आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL, INDORE BENCH, INDORE

BEFORE HON'BLE RAJPAL YADAV, VICE PRESIDENT
AND
HON'BLE MANISH BORAD, ACCOUNTANT MEMBER
VIRTUAL HEARING

ITA No.823/Ind/2018
Assessment Year 2010-11

Shri Bhola Singh Thakur
Indore
PAN :AARPT4056E : Appellant

V/s
ITO-4(1)
Indore : Respondent

Assessee by	Shri C.P. Rawka, & Venus Rawka, ARs
Revenue by	Shri Harshit Bari, Sr. DR
Date of Hearing	09.06.2021
Date of Pronouncement	09.08.2021

O R D E R

PER MANISH BORAD, A.M

The above captioned appeal filed at the instance of the Assessee for Assessment Year 2010-11 is directed against the orders of Ld. Commissioner of Income Tax(Appeals)-II (in short

'Ld. CIT], Indore dated 21.08.2018 which are arising out of the order u/s 143(3) of the Income Tax Act 1961(In short the 'Act') dated 08.11.2017 framed by ITO-4(1), Indore.

2. Brief facts of the case as culled out from the records are that the assessee is individual running proprietorship concern of M/s Sainath Iron & Scrap Traders. Return of income for A.Y. 2010-11 filed on 15.10.2010 declaring total income of Rs.5,72,180/-. This return was processed u/s 143(1) o the Act, subsequently based on information from Director of Income Tax (Investigation), Unit 1(3), New Delhi. Ld. Assessing Officer reopened the case by issuing notice u/s 148 of the Act. The assessee alleged to have taken accommodation entry at Rs.35,00,000/- from the Jain Brothers. Notice u/s 142(1) of the Act was issued saising various queries which were replied by the assessee. However, Ld. Assessing Officer completed the assessment making additions of Rs.36,00,000/- and assessing the income at Rs. 5,72,180/-.

3. Aggrieved assessee preferred an appeal before the Ld. CIT(A) and partly succeeded.

4. Now the assessee is in appeal before this tribunal raising

following grounds of appeal:

> *"*1. The Ld. CIT(A) has erred in law and facts of the case by not considering all the points which were put before him in the written submission made by the assessee.
>
> *2. That the Ld.CIT(A) erred on facts of the case and confirmed the reopening of case u/s 147/148. This action of AO and further confirmed by CIT(A) is totally wrong, arbitrary and illegal under the facts of the case.*
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> 3. That the Ld. CIT(A) erred on facts of the case and confirmed the addition of Rs.35,00,000/- on account of alleged bogus accommodation entries which is totally wrong, arbitrary and illegal under the facts of the case.

5. The assessee has also raised additional ground of appeal:

> *1.that on the fact and circumstances of the case Ld. Assessing Officer failed to issue notice u/s 143(2) which is a mandatory conditions as such assessment completed/reassessment completed is bad in law.*

6. Along with paper book filed on 10.12.2019 assessee has requested for admission of additional ground thereby challenging the reassessment proceeding on the specific issue of non-issuance of statutory notice u/s 143(2) of the Act. In support of the contention that legal ground can be admitted by the Hon'ble Tribunal reliance was placed on the judgment of Hon'ble Apex Court in the case of *National Thermal Power Co. Ltd. vs. CIT (1992) 229 ITR 383*, judgment of Hon'ble jurisdictional High Court in the case of *CIT vs. Eicher Motors Ltd. (2007) 293 ITR 464* as well as in the case of DCIT vs. Turquoise Investment & Finance Ltd. (2008) 299 ITR 143.

7. For the proposition that the Hon'ble I.T.A.T., was justified in allowing to raise the issue of legal ground for non issuance of notice u/s 143(2) for the first time and that section 292BB of the Act is a rule of evidence and would not apply so far as failure of service of notice was concerned and that section 292BB is prospective and applicable only for A.Y. 2008-09 onwards. Reliance was placed on the decision of Hon'ble High Court of Delhi in the case of *Pr. CIT vs. Silver Line in ITA No.578 to 582/2015*.

8. As regards the proposition that the issuance of notice u/s 143(2) of the Act is mandatory before commencing the reassessment proceedings and if notice u/s 143(2) of the Act is not issued then the entire reassessment proceedings can be held invalid and *void ab initio*, reliance was placed on following judgments:

1. CIT vs. Laxman Das Khandelwal in Civil Appeal No.6261-6262 of 2019 dated 13.08.2019 (SC)
2. Pr. CIT vs. Kamla Devi Sharma in ITANo.197/2018 dated 10.07.2018(Rajasthan HC)
3. Pr. CIT vs. Oberoi Hotels Pvt. Ltd. in ITANo.152 of 2015 dated 22.6.2018(Calcutta HC)

4. ITO vs. Shri Vinod Kumar Jain in ITANo.318/Ind/2017 dated 11.03.2019 (I.T.A.T.,Indore)
5. ACIT Khandwa vs. M/s. Sukhamani Cotton Industries in ITANo.222/Ind/2017 dated 21.12.2018

9. Per contra, Ld. Departmental Representative (Ld. DR) though supported the orders of the lower authorities could not controvert the fact that statutory u/s 143(2) of the Act was not issued to the assessee. Sufficient opportunity was provided to the Ld. DR on various dates of hearing to verify from the case records that whether the notice u/s 143(2) of the Act was issued before commencing reassessment proceedings. However, no such evidence was placed on record.

10. We have heard rival contentions and perused the records placed before us and carefully gone through the judgments referred and relied by the Ld. counsel for the assessee. Though, the assessee has raised other ground we will first take the legal issue raised through the additional ground of appeal challenging the validity of reassessment proceedings, for non-issuance of statutory notice u/s 143(2) of the Act.

11. So far as the admission of legal ground is concerned, after perusing the judgment of Hon'ble Apex Court in the case of *National Thermal Power Co. Ltd. vs. CIT (1992) 229 ITR 383*, judgment of Hon'ble Jurisdictional High Court in the case of *CIT vs. Eicher Motors Ltd. (2007) 293 ITR 464* and the judgment in the case of *DCIT vs. Turquoise Investment & Finance Ltd. (2008) 299 ITR 143*, are of the considered view that additional legal ground raised by the assessee deserves to be admitted as it is purely legal in nature and goes to the root of the matter and all the material relating to the additional ground are available on record.

12. In the instant case it is an uncontroverted fact at the end of revenue that notice u/s 143(2) of the Act was not served to the assessee. Thus, it is clearly evident that all the materials relating to additional ground raised by the appellant is available on record. Coordinate Bench Bangalore in the case of *Shri E. Krishnappa vs. ITO, in ITANo.313 to 315/Bang/2014* wherein the judgment of Hon'ble MP High Court in the case of *Tolaram Hassomal* dated 10.03.2006 and the two subsequent decision of the Hon'ble MP High Court in the case of *CIT vs. Eicher Motors Ltd. (supra)* and the judgment in the case of *DCIT vs. Turquoise*

Investment & Finance Ltd. (supra) were considered, held that *"when a legal question is raised then the Tribunal cannot be precluded from admitting the same and considering it in accordance with law".*

13. Thus, in the light of the above judicial precedence we admit additional legal grounds raised by the assessee and proceed to adjudicate the same. In this additional ground issue raised by the assessee is that reassessment proceedings are liable to be quashed, on the specific ground of non-issuance of statutory notice u/s 143(2) of the Act. It is an admitted fact before us that for the instant year under appeal for the purpose of reassessment Ld. AO only issued notice u/s 148 of the Act but failed to issue statutory notice u/s 143(2) of the Act.

14. Now whether the issue of notice u/s 143(2) of the Act is mandatory for carrying out reassessment proceedings, we find that Hon'ble Apex Court in a recent judgment in the case of *CIT vs. Laxman Das Khandelwal in Civil Appeal no.6261-6262 of 2019* dated 13.08.2019 adjudicating similar issue laying down the ratio that the issuance of notice u/s 143(2) of the Act being a

prerequisite and in the absence of such notices the entire proceeding would be invalid, observed as follows:-

> *5. At the outset, it must be stated that out of two questions of law that arose for consideration in in Hotel Blue Moon's case2 the first question was whether notice under Section 143(2) would be mandatory for the purpose of making the assessment under Section 143(3) of the Act. It was observed:-*
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> > *"3. The Appellate Tribunal held, while affirming the decision of CIT (A) that non-issue of notice under Section 143(2) is only a procedural irregularity and the same is curable. In the appeal filed by the assessee before the Gauhati High Court, the following two questions of law were raised for consideration and decision of the High Court, they were:*
> >
> > *"(1) Whether on the facts and in circumstances of the case the issuance of notice under Section 143(3) of the Income Tax Act, 1961 within the prescribed time- limit for the purpose of making the assessment under Section 143(3) of the Income Tax Act, 1961 is mandatory? And*
> >
> > *(2) Whether, on the facts and in the circumstances of the case and in view of the undisputed findings arrived at by the Commissioner of Income Tax (Appeals), the additions made under Section 68 of the Income Tax Act, 1961 should be deleted or set aside?"*
> >
> > *4. The High Court, disagreeing with the Tribunal, held, that the provisions of Section 142 and sub-sections (2) and (3) of Section 143 will have mandatory application in a case where the assessing officer in repudiation of return filed in response to a notice issued under Section 158-BC(a) proceeds to make an inquiry. Accordingly, the High Court answered the question of law framed in affirmative and in favour of the appellant and against the Revenue. The Revenue thereafter applied to this*

Court for special leave under Article 136, and the same was granted, and hence this appeal.

… … …

13. The only question that arises for our consideration in this batch of appeals is: whether service of notice on the assessee under Section 143(2) within the prescribed period of time is a prerequisite for framing the block assessment under Chapter XIV-B of the Income Tax Act, 1961?

… … …

27. The case of the Revenue is that the expression "so far as may be, apply" indicates that it is not expected to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143 strictly for the purpose of block assessments. We do not agree with the submissions of the learned counsel for the Revenue, since we do not see any reason to restrict the scope and meaning of the expression "so far as may be, apply". In our view, where the assessing officer in repudiation of the return filed under Section 158- BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143."

6. The question, however, remains whether Section 292BB which came into effect on and from 01.04.2008 has effected any change. Said Section 292BB is to the following effect:-

"292BB. Notice deemed to be valid in certain circumstances. – Where an assessee has appeared in any proceeding or cooperated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from

taking any objection in any proceeding or inquiry under this Act that the notice was –

(a) Not served upon him; or

(b) Not served upon him in time; or

(c) Served upon him in an improper manner:

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment."

7. A closer look at Section 292BB shows that if the assessee has participated in the proceedings it shall be deemed that any notice which is required to be served upon was duly served and the assessee would be precluded from taking any objections that the notice was (a) not served upon him; or (b) not served upon him in time; or (c) served upon him in an improper manner. According to Mr. Mahabir Singh, learned Senior Advocate, since the Respondent had participated in the proceedings, the provisions of Section 292BB would be a complete answer.

On the other hand, Mr. Ankit Vijaywargia, learned Advocate, appearing for the Respondent submitted that the notice under Section 143(2) of the Act was never issued which was evident from the orders passed on record as well as the stand taken by the Appellant in the memo of appeal. It was further submitted that issuance of notice under Section 143(2) of the Act being prerequisite, in the absence of such notice, the entire proceedings would be invalid.

8. The law on the point as regards applicability of the requirement of notice under Section 143(2) of the Act is quite clear from the decision in Blue Moon's case2. The issue that however needs to be considered is the impact of Section 292BB of the Act.

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.*
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> *10. Since the facts on record are clear that no notice under Section 143(2) of the Act was ever issued by the Department, the findings rendered by the High Court and the Tribunal and the conclusion arrived at were correct. We, therefore, see no reason to take a different view in the matter.*

15. We, thus, respectfully following the judgment of Hon'ble Apex Court and examining the fact of the instant appeal observe that since notice u/s 143(2) of the Act was not issued to the assessee, before commencing reassessment proceedings the error being fatal and uncorrectable renders the reassessment proceedings *void ab initio* and thus liable to be quashed. Hence the assessment so framed without issuance of notice u/s 143(2) of the Act is hereby quashed being contrary to law. We, thus allow assessee's additional legal ground. Adjudication of the remaining grounds on merits and legal issue will be merely academic in nature since we have quashed reassessment proceedings. Thus, the remaining grounds raised by assessee are dismissed being infructuous.

16. In the result, Assessee's appeal in ITANo.823/Ind/2018 is allowed.

The order pronounced as per Rule 34 of ITAT Rules, 1963 on 09.08.2021.

Sd/-	Sd/-
(RAJPAL YADAV)	(MANISH BORAD)
VICE PRESIDENT	ACCOUNTANT MEMBER

दिनांक /Dated : 09.08. 2021
Patel/PS

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore