

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH: 'A', NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
(THROUGH VIDEO CONFERENCE)

ITA NO. 831/DEL/2017

A.Y. : 2013-14

M/S BOUTIQUE INTERNATIONAL PVT. LTD., C/O SH. KAPIL GOEL, ADVOCATE, F-26/124, SECTOR-7, ROHINI, DELHI – 110 085 (PAN: AAACB4905C)	Vs	ITO, WARD 5(1), NEW DELHI
(Appellant)		(Respondent)

Assessee by	Sh. Kapil Goel, Advocate
Department by	Sh. Prakash Dubey, Sr. DR.

ORDER**PER H.S. SIDHU, JM:**

This appeal filed by the Assessee is directed against the impugned order dated 11.01.2017 passed by the Ld. CIT(A)-35, New Delhi in relation to assessment year 2013-14 on the following grounds:-

1. That on the facts and in the circumstances of the case and in law, AO erred in issuing notice u/s. 143(2) on the basis of CASS, which is not in accordance with jurisdictional conditions stipulated under the act.
2. That on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in sustaining the addition made by the AO on the adhoc basis (without doubting audited defect free books of accounts), on basis of mere estimate by substituting 60% disallowance made by AO with 40% (on foreign travel expenses and business promotion expenses).
3. That on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in not deleting the addition made by AO in toto, without appreciating the replies and evidences filed before him by the assessee.
4. That the appellant craves leave to add / alter any/ all grounds of appeal before or at the time of hearing of the appeal.

2. The assessee has also raised the following additional grounds:-

1. *“That assessment framed u/s 143(3) for the period under consideration is void ab initio (qua additions made on a/c of foreign travel and business promotion expenses) where basis of selection of case in scrutiny in CASS u/s 143(2) of the Act vide stated notice dated 04/09/2014 was AIR information only (of Rs 759,146 for credit card expenses through american express bank which are admittedly recorded and accounted in regular audited books of accounts as clarified in reply dated 05.12.2015 & 15.11.2015 enclosed herewith for which no addition is made in assessment order) then without getting the case converted to comprehensive scrutiny as per procedure outlined in applicable CBDT instruction no 7/2014 dated 26.09.2014 (applicable to cases selected in scrutiny in financial year 2014-2015 on basis of AIR/CIB/26as mismatch information), additions made and sustained by Ld CIT-A deserves to be set aside and deleted being made in violation of applicable CBDT instruction.*

2. *That assessment framed u/s 143(3) for the period under consideration is void ab initio as for return of income filed by assessee with income of Rs 17,81,460 jurisdiction as per CBDT instruction of 31.1.2011 vested with ITO to assume jurisdiction u/s 143(2) of the Act where as per facts in present case , notice u/s 143(2) dated 04/09/2014 was purportedly issued by DCIT Circle 3(1) New Delhi who could not issue said notice as per stated CBDT instruction ,so impugned assessment framed u/s 143(3) by ITO Ward 5(1) New Delhi without timely issue of mandatory notice u/s 143(2) (as only notice u/s 143(2) issued by ITO Ward 5(1) New Delhi is 08/09/2015 outside time barring date of 30/09/2014 as ITR submitted on 29/08/2013) , accordingly orders of Ld AO and ld CIT-A may please be quashed as being passed without having valid jurisdiction.*

3. The brief facts relating to the issue are that the assessee filed return of income on 29.8.2013 declaring income of Rs. 17,81,460/-. The case of the assessee was selected for scrutiny through CASS and notice u/s. 143(2) of the Income Tax Act, 1961 (in short "Act") was issued and served upon the assessee. Ld. AR of the assessee appeared and filed the requisite details and documents. The AO examined the details and found that the assessee has claimed huge amount of expenditure on account of Director Foreign Travel amounting to Rs. 58,73,321/- as against Rs. 4,50,798/- in the preceding year and on account of business promotion expenses of Rs. 11,42,029/- as against Rs. 3,31,665/- in the preceding year. The Assessee was asked to furnish the complete details alongwith the corresponding bills / vouchers of expenses incurred on foreign visit and business promotion. In response to the same, assessee filed its details with the written submission dated 30.11.2015. The AO noticed that details furnished by the assessee regarding spouses of both Directors has also accompanied them on the foreign visit. The documentary evidences supporting the same were incomplete and assessee has not explained about the expenses with

necessary evidences of the expenditure incurred wholly and exclusively for the purpose of business. In response to the same, assessee furnished the written submissions dated 28.2.2015; 29.12.2015 and 15.1.2016. After examining the same the AO disallowed out of expenses on foreign travel amounting to Rs. 35,23,993/- and expenses on business promotion amounting to Rs. 6,85,217/- and made the total taxable income of the assessee amounting to Rs. 59,90,669/- by completing the assessment at Rs. 59,90,669/- u/s. 143(3) of the Act vide order dated 27.1.2016. Aggrieved with the assessment order, assessee appealed before the Ld. CIT(A), who vide its impugned order dated 11.01.2017 has partly allowed the appeal of the assessee. Now the assessee is aggrieved with the impugned order and raised the original grounds of appeal as well as additional grounds of appeal, as reproduced above before the Tribunal.

4. At the time of hearing, Ld. Counsel for the assessee stated that assessee filed its return of income u/s. 139(1) of the Act on 29.8.2013 and the AO issued notice u/s. 143(2) of the Act on 04.9.2014. He further stated that this notice was issued by

the DCIT, Circle 3(1), New Delhi. Thereafter by transfer memo AO stated reason for transfer the case from DCIT, Circle 3(1) to ITO, Ward 5(1), New Delhi is returned income before Rs. 30 lacs which correlates to CBDT Instruction NO. 1/2011 dated 31.1.2011. He further stated that the correct AO i.e. ITO, Ward 5(1), New Delhi has issued noticed u/s. 143(2) of the Act dated 08.9.2015 which is time barred. Therefore, the assessment order dated 27.01.2016 passed by the ITO, Ward 5(1), New Delhi is without jurisdiction.

4.1 It was further submitted that the assessment framed u/s. 143(3) of the Act for the period under consideration is void ab initio and the impugned order is also deserve to be cancelled, because it is based upon on the illegal assessment order. Ld. Counsel for the assessee further stated that assessee has submitted its return of income u/s. 139(1) of the Act on 28.9.2013 and the assessment u/s. 143(3) of the Act for the period under consideration which was framed by the ITO, Ward 5(1), New Delhi is also time barred because the mandatory notice u/s. 143(2) of the Act dated 8.9.2015 is beyond the time limit under the provisions of the Act. Hence,

he requested that assessment in dispute may be quashed by accepting the appeal filed by the assessee on this ground only. He finally stated that assessee has filed the written submissions alongwith the case laws in the shape of paper book as well as in the written submissions, the same may be read as part of his arguments. In support of his contention, he cited the various decisions viz. Apex Court decision in Singhad Technical Society (order dated 29.8.2017) 397 ITR 344; Hon'ble Delhi High Court decision in the case of Fast Booking I Pvt. Ltd. order dated 2.9.2015 (ITA No. 334/2015) 378 ITR 693; Hon'ble Delhi High Court decision in case of Silver Line order dated 4.11.2015 (ITA No. 578/2015) 383 ITYR 455; Hon'ble Punjab & Haryana High Court decision in the case of M/s VMT Spinning Co. Ltd. order dated 16.9.2016 (ITA No. 445/2015) 389 ITR 326; Hon'ble Gujarat High Court in case of Jolly Fantasy World Ltd. 383 ITR 530 and the ITAT, SMC Bench, Delhi decision in the case of Manish Kumar & Sons HUF vs. ITO Ward 1(5), New Delhi dated 22.1.2018 in ITA No. 1563/Del/2018 (AY 2015-16).

4.2 On the contrary, Ld. DR relied upon the orders of the authorities below and stated that the concerned AO has issued notice u/s. 143(2) of the Act within time which is within his jurisdiction and stated that no interference is called for in the well reasoned orders passed by the revenue authorities and appeal filed by the assessee may be dismissed.

5. We have heard both the parties and perused the records, especially the orders of the revenue authorities and the case laws cited before us. On the anvil of decision of the Hon'ble Supreme Court of India in the case of NTPC Limited 229 ITR 455, we admit the additional grounds being legal in nature and which goes to the root of the matter for which necessary facts are available on record and hence, we are deciding the same first.

5.1 We find that assessee filed its return of income u/s. 139(1) of the Act on 29.8.2013 and the AO i.e. DCIT, Circle 3(1), New Delhi issued notice u/s. 143(2) of the Act on 04.9.2014. Thereafter by transfer memo, AO stated the reason for transfer the case from DCIT, Circle 3(1) to ITO, Ward 5(1), New Delhi is returned income before Rs. 30 lacs

which correlates to CBDT Instruction NO. 1/2011 dated 31.1.2011. The correct AO i.e. ITO, Ward 5(1), New Delhi has issued noticed u/s. 143(2) of the Act dated 08.9.2015 which is time barred, hence, the assessment order dated 27.1.2016 passed by the ITO, Ward 5(1), New Delhi is without jurisdiction and void ab initio. Therefore, in our view the impugned order passed by the Ld. CIT(A) deserve to be cancelled, because it is based upon the illegal assessment order. We find that similar issue has been dealt and adjudicated by the ITAT, SMC Bench, Delhi in the case of Manish Kumar & Sons HUF vs. ITO Ward 1(5), New Delhi dated 22.1.2018 in ITA No. 1563/Del/2018 (AY 2015-16) and decided the similar issue in favour of the assessee, wherein the Tribunal has decided as under:-

"9. I have heard both the parties and perused the records, especially the Paper Book filed by the Assessee's counsel and all the case laws cited by him. I note that assessee filed his return of income on 12.3.2016 of Rs.4,15,280/- Page No. 4 of the Paper Book with address mentioned as " A- 48 Omaxe RPS Green Valley Sector 41-42 Faridabad

Haryana 121001". This case was selected for scrutiny u/s 143(2) of the Act vide notice dated 26.07.2016 issued by DCIT Circle II Hazaribagh (Page No. 6 of the Paper Book). Since assessee was regularly filing return from AY 2012-2013 onwards at Faridabad same Address so he requested that case should be transferred to Faridabad as jurisdiction lies with Faridabad only due to which case was transferred to Faridabad AO as admitted in first para of AO order, vide order u/s 127 dated 28.03.2017 passed by PCIT Hazaribagh. For the sake of convenience, para first of the assessment order is reproduced below:-

"Return declaring income of Rs. 415280/- was e-filed by the assessee on 12.3.2016. The case was selected for scrutiny under CASS (Computer Assisted Selection Scrutiny). After taking the case into scrutiny notice under section 143(2) of the Income Tax Act (in short "Act") dated 26.07.2016 issued by the DCIT, Circle-II, Hazaribagh Faridabad to the assessee through speed post vide dispatch No. 2551 dated 26.7.2016 fixing the case for hearing

on 17.8.2016. On the fixed date, assessee attended the proceeding and filed written reply wherein stated that the assessee is regularly filing the income tax return at Faridabad address only and requested to transfer his case to the Faridabad AO. After passing order u/s. 127 of the Act by the Pr. CIT, Hazaribagh vide its order Fine.CIT/HZB/Tech/ u/s. 127/2016-17/3081-87 dated 28.3.2017, the case of the assessee was transferred to this office on 30.9.2017. On receipts of case on transfer, notice u/s. 142(1) read with section 129 of the Act was issued on 14.10.2017 fixing the case for hearing on 20.7.2017. In response to the notice issued, Sh. Dinesh Kumar Aggarwal, FCA attended the proceedings and filed written reply. Asked to furnish the rest of the information as asked for vide u/s. 142(1) of the Act. Request for adjournment. On his request, case was adjourned to 21.8.2017.”.....

9.1 After perusing the aforesaid contents of the assessment order mentioned in para first of the said order, it is crystal clear that without any valid notice

issued u/s 143(2) of the Act by Faridabad AO, impugned assessment is framed by ITO Ward 1(5) Faridabad, simply in extension to proceedings initiated by Hazaribagh DCIT Circle 2 who is admittedly not AO of assessee within meaning of section 2(7A) of the Act on date of issue of notice u/s 143(2) of the Act. So on this short count itself impugned proceedings deserves to be quashed being unsustainable in the eyes of law. I further note that the case laws cited by the Id. counsel for the assessee are applicable in the present case. However, the most direct decision of the ITAT, Delhi (E-Bench) was decided in case of Al Faheem Meatex Pvt. Ltd. vs. ACIT in ITA Nos. 6122 & 6123/Del/2015 (Ays. 2010-11 & 2011-12) vide order dated 09.6.2017 which is directly applicable in the present case. The Tribunal in the case of Al Faheem Meatex Exports Pvt Ltd (supra) vide para No. 6 has held as under:-

"6. We have carefully consider the rival contentions and perused the copies of the return filed before us by the assessee. The first paragraph of the assessment order speaks that notice under section 143(2) was first issued by the DCIT, Circle, Ghaziabad on 29.8.2011. Admittedly, the notice should have been issued on or before 30th September, 2011 and it was issue don 29.8.2011. However, the question is whether the notice was issued by the correct jurisdictional officer or not. In the present case as mentioned by the AO himself that the case was subsequently transferred to the Assessing Officer as per the actual jurisdiction on 07/09/2012 and subsequently he issued notice under section 143(2) on 20.9.2012. From the above facts, it is apparent that first notice was issued by the DCIT, Ghaziabad on 29/08/2011, who was not having jurisdiction over the assessee. It is the legality of this notice that is required to be tested. According to the

provisions of section 143 (2) of the act the notice for verifying the return of income is required to be issued by the 'assessing officer'. The assessing officer has been defined under section 2 (7A) of the act, which means the assistant Commissioner or the deputy Commissioner or assistant director or Deputy Director or the income tax officer who is vested with the relevant jurisdiction by the virtue of directions order issued under subsection (1) or subsection (2) of section 120 or any other provisions of the act and additional Commissioner or additional director or joint Commissioner or joint director who is directed under clause (b) of subsection (4) of that section to exercise or perform all or any of the powers and functions carried on or assigned to an assessing officer under this act. Before us, no such directions issued under section 120 (1) or (2) issued in favour of DCIT, Ghaziabad was produced. In view of this, we are unable to hold

that at that relevant time he was holding jurisdiction over the assessee. As the original jurisdiction over the assessee by the DCIT, Ghaziabad could not be established the provisions of section 127 of the act are not applicable. Further, the provisions of section 124 (3) also does not come to the rescue of the revenue because in the present case the assessee is filed return of income showing the address of Meerut and subsequently according to the assessing officer actual jurisdiction lies with him, but the impugned notice issued under section 143 (2) was issued on 29/08/2011 by DCIT, circle Ghaziabad. Therefore, it is apparent that notice under section 143 (2) which should have been issued by 30/09/2011 by the correct jurisdictional officer was not issued.”

9.2 I further note that the aforesaid Division Bench decision was duly followed by the SMC Bench, in the case of Sh. Yogesh Yadav vs. ITO passed in ITA No.

1757/Del/2016 (AY 2011-12) vide order dated 09.10.2017 being the identical facts / reasoning with the aforesaid case of Al Faheem Meatex Exports Pvt. Ltd. (Supra) and accordingly assessment framed as declared as void-ab-initio.

10. Keeping in view of the facts and circumstances of the case and respectfully following the aforesaid precedents being the identical facts of the present case, I hold the present assessment is void ab inito, hence, the same is quashed and accordingly, the additional legal ground raised by the assessee is allowed. Since I have quashed the assessment on the legal ground itself, the other grounds on merit became academic, hence, need not be adjudicated.

11. In the result, the appeal of the assessee is allowed.”

6. Keeping in view of the facts and circumstances of the case and respectfully following the aforesaid precedents being the identical facts of the present case, we hold the present assessment is void ab inito, hence, the same is quashed and

accordingly, the additional legal grounds raised by the assessee are allowed. Since we have quashed the assessment on the legal grounds itself, the other grounds on merit became academic, hence, need not be adjudicated.

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

The decision is pronounced on 18.12.2020.

Sd/-

(ANIL CHATURVEDI)
ACCOUNTANT MEMBER
"SRB"

Sd/-

(H.S. SIDHU)
JUDICIAL MEMBER

Copy forwarded to:

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

Asstt. Registrar, ITAT, New Delhi

