

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "SMC", MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.5730/M/2019
Assessment Year: 2011-12**

Shri Vilas Dattatray Joshi, Office No.57, 4 th Floor, Alli Chambers, Tamrind Street, Fort, Mumbai – 400 023 PAN: AAAPJ5714A	Vs.	Dy. CIT of ITC, CC 2(4), R.No.802, Old CGO Annex Bldg., M.G. Road, Mumbai – 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Nishit Gandhi, A.R.
Revenue by : Ms. Smita Verma, D.R.

Date of Hearing : 23.06.2021
Date of Pronouncement : 23.06.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against order dated 28.06.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2011-12.

2. The first ground of appeal is against the order of Ld. CIT(A) upholding the order of AO framed under section 143(3) read with section 148 of the Act by ignoring the fact that the AO has no jurisdiction to frame the assessment as no mandatory notice under section 143(2) of the Act was issued.

3. The facts in brief are that the assessment was framed under section 143(3) read with section 153A of the Act vide order dated 25.03.2014 assessing the total income at Rs. 89,04,460/-. Thereafter, the case of the assessee was reopened after a survey was conducted under section 133A of the Act on PMC Machine Ltd. simultaneously with the search and seizure action on M/s. Sterling Biotech Group of Companies on 28.06.2011. In the said survey some documents revealed that some payment has been made to the assessee of Rs.5,22,000/- and accordingly the case of the assessee was reopened by issuing notice under section 148 of the Act dated 28.03.2018. Notice under section 142(1) dated 25.07.2013 was also issued and served upon the assessee along with reasons recorded for reopening which was replied by the assessee by filing objection to the reopening and finally the assessment was completed by making an addition of Rs.5,22,000/- under section 147 read with section 143(3) of the Act dated 18.12.2018.

4. The assessee challenged the said assessment before the Id CIT(A) on legal issue that the assessment framed is invalid and without jurisdiction as no notice u/s 143(2) of the Act was ever issued to the assessee. But the Id CIT(A) dismissed the same by observing and holding that assessee has been given proper opportunity after serving letter on the assessee though the section 143(2) was not mentioned. The Ld. A.R. submitted before the Bench that the mandatory statutory notice under section 143(2) of the Act was not issued and not served upon the assessee. The Ld. A.R. submitted before the Bench that while reopening the assessment under section 147 of the Act the AO

has failed to issue the notice under section 143(2) of the Act. The Ld. A.R. submitted that in absence of non issuance of statutory notice, the AO can not proceed to compute the income in the reassessment proceedings. The Ld. A.R. submitted that the order passed under section 143(3) read with section 147 of the Act is therefore without jurisdiction and is bad in law as the Revenue has not complied with the mandatory issuance of notice under section 143(2) of the Act. The Ld. A.R. submitted that the said lapse on the part of the AO is not a procedural irregularity and is not curable as the requirement of notice under section 143(2) can not be dispensed with. The Ld. A.R. submitted that the non issuance of notice under section 143(2) goes to the root of the assessment and is not a procedural defect but renders the entire assessment as nullity in the eyes of law. In defence of his argument the Ld. A.R. relied on the following judicial decisions:

1. CIT Vs Laxman Das Khandelwal (2019) 108 taxmann.com 183(SC)
2. ACIT v. Hotel Blue Moon: [2010] 188 Taxman 113 (SC)
3. ACIT v. Geno Pharmaceuticals Ltd.: [2013] 32 taxmann.com 162 (Bombay)
4. PCIT v. Silver Line: [2016] 65 taxmann.com 137 (Delhi)
5. Ajaysingh Gajanansingh Gour v. ITO: ITA No.398/Nag./2017 (Nagpur-Trib)

5. The Ld. A.R., therefore prayed before the Bench that the assessment so framed by the AO under section 143(3) read with section 147 of the Act dated 18.12.2018 be quashed as invalid and without jurisdiction as the same suffers from the incurable defects of non issuance and non service of notice under section 143(2) of the Act.

6. The Ld. D.R. submitted that since the fact of having issued letter and served upon the assessee was done and assessee attended the assessment proceedings and therefore the ld AR can not be allowed to take this issue at latter date. The ld DR stated the ld CIT(A) duly mentioned the fact of having granted proper opportunity to the assessee and considering these fact the legal issue raised by the assessee may be dismissed.

7. We have heard the rival submissions of both the parties and perused the material on record including the impugned order. We observe from the facts before us and the rival submissions made before us that there is a controversy as to non issuance and non service of notice under section 143(2) of the Act in the reassessment proceedings. Even ld CIT(A) has recorded this fact that letter granting opportunity to the assessee was duly issued and served on the assessee in which the AO omitted to mention section 143(2). In our opinion the non issuance of notice u/s 143(2) is a fatal defect which can not be cured and goes to the root of the assessment framed. In this background of the case, we are of the considered view that assessment so framed by the AO without issuing notice under section 143(2) is invalid and liable to be quashed. Accordingly, we hold that the assessment framed by the AO under section 143(3) read with section 147 of the Act dated 18.12.2018 is without jurisdiction and is invalid. The case of the assessee is squarely covered by the various decisions relied and referred to above as in the case of ACIT vs. Geno Pharmaceuticals Ltd. (supra) the Hon'ble Bombay High Court has held that where no notice under section 143(2) has been issued while making

assessment under section 143(3) read with section 147, the assessment so framed is bad in law as the AO can not proceed to make an enquiry on the return filed in compliance to the notice issued under section 148 of the Act and thus dismissed the appeal of the Revenue by holding that no substantial question of law arose out of the appeal of the Revenue. Similarly, in the case of CIT vs. Laxman Das Khandelwal (2019) 108 taxmann.com 183 (SC) the Hon'ble Apex Court has held that no notice under section 143(2) was ever issued by the Department, therefore, the finding rendered by High Court and the Tribunal and the conclusion arrived at were correct and there is no reason to take a different view in the matter. Pertinent to mention that Hon'ble Madhya Pradesh High Court in the case of CIT vs. Laxman Das Khandelwal (supra) has held that AO had no valid jurisdiction to pass the assessment order as the very foundation of assessment proceeding is bad in law and hence these proceedings culminated in the assessment order as well as impugned order stand quashed and thus dismissed the appeal of the Revenue.

8. After taking into consideration the facts of the case vis-à-vis the ratio laid down by the Hon'ble Supreme Court and various High Courts, we are of the considered view that the assessment proceedings and the consequent reassessment order dated 18.12.2018 passed under section 143(3) read with section 147 are bad in law as the mandatory notice under section 143(2) was not issued. Accordingly, we quash the proceedings initiated by the AO under section 147 and also the consequent reassessment order. The ground no. 1 is allowed. Since we

have decided the legal issue as raised in ground no 1 in favour of the assessee other grounds need no adjudication.

9. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 23.06.2021.

**Sd/-
(Saktijit Dey)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 23.06.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.