 148 of the Act within the prescribed time from the date of filing of return. The ratio laid down by Hon'ble Apex Court in the case of Hotel Blue Moon (supra) and by Hon'ble Madras High in the case of C. Palaniappan (supra) and also by Hon'ble Calcutta High Court in the case of Ma Kamakhyaya Enterprises (supra) exactly on similar circumstances, I am of the considered view that the reassessment framed without issuing notice u/s.L43(2) of the Act within the prescribed time limit from the date of filing of return is without jurisdiction. Section 143(2) incorporates the rule of audi alterem partem i.e., no man should be condemned unheard. The words "shall serve on the assessee notice" occurring in section t43(2) imply a duty to be performed and the word "shall" connotes that the provisions are mandatory and

non-compliance of the same goes to vitiate the order of assessment itself. Even the provisions will apply to reassessment proceedings as held by Hon'ble Madras High Court in the case of Palaniappan (supra). Accordingly, I quash the assessment in the present case. This ground of appeal is allowed."

The Ld. CIT(A) also deleted all the additions made by the AO to the total income of the assessee in the assessment completed u/s 147/144 vide his impugned order and allowed the appeal of the assessee.

4. Aggrieved by the order of the Ld. CIT(A), the revenue has preferred this appeal before the Tribunal on the following grounds:

"1. That on the facts and in circumstances of the case and in law, the Ld. CIT(A) has erred in appreciating the fact that the assessee did not comply with notice u/s 148 of the I.T. Act and as such notice u/s 143(2) of the I.T. Act is not required in the assessee's case.

2. That on the facts and in the circumstance of the case and in law, the Ld. CIT(A) has erred in appreciating the facts that the AO proceeded the assessment after issuing notice u/s 142(1) of the I.T. Act for making assessment in the manner of u/s 144/147 of the Act.

3. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting Rs. 6,87,129/- on account of conversion charge without remitting the issue for fresh examination in violating Rule 46A(3) of the I.T. Rules 1962.

4. That on the facts and in circumstances of the case and in law, the Ld. CIT(A) has erred in deleting of addition of Rs. 1,14,51,971/- on account of commission payments.

5. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in appreciating the facts the parties to whom commission was paid, did not comply with the notice u/s 131 of the Act.

6. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting of Rs. 7,83,94,915/- on account of unsecured loans taken from body of corporate.

7. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting a sum of Rs. 11,69,129/- under the head of various expenses.

8. That on the facts and in the circumstances of the case in law, the Ld. CIT(A) has erred in appreciating the facts that the assessee has failed to substantiate the expenses of Rs. 11,69,129/- in original proceedings and also in remand proceedings.”

5. We have heard the arguments of both the sides and also perused the relevant material available on record. In support of the Revenue's case on the preliminary issue involved in Ground No. 1 relating to the validity of the assessment made by the AO u/s 147/144, the learned DR has contended that there being no return of income filed by the assessee in response to the notice issued by the AO u/s 148, there was no requirement of issue of notice u/s 143(2) and the Ld. CIT(A) is not justified in quashing the assessment made by the AO u/s 147/144 for want of issue of notice u/s 143(2). In support of this contention, he has relied on the decision of Hon'ble High Court of Jammu & Kashmir in the case of Pr. CIT vs Broadway Shoe Co. 259 Taxman 223 wherein it was held that where there was no return filed in pursuance to notice issued u/s 148, issue of notice u/s 143(2) was not required for making the assessment.

6. The learned counsel for the assessee, on the other hand, has submitted that a letter was submitted by the assessee during the course of reassessment proceedings before the AO on 09.07.2014 stating that the return originally filed u/s 139 on 26.09.2011 may be treated as the return filed in response to notice u/s 148. He has

contended that the notice issued u/s 148 thus was duly complied with by the assessee and it was mandatory for the AO to issue a notice u/s 143(2) before proceedings to make an assessment u/s 147. In this regard, the learned DR has contended that the letter filed by the assessee cannot replace the return and by filing such letter, the assessee cannot be said to have complied with the requirement of filling the return of income in response to notice issued u/s 148. It is however observed that this aspect has already been considered by Hon'ble Delhi High Court in the case of Jai Shiv Shankar Traders Pvt. Ltd. 383 ITR 448 cited on behalf of the assessee and relied upon by the Ld. CIT(A) in his impugned order wherein a letter was filed by the assessee on 16.12.2010 informing the AO that the return originally filed should be treated as the return filed pursuant to the notice u/s 148. The AO thereafter, proceeded to complete the reassessment without issuing a notice u/s 143(2) and it was held by the Hon'ble Delhi High Court that the failure by the AO to issue a notice to the assessee u/s 143(2) subsequent to 16.12.2010 when the assessee made the statement before the AO to the effect that the original return filed should be treated as a return filed pursuant to a notice u/s 148 of the Act, was fatal to the order of reassessment. It was held that there was thus no legal infirmity in the order of the Tribunal cancelling the reassessment made by the AO on the ground that the same was made without issue of notice u/s 143(2). In our opinion, the ratio of the decision of Hon'ble Delhi High Court in the case of Jai Shiv Shankar Traders Pvt. Ltd. is squarely applicable in the facts of the present case and the Ld. CIT(A) was fully justified in quashing the assessment made by the AO u/s 147/144 of the Act by treating the same as *void ab initio* by relying on the same. We, therefore, uphold

the impugned order of the Ld. CIT(A) on this preliminary issue and dismiss Ground No. 1 of the Revenue's appeal.

7. As a result of our decision rendered on the preliminary issue as involved in Ground No. 1 of the Revenue's appeal upholding the impugned order of the Ld. CIT(A) quashing the assessment made by the AO u/s 147/144 of the Act, other grounds raised by the Revenue in its appeal as well as all the grounds raised in the cross-objection of the assessee have become infructuous and we do not consider it necessary or expedient to adjudicate upon the same.

8. In the result, the appeal of the revenue and cross-objection of the assessee both are dismissed.

Order Pronounced in the Open Court on 23rd October, 2019.

Sd/-
(S.S. Godara)
JUDICIAL MEMBER

Sd/-
(P.M. Jagtap)
VICE-PRESIDENT

Dated: 23/10/2019

Biswajit, Sr. PS

Copy of order forwarded to:

1. M/s. Sudarshan Paper & Board Pvt. Ltd., 27, Brabourne Road, Room No. 311, Kolkata – 700 001.
2. DCIT, Circle – 4(2), Kolkata.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Assistant Registrar / H.O.O.
ITAT, Kolkata