

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI
BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER
AND
SHRI N. K. CHOUDHRY, JUDICIAL MEMBER

ITA No.166/Del/2015
(Assessment Year: 2007-08)

ITO(Exemption),
Ward-1(2),
New Delhi

(Appellant)

Vs. Innovative Welfare and
Educational Society,
Regd. Office: B-19, Defence
Colony, New Delhi
PAN: AAATI4207R
(Respondent)

ITA No.7598 & 7599/Del/2018
(Assessment Year: 2005-06 & 2006-07)

Innovative Welfare and
Educational Society,
Regd. Office: B-19, Defence
Colony, New Delhi
PAN: AAATI4207R
(Appellant)

Vs. ADIT(E),
Trust Circle,
New Delhi

(Respondent)

Revenue by :

Shri Hemant Gupta, Ld. Sr. DR

Assessee by:

Shri Rohit Kapoor, Ld. CA
Shri Vir Aggarwal, Ld. Adv

Date of Hearing

14/03/2022

Date of pronouncement

29/04/2022

O R D E R

PER N.K. CHOUDHRY, J. M.:

1. The instant Appeals i.e. ITA No. 166/Del/2014 by the Revenue Department and ITA Nos. 7598 and 7599/Del/201 by the Assessee , have been preferred against the orders dated 24.01.2014 and 05.09.2018

impugned herein, respectively passed for the Assessment Years 2007-08 and 2005-06 and 2006-07 by the Ld. CIT(A)-40 and CIT(A)-XI, New Delhi (in short Ld. Commissioner) u/s 250 of the Income Tax Act 1961 (in short 'the Act').

2. As all these appeals related to the Assessee and more or less involved similar facts and issues, therefore for the sake of brevity, we are disposing off by this composite order.

3. First we will decide the appeals filed by the Assessee. Facts and issues involved in ITA Nos. 7598/Del/2018 and 7599/Del/2018 are exactly similar and therefore for the sake of brevity, we will refer the facts and issues involved in ITA No. 7598/Del/2018 and result of the same shall also be applicable to ITA No. 7599/Del/2018.

ITA No. 7598/Del/2018

4. Brief facts of the case for adjudication of the issues involved in the instant appeal are that the Assessee had filed its return of income on dated 31.03.2006 by declaring 'Nil' income which was processed and resulting into passing of the assessment order u/s 143(3) of the Act on dated 21-09-2007. Later on it came to the knowledge of the AO that the Assessee has re-audited its books of account on dated 22.09.2011 from Assessment Year 2005-06 onwards but the Assessee has never submitted the same to the revenue department till the time inconsistencies were recorded, therefore it was observed by the AO that the books of account are in the form of history and cannot be revised any time in the future as they are to be accepted by the Annual General Body meeting by all members and therefore become final documents on record. The AO on finding difficult to verify the claims of the Assessee and to determine the income and its application, made reference u/s 142(2A) of the Act on dated 13.12.2011 for taking service of 3rd neutral party/auditor in the

form of Special Auditor for checking the veracity of the original viz-a-viz re-audited accounts of the Assessee.

4.1 Subsequently, the case of the Assessee was reopened u/s 147/148 of the Act on dated 27.03.2012 and thereafter by issuing show cause notice u/s 143(2) on dated 01.05.2012 on various points, the reply from the Assessee was sought and after considering the reply filed by the Assessee it was held by the AO that the Assessee was supposed to file return u/s 147(1)/ 148 of the Act up to 27.04.2012 i.e. within 30 days from the date of the issuing notice u/s 148 of the Act, but the Assessee has filed its revised return on 12.10.2012 even after the normal limitation time period of 30.09.2012 for filing of any return, thus the return was accepted but treated as non-est for being submitted after due time limit and later returned to the Assessee.

4.2 The AO while comparing the original audited and re-audited account found some difference in amounts and also observed that the Assessee has not shown its expenses in the books of account. Some expenses and its clear circulation of funds between two societies in the form of unsecured loan and repayment which resulted into difference between loan amount of Assessee society and patronage welfare and educational society. Further the original bills and vouchers were not presented by the Assessee and the expenses claimed of Rs. 38450457/- by the Assessee is not supported by original bills and vouchers for verification.

4.3 Ultimately, the AO vide Assessment order dated 28-03-2013 passed u/s 143(3) of the Act, made the additions of Rs. 38450457/- (3,55,71,267 + 28,79,190) on account of difference between original and revised balance sheet and Rs. 15 lakhs on account of cash withdrawn and also held "*that the activities of the society are not in accordance with its objects and accordingly, the Assessee society is not entitled for the claim of exemption u/s 11 of the Act and accordingly it is denied. A proposal for withdrawal of*

registration u/s 12AA has been moved separately to DIT(Exemptions) as the organization can no longer be regarded as a charitable organization within the meaning of provision of section 2(15)."

For brevity and ready reference, the concluding part of the Assessment order is reproduced herein below:

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The explanation given by the assessee is not tenable, as no reason for not correctly maintaining the books of accounts have been given by the assessee. The Patronage Welfare Society and the assessee society have three common trustees u/s- 13(3) of the Act. There is continuous transaction of funds between the Patronage Society and assessee society throughout the year which is clear violation of S-11(5). No explanation for tire transfer of funds between the Patronage Society and assessee society has been given. The balance sheet on 31.03.05 of the Patronage Society show's that the specified person u/s 13(3) of the assessee society has given unsecured loan to it during the year. There is clear circulation of funds between the two societies in form of unsecured and repayment. This is clear violation of S-13(1)(d) r.w.s S-13(3) r.w.s S-11 (5) of the Income Tax Act, 1961. The loan given to patronage society during the year is being added to the total income.

3. *Huge Cash unexplained Cash withdrawal :-*

The assessee in the submission dated 06.12.12 has stated that there was cash withdrawal from the bank account of Rs. 10,00,000/- (Rs. 5,00,000/- on 27.09.2004 and Rs. 5,00,000/- on 01.10.2004) which was wrongly treated as payment for land. There was again as cash withdrawal of Rs. 5,00,000/- dated 01/01,2005 from the Bank account which was again wrongly treated as payment for land. The total amount is Rs. 15,00,000/-.

It is clear evident from the above facts that the assessee is in the habit of withdrawing cash from the bank without properly accounting for it in the Books of Accounts. The purpose for withdrawal was not stated in any of the replies filed by the assessee. This fact has been stated by the Special Auditor in the Special Audit Report as well. Therefore, the unaccounted cash withdrawal is being added to your total income for the year.

4. *Original bills and Vouchers not presented and Poor maintenance of Books Of Accounts:- The expense claimed of Rs. 3,84,50,457/- by the assessee is not supported by original bills and vouchers for verification. These expenses have not been accounted for in the books of accounts and no valid explanation for incorrect*

recording of accounts have been given by the assessee. The assessee has claimed that the original bills and voucher are with the bank for the taking the term loan from Central bank of India, but his claim has also not been supported by any letter or explanation from the Bank authorities. In absence of documentary evidence for the expense incurred and not reflected in the original Audited accounts are being added to the total income of the assessee.

5. Therefore, from the activities of the assessee vis-a-vis its objects, it is held that the activities of the Society are not run, in accordance with its objects and accordingly, the assessee Society is not entitled for the claim of exemption u/s 11 of the I.T. Act and accordingly it is denied. A proposal for withdrawal of registration u/s 12AA has been moved separately to DIT (Exemptions) as the organization can no longer be regarded as a charitable organization within the provision of Section 2(15). The assessee has concealed facts from the AO during the first assessment proceedings and furnished incorrect information as well. In view of clear violation of Sec-13(l)(d) r.w.s 13(30) r.w.s 11(5) of Act, 1961, exemption u/s 11 and 12 are denied to the assessee.

6. Hence, the income of the assessee is taxed as per rates applicable to an AOP, as its claim of exemption for being a charitable institution is denied due to reasons already discussed above. No fixed asset schedule has been attached by the assessee along with the original return of income, therefore, no claim on depreciation can be given for the A.Y. 2005-06 and nor has the assessee claimed for it in the original Income and Expenditure A/c. Assessee has failed to provide the Revised audited accounts of the financial year 2004-05 i.e. A.Y. 2005-06, in place of it, the Assessee has submitted the Audited a/c financial year 2006-07.

Computation of income:-

Heads	Amount (Rs.)	Amount
Gross Receipts		24,285/-
Add: Unexplained cash withdrawal of	15,00,000/-	
Add: Unexplained	3,557,1267/-	
Add: Amount given to Patronage Society	28,79,190/-	
Total Income		3,99,74,742
Expenses as per I&E		12,09,209/-
Taxable Income		3,87,65,53
Round off		3,87,65,53 0/-

The assessee has furnished Return of Income beyond the specified date for filing of Return. Penalty u/s 272(A)(e) for late filing of return is being initiated separately.

Assessed u/s 143(3) of the I.T. Act as above. Issue necessary forms. Initiate penalty proceeding u/s 271(l)(c) separately, for furnishing false particulars of income

5. The Assessee being aggrieved challenged the assessment order before the Ld. Commissioner, who vide impugned order partly sustained the same, by allowing the appeal of the Assessee partly. For brevity and ready reference the concluding part is reproduced herein below:-

4 Determination

4.1 Grounds of appeal Nos. 1 to 4 challenge the denial of exemption under section 11, addition on account of cash withdrawal of Rs. 15 lakh, disallowance of expenses incurred for running the institution and addition of amount given as loan to Patronage Society.

4.1.1 The Assessing Officer noted that a special audit was conducted under section 142(2A) for the assessment year 2009-10 in which various inconsistencies were noted. It was also noted that the books of account of the assessee were re-audited from assessment year 2005-06 onwards but were not submitted to revenue till the time the inconsistencies were recorded. Further, in response to notice under section 148, return was not submitted within 30 days from the date of the notice and the assessee failed to file the return on time. The return filed on 12/10/2012 was declared to be non-est. Further, it was noted that the explanation given by the assessee about the difference in the amounts as per the original return & accounts and as per the re-audited accounts was unacceptable since no reason for not maintaining the books of account correctly has been given by the assessee. It was also noted that no explanation has been given regarding transfer of fund between the assessee society and the Patronage Society, which was a specified person within the meaning of section 13(3). No vouchers were presented, and the books of accounts were maintained poorly as a result of which expense incurred and not reflected in the original audited accounts were added to the total income. It was held that the activities of the assessee were not in accordance with its objects and that the society is not entitled to the claim

of exemption under section 11. The loan given to the Patronage Society was also added to the income along with unexplained cash withdrawal.

4.1.2 I have considered the assessment order and the submissions of the appellant Analysis of the differences the original and re-casted accounts is as under:

Assets	Original	Revised	Differences
Land	16705324	16209467	-495857
Building	5829960	18677360	12847400
Computers		1600020	1600020
Furniture		1240000	1240000
Books & periodicals	50000	1250000	1250000
Lab equipment		1970000	1970000
FDR	3000000	3000000	0
Central Bank of India	4979	4979	0
Indian Bank		23276	23276
TDS	3921	3921	0
Cash in hand	2676	10283	7607
Miscellaneous expenses (I&E)		1195085	1195085
	25596860	45184391	19587531

Liabilities	Original	Revised	Differences
Capital	-1184924	15528924	16713848
Central Bank of India-OD	1814789	1814789	0
Central Bank of India-TL	24964994	24959487	-5507
Unsecured loan	0	2879190	2879190
Audit fee payable	2000	2000	0
	25596860	45184390	19587531

4.1.3 It is noted that the Assessing Officer has made an addition of Rs. 3,84,50,457/- (Rs. 3,55,71,267/- + Rs. 28,79,190/-) on account of difference between the original and revise balance sheet. From the above analysis it is apparent that the said amount is a result of addition on account of differences in debit and credit entries, being Rs. 1,95,87,531/- each. Making addition on both counts would result in adding the same amount twice which cannot be sustained.

4.1.4 However, it is also a fact that the said expenses have been disallowed by holding that the expenses are not supported by original bills and vouchers. It has also been held that the said expenses have not been accounted for in the books of account and no valid explanation for the same has been given. No letter in support of the contention that the original bills/vouchers were with the Bank against the term loan has been furnished. Hence, in view of the discussion above and in absence of satisfactory explanation, the addition is restricted to Rs, 1,95,87,531 /-.

4.1.5 As regards the addition on account of cash withdrawal, it has been submitted that the Assessing Officer has not gone to the bank statement and there were cash deposits amounting to Rs. 15,00,000/- which were ignored by the Assessing Officer. Copy of bank statement has been given in support of the contention. From the copy of the said statement, it is seen that there are indeed cash deposits subsequently but, in this regard, again the appellant has failed to establish that the source of the cash for the subsequent deposits made was from the cash withdrawal. In absence of any satisfactory explanation, the addition of Rs. 15,00,000/- is sustained.

4.1.6 As regards the issue of treating the assessee as an AOP, it is apparent from the facts and circumstances of the case the activities of the assessee were not run in accordance with its objects and there is no satisfactory explanation for mismanagement of funds since the books of account were maintained poorly and none of the expenditure incurred was verifiable. In view of this the finding of the Assessing Officer that the society' was not entitled for the claim of exemption cannot be faulted. It is to be noted that even besides the issue regarding loan from the Patronage Society on the basis of which the Assessing Officer has invoked the provisions of section 13, which in turn is a transaction for which no satisfactory explanation is available, it is apparent from the facts of the case that the accounts of tire assessee were poorly maintained and had to be re-casted subsequent to the special audit conducted for assessment year 2009-10. In such a scenario the audit report in Form No. 10B cannot be relied upon and as per the provisions of section 12A, one of the conditions for allowing exemption is that the account

should be audited, and report of such audit is required to be submitted along with the return of income. The Assessing Officer is also noted that there were gross violations on the part of tire assessee and auditors and the original audit report does not indicate that the assessee society had dealing with any specified persons as defined in section 13(3). In view of these facts, there is no infirmity the order of the Assessing Officer in treating the assessee as an AOP.

4.1.7 In view of the discussion above, grounds of appeal Nos. 1 to 4 are partly allowed.

4.2 Ground of appeal No. 5 states that the appellant keeps the right to add, change and delete any of the grounds of appeal. Since no such option was exercised during the appellate proceedings, this ground of appeal is academic in nature and is considered to be dismissed for statistical purposes.

5. In the end result, the appeal is PARTLY ALLOWED

6. The Assessee being aggrieved, challenged the partly affirmation of the additions and sustaining the treatment of Assessee as an AOP by the Ld. Commissioner by raising following grounds of appeal:-

- “1. On the facts and circumstances of the case, the Learned Assessing Officer has erred in considering the educational society into A.O.P*
- 2. On the facts and circumstances of the case, the Learned Assessing Officer has erred in adding cash withdrawal of Rs 15,00,000/- in the taxable income .*
- 3. On the facts and circumstances of the case, the Learned Assessing Officer has erred in disallowing the expenses incurred in running the institution and added in the taxable income.*
- 4. On the facts and circumstances of the case, the Learned Assessing Officer has erred in adding, the amount given as a loan to patronage society.”*

6.1 Subsequently, the Assessee vide letter dated 24.11.2021 raised the following additional grounds of appeal:-

“1. That the notice issued u/s 143(2) on 01.05.2012 is bad in law and consequential assessment framed in response to the said notice is also bad in law.

2. That the Ld. AO has erred in holding that the return filed on 12.10.2012 in response to notice u/s 148 after specified time limit of 30 days is nonest particularly considering the facts that the order u/s 147 was passed on 28.03.2013.

3. That the Ld. AO has erred in framing assessment u/s 148 read with section 143(3) after treating the return filed in response to notice u/s 148 on 12.10.2012 as non-est.

4. That the reasons recorded and the reopening u/s 148 is bad in law since, no proper approval as required in section 151 has been obtained.

7. Ld. AR on behalf of the Assessee, though argued the case on merits however emphasized on the additional grounds of appeal as legal grounds and submitted that notice issued u/s 143 (2) on dated 01.05.2012 is bad in law and consequential assessment framed in response to the said notice in un-sustainable and assessment framed u/s 148 read with section 143(3) after treating the return filed on dated 12.10.2012, in response to notice u/s 148 of the Act, as non-est, is unwarranted and liable to be set aside as it is settled law that notice u/s 143(2) of the Act is not only mandatory but in the absence of such notice, the AO cannot proceed to make enquiry.

7.1 The ld. counsel also submitted that the AO has erred in holding that the return filed on dated 12.10.2012 in response to the notice u/s 148 after specified time limit of 30 days is non-est.

7.2 It was further claimed by the Ld. Counsel that the reasons recorded and the reopening u/s 148 is bad in law since no proper approval as required u/s 151 has been obtained.

7.3 The Ld. A R in support of its contentions also relied upon various judgments.

8. On the contrary the Id. DR supported the impugned order passed by the Ld. Commissioner and submitted that the same is not suffered from any perversity, impropriety and illegality and therefore does not require any interference.

9. Heard the parties and perused the material available on record. The Assessee has raised the additional grounds, which admittedly are legal in nature and emanates from the facts already on record in the proceedings of the authorities below and does not require any independent facts and material for its adjudication, hence we deem it appropriate to allow the Assessee to raise the same and consequently the additional grounds raised are admitted for adjudication, as per dictum of the Hon'ble Apex Court in the case of NTPC Vs. CIT [229 ITR 383 (SC)].

9.1 Coming to the merit, the Assessee before us vide additional ground No. 1 raised the issue that the notice issued u/s 143(2) on dated 01.05.2012 is bad in law and consequently, assessment framed in response to the said notice is also bad in law, because no notice u/s 143(2) of the Act was issued to the Assessee after filling of its return of income 12.10.2012 in response to the notice issued u/e 148 of the Act on dated 27.03.2012.

9.2 The Id. DR on the contrary claimed that after issuing notice u/s 148 of the Act to the Assessee, admittedly two notices u/s 143(2) have been issued on dated 01/05/2012 and 09/08/2012 to the Assessee, hence the assessment framed and its sustenance do not require any interference.

9.3 On the rival claims of the parties, the question emerges as to whether issuance of notice u/s 143(2) of the Act is mandatory after filing of return of income in response to the notice issued u/s 148 of the Act. Secondly if the answer is 'yes' then what would be the fate of the Assessment order framed without issuing notice u/s 143(2) of the Act.

9.4 The Hon'ble Supreme Court in ACIT v. Hotel Blue Moon (2009) 321 ITR 362, has laid down the dictum that the requirement to issue notice under Section 143(2) is mandatory and non-issuance of notice is not a procedural irregularity and the same is not curable and, therefore, the requirement of notice under Section 143(2) cannot be dispensed with.

9.5 As relied by the Assessee, Hon'ble Gujarat High Court in the case of Pr. CIT Vs. March Bio-sciences Ltd (2019) 106 taxmann.com 399 (Gujarat), while dealing with the situation where the assessment order was passed without issuance of valid notice u/s 143(2) of the Act after filing of return of income, has held that section 143 read with section 292 BB of the Act on non-issuance of notice u/s 143(2) is not a procedural irregularity and same cannot be cured u/s 292 BB of the Act. Notice issued u/s 143(2) of the Act to the Assessee prior to filing of return of income, being invalid notice and assessment order passed in pursuance to the notice deserves to be set aside.

9.6 Hon'ble High Court of Bombay in the case of ACIT, Circle-2(1) Vs. Geno Pharmaceuticals Ltd (2013) 32 taxmann.com 162 (Bombay) approved the view of the ITAT wherein the ITAT held that notice u/s 143(2) is mandatory and in absence of such service, the AO cannot proceed to make an enquiry on the return filed in compliance with the notice issued u/s 148 of the Act.

9.7 Hon'ble Jurisdictional High Court in the case of DIT Vs. Society for Worldwide Inter Bank Financial, Telecommunication (2010) 323 ITR 249 (Delhi) dealt with the same situation where the notice was served

upon the authorized representative simultaneously on its filing of the return and the Hon'ble Court held that notice was ready even prior to filing of the return of income and therefore, on its face value would amount to gross violation of the scheme of section 143(2) of the Act.

9.8 The Hon'ble jurisdictional High Court in the case of PR. Commissioner of Income Tax-08 Versus ShriJai Shiv Shankar Traders Pvt. Ltd (2016) ITR 448, also dealt with identical situation and held as under:

19. The resultant position is that as far as the present case is concerned the failure by the AO to issue a notice to the Assessee under Section 143(2) of the Act subsequent to 16th December 2010 when the Assessee made a statement before the AO to the effect that the original return filed should be treated as a return pursuant to a notice under Section 148 of the Act, is fatal to the order of re-assessment.

9.9 Even jurisdictional bench of the Tribunal in the case of ShriRishavPrakash Jain, NewVsITO, New Delhi (ITA No.2061/Del/2012 decided on 08-02-2019) also dealt with the identical issue and held as under:

8. *We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also considered the various decisions cited before us. It is an admitted fact that in response to the notice u/s 148 dated 28th March, 2008 the assessee, vide letter dated 9th May, 2008 has requested the Assessing Officer to treat the return already filed as return filed in response to notice u/s 148. It is also an admitted fact that no notice u/s 143(2) of the Act was issued subsequent to the filing of the return by the assessee in response to the notice u/s 148 of the [IT Act](#). The information supplied by the Assessing Officer to the assessee in response to the RTI application reads as under:-*

" In response to the application filed by the applicant dated 17.01.2018 and received in this office on 19.01.2018 the following information is furnished.

S.no. 1. No remand report was passed by this office.

S.no. 2. No rejoinder was filed by the assessee.

S.no.3. No notice u/s 143(2) of the [I.T Act](#) was issued subsequent to the submission of ITR filed by the

assessee in response to notice u/s 148 of the I.T Act. However, notice u/s 142(1) of the Income Tax Act, was issued on 19.08.2008 & 24.11.2008 which was served on 21.08.2008 & 28.11.2008 respectively."

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12. ***Since, in the instant case, admittedly, no notice u/s 143(2) of the Act was issued and served on the assessee after the return in response to notice u/s 148 of the Act was filed by stating that the original return filed may be treated as return filed in response to notice u/s 148, therefore, the reassessment order passed by the Assessing Officer is not sustainable in law. We, therefore, accept the additional ground raised by the Assessee and quash the order passed u/s 143(3)/147 for non-issuance of notice u/s 143(2) of the Act which is mandatorily required. The additional ground raised by the assessee is accordingly allowed. Since the assessee succeeds on this legal ground, the other grounds being academic in nature are not being adjudicated.***

(highlighted by us)

9.10 From the judgments referred above it is clear that for processing the revised return filed in response to the notice u/s 148 of the Act, issuance of notice u/s 143(2) of the Act is necessary and mandatory. Non-issuance of the notice u/s 143(2) is not a procedural irregularity and therefore the same cannot be cured u/s 292 BB of the Act. Consequently the assessment framed against the Assessee without issuing notice u/s 143(2) of the Act is unsustainable and liable to be quashed being void-ab-initio, hence the questions posed by us, answered accordingly.

9.11 Coming to the instant case, admittedly the AO issued the notice u/s 148 of the Assessee on dated 27.03.2012, in response to which the Assessee filed its revised return of income on dated 12.10.2012, which was although accepted by the AO, but treated as non-est being filed after the prescribed period of 30 days. The case of the Assessee is at much higher footing than the cases as referred above wherein the Assesseees in response to the notice u/s 148 of the Act claimed that return filed originally may be treated as filed in response to the notice u/s 148 of the Act, whereas in this case the Assessee responded the notice u/s 148 of the Act, may be belatedly, by filling its revised return of income which was though duly accepted but later on treated as non-est by the AO but used for comparison with the original Return of income. The AO has passed the order u/s 143(3) of the Act but not u/s 144 of the Act, meaning thereby the AO has proceeded with the return filed in response to the notice u/s 148 of the Act and therefore we are of the considered view that on acceptance of the revised return of income filed by the Assessee on dated 12-10-2012 in response to the notice issued on dated 27-03-2012 u/s 148 of the Act and before framing the Assessment against the Assessee on dated 28-03-2013, as per the provisions of the Act, the AO was under obligation to issue the notice u/s 143(2) of the Act, which the AO has failed to do, hence we are inclined to quash the assessment order on this count itself. Thus ordered accordingly.

9.13 Since we have quashed the assessment order on additional ground no. 1 itself, hence no useful purpose is going to be served while deciding other grounds raised by Assessee including on merits, as the same have become infructuous, hence we are not proceeding to decide the same.

10. In the result, both the appeals i.e. ITA nos. 7598 & 7599/Del/2018 filed by the Assessee stands allowed.

ITA No. 166/Del/2015 (Filed by Revenue)

(Assessment Year 2007-08)

11. In this case, brief facts of the case relevant for adjudication of the instant appeal are that the return of income for the year under consideration was filed by the Assessee on dated 27.03.2008 by declaring 'Nil' income which was processed u/s 143(1) of the Act. Subsequently, the case of the Assessee was selected for scrutiny and resulted into issuance of notice u/s 143(2) of the Act and ultimately, the AO made the additions of Rs. 19,63,366/- on account of net profit as per I&E Account and Rs. 5,09,62,944/- on account of unexplained cash credit u/s 68 of the Act by passing the Assessment order dated 23.12.2009 u/s 143(3) of the Act.

12. Aggrieved by the assessment order, the Assessee challenged the said additions before the Id. Commissioner who vide impugned order annulled the assessment order itself by holding as under:-

"7.5. The facts of the case have been carefully considered. I have personally perused the assessment record. The assessment folder is page numbered from page 156 to 456. Besides that some papers relating to recovery of demand and of appellate proceedings are also kept in the folder which are not numbered. It is noticed that order-sheet entry dt. 30.07.2008 is recorded as under:

"The assessee trust/society has filed return declaring gross receipt including donations which exceeds Rs. 5 Crores. The case falls under compulsory scrutiny as per guidelines for selection of cases for scrutiny during 2008-09. Issue notice u/s 143(2) and ensure its service.

DDIT(E) "

Thereafter, the next order-sheet entry is dt.12.08.2009 which is in respect of issuance of notice u/s 143(2) and 142(1) alongwith questionnaire fixing the hearing on 24.08.2009.

It is, however, noticed that the office copy of notice u/s 143(2) dt. 30.07.2008 is nowhere placed on record. It is further observed that in response to notice and questionnaire dt. 12.08.2009, the appellant filed the following letter (placed at page 234 of assessment folder) objecting the assessment proceedings:

'To,

Date: 18.09.2009

The Asst Director of Income Tax (Exemptions)

Trust Circle-11, Delhi

Ref: Assessment Proceeding of Innovative Welfare & Educational Society for Asst Year 2007- 2008

Sir,

We received the notice u/s 142 & 143(2) of I. T. Act 1961 on 26/08/2009 for A/y 2007-08 as per law, a notice u/s 143(1) should not be sent after the expiry of one year from the end of financial year in which return of income is made.

In our case we have filed a return on 27/03/2008 for a.y 2007-08.

Copy of roi filled is enclosed.

So notice u/s 142/143(1) should be issued by 31/03/2009 so this notice is time barred and no assessment can be made.

Prayed Accordingly,

Submitted on behalf of the Assessee. "

7.6. It is further noticed that the AO vide letter F.No. ADIT(E)TC-II/AAAT14207R/09- 10/425 dt. 20.11.2009 replied the objection of the appellant as under:

"However subsequently Shri Jeevesh Krishna, filed an objection stating that the issue of the notice u/s 143(2) dated 12.08.2009 was barred by limitation. The objection is not sustainable on the following grounds.

1. The proceeding was initiated vide issue of notice u/s 143(2) dated 30.07.2008. The notice was issued to the society at its registered address at B-19, Defence Colony, New Delhi. This address was mentioned as your registered address in your return dated 27.03.2008. This address is also the address available in the PAN records maintained by the Department. This information is confirmed from the copy of registration under Societies Registration Act and Registration order u/s 12A of the I T. Act. Subsequently another notice u/s 143(2) was issued to the same address. A copy of the notice dtd. 30/07/08 is enclosed herewith.

2. *The notice was issued by speed post through Department of Post, Delhi which was tantamount to proper service as per law. As already mentioned vide point-1, the notices were sent to the address per record to available to the Department at the time of issue of notice.*
3. *The notices were not returned which indicates service of the same.*
4. *The notice dated 12.08.2009 was just a formality as the undersigned has taken over jurisdiction of your case from the previous incumbent Shri V.S. Kapoor. ”*

Surprisingly, the enclosed copy of notice dt. 30.07.2008 is nothing but unsigned copy of notice u/s 142(1) only. Even the unsigned copy of the notice u/s 143(2) of the Act does not find place neither as enclosure of the AO's letter nor anywhere in the assessment record. The subsequent replies of the AO during the appellate proceedings are all evasive and highlighting the behavior of the appellant in the proceedings for AY 2010-11. Such attempts on the part of the present AO are nothing but defending the indefensible. The AO's reply dt. 09.07.2012 stating that notice u/s 143(2) was duly sent through speed post at the address mentioned on the ITR of the assessee for AY 2007-08 is not supported with the available papers in the assessment record. Neither the office copy of the notice is available in the assessment folder nor there exists any evidence of sending the notice through speed post.

7.7. In view of the above facts, it is clear that the AO failed to issue notice u/s 143(2) of the Act within the stipulated time as provided in the section. Notice u/s 143(2) dt. 12.08.2009 was definitely barred by limitation as provided in proviso to section 143(2)(ii) of the Act. The Hon'ble Courts have decided the issue in several cases that assessment made on the service of notice u/s 143(2) beyond the stipulated time is bad in law. In the following cases, it is held that issue of notice u/s 143(2) of the Act is mandatory for finalization of assessment; In the case of CIT vs. Cebon India Ltd. (2010) 34 DTR 119 /229 CTR 188 / (2009) 184 Taxman 290 (P&H), it is held that: In the absence of service of notice the Assessing Officer had no jurisdiction to make assessment.

In the case of Semite Sisters Society (2010) 37 PTR 371 /130 TTJ 96 (Ind.)(Trib.), it is held that: Notice under section 143(2), though issued within 12 months but served after the expiry of 12 months from the end of the month in which the return was furnished is invalid and the assessment completed on the basis of such notice cannot be sustained.

In the case of Dy. CIT vs. National Refinery (P) Ltd. (2010) 134 TTJ 109 / 38 SOT 36 / 45 DTR 325 (Munu)(Trib.), it was held that: Assessing officer had issued notice under section 143(2), after expiry of twelve months from the end of month in which return was filed, notice issued was barred by limitation and therefore, assessment made in pursuance of said notice was quashed.

In the case of Dy. CIT vs. Maxima Systems Ltd. (2010) 40 DTR 49/236 CTR 443 (Guj.), it was held that: Notice having been served after the expiry of 12 months from the end of the month in which the return is furnished, Assessing Officer had no jurisdiction to frame the assessment.

In the case of CIT vs. PaiVaibhav Hotels (P) Ltd. (2010) 42 DTR 121 (Kar.), it was held that: Omission on the part of the assessing authority to issue notice under section 143(2), within prescribed time cannot be a mere procedural irregularity and the same not curable, as the notice under section 143(2), was issued beyond the period of limitation, the proceedings initiated pursuant to the notice are vitiated.

7.8. Accordingly, as this statutory requirement of section 143(2) has not been complied with, it cannot be treated as a defect in service of notice which is curable under section 292B. Further, resort cannot be taken to S. 292BB of the Act as well, because vide letter dt. 18.09.2009 filed by the assessee to the AO and placed in the assessment record the objection relating to the service of notice being beyond the limitation date and therefore the proceedings u/s 143(2) being net lawful has been raised by the assessee. Consequently, as the assessment order is finalized on the basis of subsequent notice u/s 143(3) dt. 12.08.2009 which is barred by limitation, the assessment order passed on the basis of such notice is held re null and void. Therefore, the assessment order passed by the AO is bad in the eyes of law and deserves to be annulled. Ground No. 6 of the appeal is allowed.

8. Since the assessment itself has been annulled, the additions made by the AO need not to be adjudicated on merits.”

13. The revenue department being aggrieved preferred the instant appeal, by raising following grounds of appeal:-

- “1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding the assessment null and void disregarding the fact that the notice was sent on the correct address mentioned in the return of income.
- 2 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding the assessment null and void disregarding the fact that the intimation of the change of address from M/s ArunViander & Co. which is without any power of attorney and not from any the functionary of the society.
- 3 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding the assessment null and void disregarding the fact that the notice has been sent on all known addresses of Members of the Society and the addresses of the Institutions because the notice was refused to receive at the 82/21, Circular Road, Mukesh Nagar, Shahdara, Delhi when Inspector was sent to deliver this notice.”

13. Heard the parties and perused the material available on record. In the instant case, the return filed by the Assessee on dated 27.03.2008 was processed u/s 143(1) of the Act and resulted into of passing assessment order dated 23.01.2009 u/s 143(12) of the ACT.

The notice u/s 143(2) was supposed to be issued by 31/03/2009, however the same was issued to the Assessee only on dated 12/08/2009 and therefore the same was held as barred by limitation by the Ld. Commissioner. As the provisions of section 139 read with section 143 of the Act, mandates issuance of notice u/s 143(2) of the Act and also held by us in the ITA nos. 7598 & 7599/Del/2018 that issuance of notice u/s 143(2) of the Act is mandatory before passing assessment order against the Assessee, therefore we have to see as to whether in this case, the notice u/s 143(2) of the Act was issued and served upon the Assessee by the AO with the time prescribed by law.

13.1 Before the Ld. Commissioner, the Assessee challenged the assessment order on merit as well as on legal grounds and mainly focused that assessment order has been passed without serving statutory notice u/s 143(2) of the Act within statutory period. Though the AO in the

assessment order mentioned that notice u/s 143(2) was issued to the Assessee on 30.07.2008 however, no such notice was ever issued by the AO within the time barring period. The Assessee before the Ld. Commissioner in appellate proceedings also filed an affidavit dated 21.01.2011 qua non-receipt of notice u/s 143(2) of the Act on which the comments of the AO were sought by the Ld. Commissioner in response to which the AO submitted its comments and explanation before the Ld. Commissioner, who while considering the same has observed that it is clear that the AO has failed to issue notice u/s 143(2) of the Act within stipulated time as provided in the section. Notice u/s 143(2) dated 12.08.2009 was definitely barred by limitation as provided in proviso to section 143(2)(ii) of the Act. Accordingly, as this statutory requirement of section 143(2) has not been complied with, it cannot be treated as defect in service of notice which is curable u/s 292BB. Consequently, the notice u/s 143(2) dated 12.08.2009 issued by the AO is barred by limitation and the assessment order passed on the basis of such notice, is held to be null and void, deserves to be annulled.

14.2 We have given thoughtful consideration to the facts and circumstances of the case and find that the Id. Commissioner personally perused the assessment records and the AO's order sheet entry dated 30.07.2008 wherein it has been recorded "*that Assessee trustee/society has filed return declaring gross receipt including donation which exceeds Rs. 5 crores. The case falls under compulsory scrutiny as per guidelines for selection of cases for scrutiny during 2008-09. Issue notice u/s 142(2) and ensure its service.*"

14.4 The Ld. Commissioner further observed "*that next order sheet entry dated 12.08.2009 which in respect of issuance of notice u/s 143(2) and 143(1) along with questionnaire fixing the date of hearing on 24.08.2009 and noticed that the office copy of notice u/s 143(2) dated 30.07.2008 is nowhere placed on record. Further, in response to notice and questionnaire dated*

12.08.2009, the Assessee filed the following letter (placed at page 234 of the AO folder) objecting the assessment proceedings wherein, in the letter the Assessee submitted that in its casethe return was filed on 27.03.2008 for AY 2007-08 therefore, notice u/s 142(2)/ 143 should be issued by 31.03.2009, so notice is time barred and no assessment can be made."

14.5 The AO vide reply dated 20.11.2009, replied objection of the Assessee and submitted that proceedings were initiated vide issuance of notice u/s 143(2) dated 30.07.2008. The Id. Commissioner found the enclosed copy of the notice dated 30.07.2008 is nothing but unsigned copy of notice u/s 142(1) only. Even the unsigned copy of the notice u/s 143(2) of the Act does not find place neither as enclosure of the AO's letter nor anywhere in the assessment record. Ultimately, the Ld. Commissioner held that statutory requirement of section 143(2) has not been complied with and consequently, assessment finalized on the basis of subsequent notice dated 143(2) dated 12.08.2009 which is barred by limitation and held to be null and void.

14.6 We find that the Ld. Commissioner thoroughly considered the factual positions of the case and even examined the assessment record and also called for the comments of the AO and thereafter only came to the conclusion, on which we are having concurrence that no notice u/s 143(2) was served upon the Assessee within the statutory period prescribed in the Act and noticeu/s 143(2) issued on dated 12.08.2009 is time barred and no assessment can be made on such notice and consequently the Assessment orderheld to be null and void and deserves to be annulled.

Even otherwise we do not find any reason and material to controvert the findings of the Ld. Commissioner and therefore are not inclined to interfere with the impugned order consequently,the appeal filed by the revenue department stands dismissed.

15. In result, ITA Nos.7598 & 7599/Del/2018 filed by the Assessee are allowed and ITA No.166/Del/2015 filed by the Revenue Department stands dismissed.

Order pronounced in the open court on 29/04/2022.

-Sd/-
(R.K.PANDA)
ACCOUNTANT MEMBER

-Sd/-
(N.K. CHOUDHRY)
JUDICIAL MEMBER

Dated: 29/04/2022
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi