

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "DB" NEW DELHI**

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER**

आ.अ.सं./I.T.A No.5080/Del/2018

निर्धारणवर्ष/Assessment Year: 2015-16

Rajpal Vikas Nagar, Ambari, Dehradun, Uttarakhand	बनाम Vs.	ITO Ward 1(2)(2), Dehradun.
PAN No. BCSPR0148D		
अपीलार्थी Appellant		प्रत्यर्थी/ Respondent

निर्धारितीकीओरसे / Assessee by	Shri K.K. Juneja, Adv.
राजस्वकीओरसे / Revenue by	Shri N.C. Upadhyaya, Sr. DR

सुनवाईकीतारीख/ Date of hearing:	07.06.2022
उद्घोषणाकीतारीख/ Pronouncement on	29.08.2022

आदेश /O R D E R

PER C.N. PRASAD, J.M.

This appeal is filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals), Dehradun dated 21.05.2018 for the AY 2015-16.

2. The assessee in its appeal challenged the order of the Ld. CIT(Appeals) in denying the claim for deduction u/s 54B of the Act. The assessee also filed additional grounds of appeal challenging the very jurisdiction of the Assessing Officer in passing the assessment order u/s 148 read with section 143(3) of the Act. The Ld. Counsel for the assessee submits that the additional ground was filed challenging the very jurisdiction of the Assessing Officer in passing the assessment order as

there was neither issue nor service of statutory notice u/s 143(2) of the Act and thereby rendering the assessment order passed by the Assessing Officer u/s 148 read with section 143(3) of the Act as bad in law.

3. The Ld. Counsel further submits that in the additional grounds the assessee also challenged the jurisdiction of the Assessing Officer in initiating the 147 proceedings and issue of notice u/s 148 by non jurisdictional Assessing Officer. The Ld. Counsel submits that since these additional grounds are purely legal grounds and going to the root of the matter the same may be admitted and adjudicated upon. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of National Thermal Power Company Limited vs. CIT 229 ITR 383.

4. Heard rival submissions on admission of additional grounds. The additional grounds filed by the assessee are as under: -

1. *“That in fact and circumstances of the case, recording of the reasons of escaped income to the extent of Rs.38,67,000/- by the Non Jurisdictional ITO, initiation of proceeding u/s 147 and issuance of notice u/s 148 on the sole basis of information received from registrar, that appellant had sold the land, is illegal without jurisdiction and void-ab-initio.*
2. *That in fact and circumstances of the case, the reasons are recorded merely on basis of information and in the absence of Independent application of mind neither the Ld.CIT(A) applied his mind but in a ordinary mechanical way signed the approval is unjustified and bad in law.*

3. *That the assessment order passed under section 148/ 143(3) of the Act under appeal is bad in law, ITO neither issue nor served of statutory notice under section 143(2) of the Act, is prone to be declared as bad in law, and liable to be quashed.”*

5. In the additional grounds filed by the assessee the assessee challenged the very jurisdiction of the Assessing Officer in passing the assessment order u/s 148 read with Section 143(3) of the Act in the absence of issue or service of notice u/s 143(2) of the Act. Assessee also raised additional ground challenging the very initiation of proceedings u/s 147 and issue of notice u/s 148 of the Act by the non jurisdictional Assessing Officer. These two additional grounds raised by the assessee goes to the root of the matter and are purely legal grounds. Respectfully following the decision of the Hon’ble Supreme Court in the case of National Thermal Power Company Limited (supra) we admit the above additional grounds.

6. It is the contention of the Ld. Counsel for the assessee that the mandatory issue and service of notice u/s 143(2) was not complied with by the Revenue before completion of assessment u/s 148 read with Section 143(3) of the Act for the assessment year under consideration. The Ld. Counsel for the assessee at the time of hearing furnished copy of order dated 03.06.2022 issued by the CPIO in response to RTI application made by the assessee as to whether any notice u/s 143(2) was issued, if issued, how and when it was served on the assessee. Referring to the

order passed by the CPIO, Dehradun the Ld. Counsel submits that the CPIO had made it very clear that in the case of the assessee notice u/s 143(2) was not issued as the assessee did not file return for AY 2015-16 in compliance to the notice issued u/s 148 dated 27.03.2017. The Ld. Counsel for the assessee submits that the observation of the CPIO that the assessee did not file return in response to notice u/s 148 is misplaced and contrary to the record and the findings of the Assessing Officer in the assessment order. The Ld. Counsel referring to page 2, para vi of the assessment order it is submitted that the Assessing Officer has given a finding that in compliance to notice issued u/s 148 dated 27.03.2017 the assessee first filed his return of income in ITR - 4S on 31.03.2017 and after acknowledging the reason for initiation of action u/s 147 of the Act the assessee revised his return on 11.10.2017. The Ld. Counsel for the assessee, therefore, submits that the observation of the CPIO that the assessee did not file return in response to notice u/s 148 is misplaced. Ld. Counsel also referred to the copy of acknowledgement of the return filed for the AY 2015-16 on 31.03.2017 and revised on 11.10.2017 which was placed on record.

7. The Ld. Counsel placing reliance on the decision of the Hon'ble Delhi High Court in the case of Pr. CIT vs. Consortium Nussli Comfort Net in ITA 63/2022 dated 25.03.2022 submits that in the absence of mandatory issue of statutory notice u/s 143(2) of the Act the assessment made is *null and void*.

8. On the other hand, the Ld. DR submits that in the instant case since the assessee had not submitted any reply in response to the notice u/s 148 dated 27.03.2017 within 30 days from the service of notice or a return in the prescribed form for the assessment year under consideration, provisions of section 143(2) could not be invoked.

9. Heard rival submissions, perused the orders of the authorities below and the record placed before us. In the order passed by the CPIO dated 03.06.2022 in response to RTI application made by the assessee the CPIO stated as under:

“1) Notice u/s 143(2) in the case of the assessee i.e. Sri Rajpal, R/o H-1, Dhakowala, Ambari, Dehradun was not issued as the assessee did not submit his return of income for AY 2015-16 in compliance to the notice issued u/s 148 dated 27.03.2017. In the absence of submission of ITR, no notice u/s 143(2) can be issued. For the sake of clarity the relevant portion of section 143(2) is reproduced as under:

Section 143(2) of the IT Act, 1961: *Where a return has been furnished under section 139 or in response to a notice under section 142(1), the Assessing Officer or the prescribed income tax authority, as the case may be, if considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed the excessive loss or has not paid the tax in any manner, shall serve on the assessee a notice requiring him, on a date to be specified therein either to attend the office of the AO, any evidence on which the assessee may rely in support of the return.”*

10. As could be seen from the above, the CPIO observed that the assessee did not file return in compliance to notice issued u/s 148 of the Act. However, the Assessing Officer has clearly stated in the assessment order that the assessee has filed return on 31.03.2017 in response to notice issued u/s 148 dated 27.03.2017. The relevant observations are as under: -

“After acknowledging the reason of initiation of action u/s 147, the assessee revised his return dated 31.03.2017 on 11.10.2017. In compliance to this office notice issued u/s 148 dated 27.03.2017, assessee first filed his return of income in ITR - 4S on 31.03.2017 without declaring results of capital gain income and also no claim of exemption has been made by the assessee in this return of income. Later on, after acknowledging that the Revenue has incriminating information regarding his sales and purchases of immovable properties, assessee revised his return of income and ITR-4 on 11.10.2017 for assessment year under consideration, screenshot of the same is being placed.”

11. The copies of acknowledgement of returns filed before us also clearly establishes the fact of assessee filing return for the year under consideration originally on 31.03.2017. The CPIO also admitted the fact that no notice has been issued u/s 143(2) in assessee's case for the assessment year under consideration.

12. The issue as to whether the assessment is valid in the absence of issue of notice u/s 143(2) of the Act came up for consideration before the

Hon'ble Delhi High Court in the case of Pr. CIT vs. M/s Consortium Nussli Comfort Net (supra) and the Hon'ble Delhi High Court considering the decision of the Hon'ble Supreme Court in the case of CIT Vs. Laxman Das Khandelwal (417 ITR 325) and also various other decisions held that since notice u/s 143(2) was not issued within the period prescribed for the purpose jurisdiction assumed by the Assessing Officer u/s 143(3) of the Act was erroneous. While holding so the Hon'ble Delhi High Court held as under: -

“2. Ld. Counsel for the appellant states that the respondent-assessee had appeared and cooperated in the assessment proceedings and had not raised any objection about non-service of notice under section 143(2) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) during the entire assessment proceedings and, therefore, the assessee was precluded from taking any objection that the notice was not issued in time in accordance with Section 292BB of the Act.

3. Ld. Counsel for the appellant states that the Tribunal has erred in ignoring Section 124(3) of the Act which mandates that issue regarding jurisdiction of Assessing Officer cannot be challenged after one month from issuance of notice under section 143(2) of the Act or after completion of assessment proceedings, whichever is earlier.

*4. He also submits that Section 292BB has been interpreted by the Apex Court recently in **Commissioner of Income-Tax Vs. Laxman Das Khandelwal, (2019) 417 ITR 325 (SC)** wherein it has been held as under: -*

“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 the 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 the 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.”

5. Since the present appeal primarily deals with interpretation of Section 292BB of the Act, the same is reproduced herein below: -

“292BB. 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.”

6. This Court is in agreement with the Tribunal that Section 292BB does not give the power to condone the failure or delay in issuing the statutory notice required to be issued under Section 143(2) of the Act. Section 292BB deals with failure of service of notice and not with regard to failure to issue notice. (*CIT vs. Rajeev Sharma, (2011) 336 ITR 678 (All. HC), CIT vs. Ponorama Builders (P) Ltd., (2014) 224 Taxman 203 (Gujarat) (MAG.) and CIT vs. Salarpur Cold Storage (P) Ltd. (2014) 50 taxman.com 105 (Allahabad).*)

7. The Supreme Court in *Commissioner of Income Tax vs. Laxman Das Khandelwal (supra)* has clearly stated that the scope of Section 292BB is to make service of notice having certain infirmities to be proper and valid. However, 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. In fact, a Division Bench of this Court in *Pr. Commissioner of Income tax Vs. Shri Jai Shiv Shankar Traders (P) Ltd. (2015) 64 taxmann.com 220 (Delhi)* has categorically held that the failure of the AO, in reassessment proceedings, to issue notice under Section 143(2) of the Act, prior to finalizing the reassessment order, cannot be condoned by referring to Section 292BB of the Act. The relevant portion of the said judgment reads as under:

“....Section 292BB would apply insofar as failure of “service” of notice was concerned and not with regard to failure to “issue” notice....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 reassessment.”

8. *Therefore, on the basis of admitted fact that notice under Section 143(2) of the Act was not issued within the period of six months prescribed for the purpose, jurisdiction assumed by the Assessing Officer under Section 143(3) of the Act was assumed erroneously.*

9. *Further, it is settled law that the issue of jurisdiction goes to the roots of the cause and such an issue can be raised at any belated stage of the proceeding including appeal. (Kanwar Singh Saini vs. High Court of Delhi, (2012) 4 SCC 307 and M/s Mavany Brothers vs. CIT, 2015 SCC Online Bom 1686.*

10. *Consequently, this Court is of the view that no substantial question of law arises for consideration in the present appeal. Accordingly, the present appeal is dismissed.”*

13. Ratio of the decision of the Delhi High Court (supra) squarely applies to the facts of the assessee’s case. Thus, respectfully following

the above decision, we hold that the assessment order passed by the Assessing Officer u/s 148 read with Section 143(3) is *void ab initio* and bad in law. Accordingly, we quash the reassessment order passed by the Assessing Officer. Ground no. 3 of additional grounds raised by the assessee is allowed.

14. Since, we have decided the additional ground in favour of the assessee, we are not inclined to decide other regular grounds and also ground no. 1 and 2 of additional grounds as they become only academic at this stage.

15. In the result, the appeal of the assessee is allowed as indicated above.

Order pronounced in the open court on 29/08/2022

Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 29.08.2022

*Kavita Arora, Sr. P.S.

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi