IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER

ITA No.75/CTK/2017
Assessment Year : 2012-2013

M/s. Abhisri Nivas Pvt Ltd., House No.263, Phase-II, Kanan Vihar, Nandan Kanan Road, Bhubaneswar.	Vs.	Income Tax Officer, Ward 1(1), Aayakar Bhavan, Rajaswa Vihar, Bhubaneswar.
PAN/GIR No.AAGCA 9416 R		
(Appellant)	..	(**Respondent**)

Assessee by : **S/Shri B.Panda, Sr. Adv/B.R.Panda and Brajabandhu Bihari, ARs**

Revenue by : **Shri Sovesh Chandra Mohanty, Adl. CIT (DR)**

Date of Hearing : 11 /3/ 2022
Date of Pronouncement : 8/4/2022

O R D E R

Per C.M.Garg, JM

This is an appeal filed by the assessee against the order of the CIT(A),1, Bhubaneswar dated 21.12.2016 for the assessment year 2012-13.

2. Grounds of appeal raised by the assessee are as under:

"1. That the order passed by the learned Commissioner of Income Tax (Appeals)-1 as well as the order of assessment passed by the learned Income Tax Officer ward 1(1), Bhubaneswar without valid reason and without considering the facts of the case is illegal and arbitrary and liable to be quashed.

2. That the appellant fully and truly disclosed the amount of share application money received during the assessment year, hence addition of share application money amounting to Rs. 50, 00,000/- into total income without giving proper opportunity is illegal and arbitrary.

3. That the 'Trade Payable' is the payment payable by the appellant to its sundry creditors and suppliers amounting to Rs 24,71,973.00 which is paid by the appellant in the following assessment year. The addition of same into total income without considering the fact of the case is illegal and unjustified.

4. That the amount of Rs 1,27,15,689 is the amount received by the appellant from its customers. The appellant is having real estate business and the nature of its business is to receive the amount in advance from the customers and to deliver them the building/flat or developed plot later on. Therefore the addition of the same into total income without considering the fact of the case is improper, illegal and arbitrary.

5. That the amount of Rs 1,27,15,689/- is the brought down and reduced figure from previous assessment year. Addition of the same without considering the fact and nature of the business and without giving proper and reasonable opportunity is unjustified and liable to deleted.

6. That the order of assessment as well as order of appeal is otherwise bad in law and not maintainable, since the appellant deprived from the benefit of natural justice and reasonable opportunity of being heard.

7. That the appellant begs to urge further grounds to be raised at the time of hearing."

3. The assessee also filed petition under Rule 29 of the ITAT Rules, 1963 for filing of additional grounds, which are as under:

"8. For that the mechanical addition of Rs.50,00,000/- made towards the share application money by the share holders and such explanation filed explaining the sources and availability of funds should have been considered and accepted in toto. Otherwise erratic addition made by application u/s.68 is unlawful in the facts of the case.

9) For that addition of Rs.24,71,973/- being the "trade payable" by the Appellant in sundry creditors and the supplier should not have been added without considering the reasons and necessity arise in the matter but simple addition made without indicating the provisions of the statue is illegal hence to be deleted.

10) For that mechanical addition of Rs. 1,27,15,689/- received from the customers need to be quashed and confrontation of the matter should have been given to place the details otherwise addition made without application of mind is also liable to be deleted.

11) For that the service of Notice u/s.143(2) of the I.T.Act required for scrutiny assessment since has not been made on the authorized person the order of assessment for the relevant period is to be quashed and vacated."

4. Facts of the case are that the assessee is engaged in the business of real estate. The main business of the assessee is to purchase land and develop it, constructs building/flats and sold those constructed building/flats/land to its customers. It filed the return of income on 27.9.2012 showing a total income of Rs.6,87,260/-. The Assessing Officer completed the assessment u/s.143(3) of the Act at a total income of Rs.2,08,74,920/-, inter alia, making various disallowances/addition. Aggrieved, the assessee carried the matter in appeal before the first appellate authority but without any success.

5. At the outset, ld A.R. of the assessee referred to Ground No.11 taken in the additional grounds, which is a legal ground that the notice u/s.143(2) has not been served on the assessee before passing the assessment order, therefore, the assessment order deserves to be quashed.

6. Ld Sr DR submitted that the issue raised in the grounds of appeal being legal in nature was not raised before the ld CIT(A), therefore, same should not be entertained at this stage.

7. After considering the submissions of both the parties, it is noticed that the additional ground (No,.11) raised by the assessee relating to non service of notice u/s.143(2) of the Act is purely legal ground and goes to the root of the matter, therefore the same is admitted in view of the ratio laid down by the Hon'ble in the case of M/s National Thermal Power Co. Ltd. Vs. CIT 229 ITR 383 (SC) for adjudication.

8. Ld Sr. counsel for the assessee submitted that in this case the service of notice u/s.143(2) of the Act has not been served on the assessee, therefore, the scrutiny assessment proceedings and assessment order deserves to be quashed. Placing reliance on the judgment of ITAT 'SMC' Bench order dated 14.2.2020 in the case of Tulu Enterprises vs ITO in ITA No.372/CTK/2019 for the assessment year 2010-2011, ld counsel for the assessee submitted that as per judgment of Hon'ble Supreme Court in the case of ACIT vs. Hotel Blue Moon, 321 ITR 362 (SC), the Assessing Officer must necessarily issue notice u/s.143(2) of the Act within the time prescribed in the proviso to section 143(2) and the omission on the part of the assessing authority to issue notice u/s.143(2) cannot be a procedural irregularity and is not curable and requirement of notice u/s.143(2) cannot

be dispensed with. Therefore, the scrutiny assessment order may kindly be quashed.

9. Replying to above, ld DR drew our attention towards copy of the Power of Attorney submitted by Sri Alok Das, CA before the AO and a copy of the notice issued to the assessee u/s.143(2) of the Act dated 23.9.2013 and submitted that the then A.R. of the assessee, Sri Alok Das received notice on 23.9.2013 and he put his signature and date as acknowledgement on the copy of the notice. Further, placing reliance on the judgment of Hon'ble Allahabad High Court in the case of Sultanpur Kshetriya Gramin Bank vs JCIT, 336 ITR 156 (All), ld Sr DR submitted that the service of order of the Tribunal to advocate of the assessee is valid service for the purpose of calculation of limitation for filing an appeal or any other purposes, therefore, the service made by the department on Shri Alok Das, CA, who was representing the case before the AO is a valid service and, therefore, the additional of the assessee being devoid of merits may kindly be dismissed.

10. In the rejoinder, ld Sr. Counsel for the assessee drew our attention towards the judgment of Hon'ble Jurisdictional High Court of Orissa in the case of Nandram Hunatram vs CIT, Bihar & Orissa, 37 ITR 500 (Ori). Further drawing our attention to last para at page 7 of the judgment submitted that when there is no express authorisation by the assessee on the date of so called receipt of receipt dated 23.9.2013, then the date of

receipt of notice cannot be taken as valid service on the assessee or through A.R. Lr Counsel further drew our attention towards copy of Power of Attorney submitted by Sri Alok Das, CA before the AO and copy of note sheet/order sheet of the AO that there is no date on the Power of Attorney either by the assessee/Managing Director or Sri Alok Das, CA but the order sheet/note sheet of the AO dated 3.9.2014 clearly reveals that for the first time, Sri Alok Das, CA in the capacity of authorised representative of the assessee appeared and furnished copy of the statutory audit report and on the date of so called service of notice on 13.9.2013, Sri Alok Das was not authorised by the assessee to appear before the AO or receipt of notice on the assessee, therefore, the judgment of Hon'ble Allahabad High Court in the case of Sultanpur Kshetriya Gramin Bank(supra) is not applicable to the present case having distinct and different facts and circumstances. He further submitted that on the other hand, the preposition rendered by Hon'ble Jurisdictional High Court of Orissa in the case of Nandram Hunatram(supra) is clearly applicable to the present case as on the date of so called service of notice, Sri Alok Das, CA was not the authorised representative of the assessee to represent the case for assessment year 2012-13, therefore, such service of notice cannot be valid service by the AO on the assessee to assume jurisdiction to initiate scrutiny assessment proceedings and to pass scrutiny assessment order u/s.143(3) of the Act. Ld counsel for the assessee, before parting with arguments, also drew our

attention towards another copy of the notice u/s.143(2) of the Act dated 23.9.2013 submitted by the assessee alongwith application dated 9.3.2022 and almost similar copy of the same notice wherein, Sri Alok Das, CA put his signature alongwith date acknowledging the receipt of notice dated 23.9.2013 and submitted that the department has issued two notices one putting despatch No.6857 and second without any dispatch number, which was said to be received by Sri Alok Das, CA on 23.9.2013 i.e. on the date he was not A.R. of the assessee to represent the case. Ld Sr. counsel further drew our attention towards letter issued by the AO vide dated 8,.3.2021 to Sr D.R. ITAT, Cuttack, and submitted that the notice dated 23.9.2013 issued vide despatch No.6857 was not returned unserved by the postal authority, therefore, the department was presuming that the notice has been served on the assessee without any acknowledgement or receipt given by the assessee vide despatch letter No.6857,. ld counsel submitted that in this letter, the AO further submitted that notice was served on the A.R. of the assessee Sri Alok Das, CA and he also attached the power of attorney given by the assessee to Sri Alok Das, wherein, no date is mentioned and order sheet/note sheet clearly reveals that Sri Alok Das, for the first time appeared before the AO on 3.9.2014 and it can be safely presumed that power of Attorney was filed by him before the AO on the very same date i.e. 3.9.2014, therefore, on the date of so called service of notice on 23.9.2013, Sri Alok Das, CA was not authorised representative of

the assessee. Therefore, no valid service of notice u/s.143(2) has been made either on the assessee or A.R. of the assessee and such defect is not curable and cannot be dispensed with in view of the decision of Hon'ble Supreme Court in the case of Hotel Blue Moon (supra).

11. On careful consideration of the rival submissions, first of all, we observe that notice issued to the assessee vide despatch No.6857 was not served by the postal authority on the assessee , therefore, in absence of any receipt/acknowledgement, it cannot be presumed that it was served on the assessee within the prescribed time limit for issuance of notice u/s.143(2) of the Act. So far as service of notice u/s.143(2) of the Act on the A.R. Sri Alok Das, CA is concerned, we are of the considered view that Hon'ble Allahabad High Court in the case of Sultanpur Kshetriya Gramin Bank(supra) has categorically rendered the preposition that service of the order of the Tribunal to advocate of the assessee is a valid service for the calculation of limitation for filing of an appeal. This preposition may also be applied where there is issue of service of notice u/s.143(2) on the A.R. of the assessee but in our considered opinion, to take the benefit of this preposition, the department is required to establish that on the date of service of notice on the ld A.R./Advocate, he was authorised by the assessee to participate in the proceedings before the AO. In the present case, the fact reveals that Sri Alok Das, CA, for the first time appeared before the AO on 3.9.2014 and submitted his power of attorney and from

that date, he was the A.R. of the assessee to represent the case of the assessee before the AO for assessment year 2012-13. However, from the copy of the notice on which acknowledgement of receipt of notice alongwith signature and date has been made by Sri Alok Das is on 13.9.2013 much prior to the submission of Power of Attorney/authorisation letter before the AO. Therefore, we safely presume that on 23.9.2013, Sri Alok Das, CA was not authorised representative of the assessee for receiving any order or notice u/s.143(2) of the Act. Therefore, such receipt of notice cannot be held as valid service of notice u/s.143(2) of the Act on the assessee. our view also gets strong support from the decision of Hon'ble Orissa High Court in the case of Nandram Hunatram(supra).

12. The Hon'ble Supreme Court in the case of Hotel Blue Moon (supra) has categorically rendered the preposition that the Assessing Officer must necessarily issue notice u/s.143(2) of the Act within the time prescribed in the proviso to section 143(2) and the omission on the part of the assessing authority to issue notice u/s.143(2) cannot be a procedural irregularity and is not curable and requirement of notice u/s.143(2) cannot be dispensed with. In the present case, when the assessee has demonstrated from the documents submitted by the department that there was no valid service of notice u/s.143(2) on the assessee or A.R. of the assessee within the prescribed time limit, then we are compelled to hold that the scrutiny assessment order u/s.143(3) of the Act is not sustainable and valid in

absence of proper service of notice for assuming jurisdiction to conduct scrutiny assessment proceedings by the AO, therefore, the scrutiny assessment is hereby quashed.

13. Since, while adjudicating additional ground No.11, we have quashed the assessment order, other grounds of appeal on merits of the issue are not adjudicated.

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

Order pronounced on 8/4/2022.

Sd/-	sd/-
(Arun Khodpia)	**(Chandra Mohan Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 8 /04/2022
B.K.Parida, SPS (OS)

<u>Copy of the Order forwarded to</u> :

1. Appellant: M/s. Abhisri Nivas Pvt Ltd., House No.263, Phase-II, Kanan Vihar, Nandan Kanan Road, Bhubaneswar.
2. The Respondent. Income Tax Officer, Ward 1(1), Aayakar Bhavan, Rajaswa Vihar, Bhubaneswar
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT-1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack