

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

ITA No. 2211/Bang/2019
Assessment year: 2011-12

M/s. Bhoomika Infrabuild P. Ltd., No.823, 2 nd Cross, 11 th Main, HAL 2 nd Stage, Indiranagar, Bangalore – 560 008. PAN: AAECB 0240N	Vs.	The Income Tax Officer, Ward 1(1)(3), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri S.V. Ravishankar, Advocate`
Respondent by	:	Smt. K. Haritha, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	23.01.2020
Date of Pronouncement	:	06.02.2020

ORDER

Per N.V. Vasudevan, Vice President

This appeal by the assessee is against the order dated 1.8.2019 of the CIT(Appeals)-I, Bengaluru relating to assessment year 2011-12.

2. The assessee is a company stated to be engaged in the business of dealing in real estate for AY 2011-12. The assessee filed return of income on 30.9.2011 declaring total income of Rs.8,87,180. The said return of income was processed u/s. 143(1) of the Income-tax Act, 1961 [the Act] on 17.1.2012 accepting the return filed. Later on, an order dated 30.5.2012 was passed u/s. 154 giving credit to self-assessment tax paid. Subsequently, the AO received information from DDIT (Inv.) Unit 3(1), Kolkata vide letter dated 22.01.2016 wherein there was a reference to

investigation of enquiries conducted by the said DDIT(Inv.) in the case of Marudhara India Pvt. Ltd., Kolkata in which the director of the aforesaid company Mr. Ramesh Kumar Khaitan admitted that he was providing accommodation entries by accepting cash from the parties and depositing the same in undisclosed bank accounts and charged nominal commission from Jamakharchi transaction. Mr. Khaitan has given a list of beneficiaries of accommodation entries and the assessee's name also appears as a beneficiary in the said list. Therefore, proceedings u/s. 147 were of the Act were initiated against the assessee. A notice u/s. 148 was issued on 14.2.2018 by which assessee was asked to file return of income on or before 21.3.2018.

3. The assessee did not file return of income in response to notice u/s. 148 of the Act within time given for compliance i.e., 21.3.2018. On 3.5.2018, the AO issued a notice u/s. 143(2) of the Act in which the assessee was asked to attend the office of AO on 21.5.18. On the very same day i.e., 3.5.2018 the AO also informed the assessee that with reference to notice u/s. 148 issued by the AO, the assessee had not filed any return of income and therefore he would treat the return of income filed by the assessee for AY 2011-12 on 30.9.2011 as a return filed in response to u/s. 148 of the Act and also informed the assessee that he can intimate if he has any objection to the aforesaid proposal latest by 10.5.2018 so as to enable the assessee to continue the proceedings.

4. The AO also informed by the aforesaid letter that based on the original return filed, notice u/s. 143(2) and 142(1) will be issued in response to the aforesaid letter of AO. The assessee by letter dated 10.5.2018 informed the AO that original return filed by assessee on 30.9.2011 may be treated as a return of income filed in response to notice u/s. 148 of the Act. Thereafter, the proceedings were completed by the AO in which the AO brought to tax a sum of Rs.65 lakhs as unexplained cash credit u/s. 68 of

the Act. It is not in dispute that the aforesaid addition of Rs.65 lakhs was made by treating the receipt of share capital by the assessee from the following persons as unexplained cash credit u/s. 68 of the Act:-

Sl.No.	Name of the company/investor	PAN	Date of receipt in the bank a/c / amount received	Date of withdrawals appearing in bank statement / amount of deposit
1.	M/s Honesty Mercantile Pvt Ltd	AACCH 1907Q	20.04.2010 Rs.15,00,000	24.06.2010 Rs.50,00,000 (Clearing Venkataswamy)
2.	M/s Aashish Retail garments Pvt Ltd	AAGCA 3644K	20.04.2010 Rs 20,00,000 20.04.2010 Rs.5,00,000	
3.	M/s Shagun Shree Construction Pvt Ltd	AAKCS 9218H	22.04.2010 Rs.10,00,000	
4.	Ekalavya Tradecom P Ltd.	-	23.04.2010 Rs.10,00,000	23.06.2010 8,00,000/- (Clearing Nataraj)
5.	Siva Swathi Constructions Pvt Ltd.		30.11.2010 5,00,000	01.12.2010 Self 5,00,000
	Total		65,00,000	

5. On appeal by the assessee, the CIT(Appeals) confirmed the order of AO. Aggrieved, the assessee has filed the present appeal before the Tribunal.

6. Before the Tribunal, the assessee has filed several additional grounds of appeal. We deem it appropriate to deal with first 5 additional grounds and consider its admissibility:-

“Legal Grounds

1. The order of assessment is bad in law as the learned Assessing Officer has not assumed proper jurisdiction, by issue of valid notice under section 143(2) of the Act, consequently the order passed is required to be set aside as bad in law, on the facts and circumstances of the case.

2. The learned CIT(A) failed to appreciate that the notice issued under section 143(2) of the Act, dt: 03/05/2018 in respect of return filed in 2011, was barred by limitation and thus the assumption of jurisdiction was bad in law, on the facts and circumstances of the case.
3. Without prejudice, the notices issued under section 148 and 143(2) issued by the ACIT, was without jurisdiction in view of the monetary limits prescribed for passing the assessment order as provided in the instructions, consequently the order is liable to be annulled.
4. Without further prejudice, the authorities below failed to appreciate that "consent does not confer jurisdiction" on the facts and circumstances of the case.
5. The learned assessing officer has not issued a notice U/s 143(2), consequent to the filing of the return of income in response to notice U/s 148 of the Act, and consequently, the order passed is without jurisdiction and the assessment order is required to be set aside as bad in law, on the facts and circumstances of the case.”
7. The aforesaid additional grounds relate to validity of order of assessment on the ground that after the filing of return of income by the assessee, no notice u/s. 143(2) of the Act was issued by the AO and the assessment framed without issue of notice u/s. 143(2) of the Act is null and void and the order of assessment is liable to be annulled.
8. The assessee has placed reliance on the decision of the Hon'ble Supreme Court in the case of *NTPC Ltd. v. CIT, 229 ITR 383 (SC)* in support of admission of the additional ground. The Hon'ble Supreme Court in the aforesaid decision has held that additional grounds not raised before the lower authorities have to be admitted and adjudicated where those grounds involve legal issues which can be decided on facts already on record. We are of the view that in the light of the aforesaid decision of the Hon'ble Supreme Court, the additional grounds No.1 to 5 raised by the

assessee has to be admitted or adjudication as it involves the validity of the order of assessment passed which can be adjudicated on the basis of material already available on record. The additional grounds are accordingly admitted for adjudication.

9. We have heard the parties on the additional grounds referred to above. Records of assessment were called for and produced by the revenue. The admitted factual position with regard to issue of notice u/s. 143(2) of the Act is that originally the assessee had filed a return of income on 30.9.2011 and that return of income was accepted u/s. 143(1) of the Act on 17.1.2012. A notice u/s. 148 was issued on 14.2.2018. assessee was asked to file return of income in response to notice u/s. 148 of the Act on or before 21.3.2018. The assessee did not file return of income within the time given by the AO. The AO issued a notice u/s. 143(2) of the Act on 3.5.2018. On the very same day the AO also issued another notice/letter to the assessee wherein he had informed the assessee that he would treat the return originally filed by the assessee on 30.9.2011 as a return filed in response to notice u/s 148 of the Act and invited the assessee's objections for such a course of action on or before 10.5.2018. On 10.5.2018, the assessee informed that the return originally filed on 30.9.2011 may be treated as a return filed in response to notice u/s. 148 of the Act. The law is well settled that it is only on 10.5.2018 that the return filed by the assessee in response to notice u/s. 148 of the Act can be taken cognizance by the AO. The admitted position is that there was no notice u/s. 143(2) of the Act after 10.5.2018. It is on these factual details that we need to adjudicate the additional grounds No.1 to 5.

10. The Id. counsel for the assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of *CIT v. Laxmandas Khandelwal [2019] 108 taxmann.com 183 (SC)* in which the Hon'ble Supreme Court reiterated the legal position as laid down by it in the case of *ACIT v. Hotel*

Blumoon, 321 ITR 362 (SC) that an assessment framed without issue of notice u/s. 143(2) of the Act renders the order of assessment null and void. It was further held that the defect of non-issue of notice u/s. 143(2) of the Act and its non-service is not a defect or infirmity which can be cured by the provisions of section 292BB of the Act i.e., the mere participation of assessee in the assessment proceedings.

11. The Id. DR, however, placed reliance on the decision of the Hon'ble Jammu & Kashmir High Court in the case of *Pr. CIT v. M/s. Broadway Shoe Co. in ITA No.10/2017, order dated 11.10.2018* wherein it was held that if in response to notice u/s. 148 of the Act, the assessee did not file any return of income, then there is no requirement to issue a notice u/s. 143(2) of the Act. In our view, this decision will not be applicable to the facts of the present case for the reason that return of income had been filed by the assessee in response to notice u/s. 148 of the Act requesting the AO to treat the return filed originally on 30.9.2011 as a return filed in response to notice u/s. 148 of the Act. Therefore as of 10.5.2018, the return originally filed on 30.9.2011 becomes a return filed in response to notice u/s. 148 of the Act. Since there was a return filed in response to notice u/s. 148, we are of the view that the decision referred to by the Id. DR will not be of any assistance.

12. The Id. DR also submitted that the order of assessment does not mention that it is an order passed u/s. 143(3) of the Act and therefore the assessment can be said to be one concluded u/s. 144 of the Act. This argument of the Id. DR also cannot be accepted because before proceeding to frame an assessment u/s. 144 of the Act (best judgment assessment), the provisions of section 144(1) contemplates failure of an assessee to comply with the terms of a notice issue u/s. 142(1) or 143(2) of the Act. Admittedly, there was no failure on the part of assessee to comply with the notice u/s. 142(1) of the Act. As far as notice u/s. 143(2) is

concerned, no such notice was issued after filing of return by the assessee in the present proceedings which are under challenge. Therefore, there was no basis on which the assessment can be said to be one framed u/s. 144 of the Act. It was not even the case of AO that the assessment was framed u/s. 144 of the Act. We are therefore of the view that the requirement of service of notice u/s. 143(2) of the Act in the present case was necessary and the admitted factual position is that no such notice was issued after the filing of return of income by the assessee in response to notice u/s. 148 of the Act. In the given circumstances, we are of the view that that the ratio laid down by the Hon'ble Supreme Court in the case of *Hotel Bluemoon (supra)* and *Laxmandas Khandelwal (supra)* will apply to the present case. The consequence of non-issue of notice u/s. 143(2) of the Act is fatal to the validity of the order passed u/s. 148 of the Act. Since the aforesaid legal infirmity renders the order of assessment null and void, we are of the view that the order of assessment has to be annulled. We hold and direct accordingly.

13. In view of the aforesaid conclusions on the additional grounds of appeal, we are of the view that the other issues raised in the additional grounds of appeal as well as the issue on merits raised by the assessee in its grounds of appeal do not require any consideration.

14. In the result, the appeal of the assessee is allowed.

Pronounced in the open court on this 6th day of February, 2020.

Sd/-

(B R BASKARAN)
ACCOUNTANT MEMBER

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

Bangalore,

Dated, the 6th Feb., 2020.

/Desai S Murthy /

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.