

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

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.4403/Mum./2019
(Assessment Year : 2009-10)

Progressive Currency Bazaar Pvt. Ltd.
122-124, Laxmi Plaza, Laxmi Industrial
Estate, New Link Road, Andheri (West)
Mumbai 400 053 PAN – AAACR6461K

..... Appellant

v/s

Income Tax Officer
Ward-8(1)(2), Mumbai

.....Respondent

Assessee by : Shri Ashok Bansal
Revenue by : Ms. Smita Nair

Date of Hearing – 16/11/2022

Date of Order – 01/12/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 11/06/2019, passed under section 250 of the Income Tax Act, 1961 (*'the Act'*) by the learned Commissioner of Income Tax (Appeals)-13, Mumbai [*'learned CIT(A)'*], for the assessment year 2009-10.

2. In this appeal, the assessee has raised the following grounds:

"1. *GROUND'S OF APPEAL:*

1. *The Id CIT(A) erred in holding that the issue of notice u/s 148 rws 147 of the Act was valid in law.*

1.i. In doing so, the Id.CITA) erred in not considering the judgement of the high courts including of the jurisdictional high court relied upon by the appellant which are on all four with the appellant's facts

2. The Id. CIT(A) erred in dismissing Gr No. 11 & Lii raised before him with regard to challenge to the assessment order for non-issue of notice u/s 143(2) of the Act.

2.i In doing so, the Id. CIT(A) erred in relying on sec. 29288 of the Act without appreciating that non-issue of notice u/s 143(2) of the Act is a jurisdictional defect which cannot be cured and in any event the proceedings were attended by the appellant without prejudice to its preliminary contention that the same is without the authority of law.

3. The Id. CIT(A) erred in confirming the addition of Rs.2275255/- on account of alleged bogus loss generated by means of client code modification on extraneous consideration without bringing any evidence on record.

4. The Id. CIT(A) in restricting the alleged commission paid to 2% of the bogus loss alleged to have been availed due to client code modification erred in not appreciating that no such addition can be made without bringing any material on record.

Your appellant, therefore, submits that the order under appeal be quashed and in alternative the disallowance and the addition so made be deleted."

3. During the hearing, the learned Authorised Representative ('learned AR') wishes to first argue ground No.2, pertaining to the validity of assessment proceedings in absence of issuance of notice under section 143(2) of the Act.

4. The brief facts of the case as emanating from the record are: The assessee is engaged in the business of trading in shares and securities. For the year under consideration, the assessee filed its return of income on 24/09/2009 declaring a loss of Rs. nil. During the year, the assessee has mainly derived income from the business, speculation income, capital gain, and income from other sources. The return filed by the assessee was processed under section 143(1) of the Act. Subsequently, reassessment

proceedings were initiated in the case of the assessee on the basis of information received from DIT (Investigation), Ahmedabad, that during the financial year 2008–09 fictitious profits and losses have been created by misusing the client code modification facility in F&O segment on NSE by some brokers and the assessee is one of the beneficiaries of these fictitious profits and losses, which has been transferred to reduce its tax liability. Accordingly, notice under section 148 of the Act was issued to the assessee on 29/03/2016. In response thereto, the assessee requested that the return originally filed be treated as a return filed in response to notice under section 148 of the Act. The assessee also filed its objections against the initiation of reassessment proceedings. The said objections were disposed off vide order dated 19/05/2016. Thereafter, notice under section 142(1) of the Act was issued to the assessee on 19/12/2016. During the course of reassessment proceedings, details with respect to trading activity were called for. The Assessing Officer ('AO') vide order dated 29/12/2016 passed under section 143(3) read with section 147 of the Act did not agree with the submissions of the assessee and held that the assessee has shown bogus loss of Rs. 52,14,605, and transferred out the profit of Rs. 29,39,350. Thus, the loss has resulted in the reduction of taxable income and the net reduction in income due to client code modification comes to Rs. 22,75,255, which was added to the total income of the assessee. The AO estimated the commission charged by the broker at 6% on the fictitious loss and accordingly added Rs. 1,36,515, (i.e. 6% of the fictitious loss of Rs. 22,75,255) to the total income of the assessee.

5. In its appeal before the learned CIT(A), the assessee raised grounds, inter-alia, challenging the validity of assessment in absence of issuance of notice under section 143(2) of the Act. The assessee also challenged the validity of the initiation of reassessment proceedings under section 147 of the Act as well as various additions made by the AO. Vide impugned order dated 11/06/2019, learned CIT(A) dismissed the ground challenging the validity of assessment proceedings in absence of notice issued under section 143(2) of the Act, by observing as under:

"(ii) Notice u/s.143(2):

5.7 The assessee submitted that the order u/s. 143(3) r.w.s.147 of the I.T. Act was passed without issue of notice u/s 143(2). The assessee in its support contended that vide letter dated 22.12.2016 the assessee raised objection to this effect. For ready reference assessee's letter dated 22.12.2016 is enclosed as Annexure-A.

5.8 In this letter, on the 4th line assessee has mentioned as under "At the outset, we have to submit that proceedings pursuant to said notice is without the authority of law."

The above objection of assessee is general in nature and most of the assesses use such language in their submissions. The same cannot be treated as a specific objection for non issue of notice u/s. 143(2) of the I.T.Act.

5.9 The assessee has participated in the proceedings before the AO and therefore assessee cannot take this objection subsequently, more so, in view of section 2928B. For ready reference Section 292BB is reproduced below:

"Where an assessee has appeared in any proceedings or co-operated 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 completion of such assessment or reassessment."

As per the proviso, Section 292BB does not apply if the assessee has taken such objection before completion of assessment.

Such objection should be specific to the point that no notice u/s.143(2) was issued and general objection cannot be made specific by enlarging the scope of words used.

5.10 In view of the above, this ground of assessee is also dismissed.”

6. The learned CIT(A) also upheld the initiation of reassessment proceedings under section 147 of the Act in the case of the assessee as well as the additions made by the AO. Being aggrieved, the assessee is in appeal before us.

7. We have considered the rival submissions and perused the material available on record. It is the plea of the assessee that in the present case, the assessment under section 143(3) read with section 147 of the Act is null and void as no notice under section 143(2) of the Act was issued and served upon the assessee. In order to check the veracity of the contention of the assessee, time was granted to the Revenue to call for the assessment record and produce the copy of the notice issued under section 143(2) of the Act. During the hearing on 16/11/2022, the learned Departmental Representative ('learned DR') upon perusal of the assessment record submitted that there are no details pertaining to notice under section 143(2) of the Act. The aforesaid fact was also confirmed vide letter dated 18/11/2022 filed by the AO through the office of learned DR. The letter dated 18/11/2022 filed by the AO reads as under:

"No ITO 10(3)(1)/ITAT/2022-23

Date: 18.11.2022

To
The ITO-ITAT 'SMC' Bench,
Mumbai

Sub: Issue of notice u/s 143(2) in the case of M/s. Progressive Currency
Bazaar Pvt. Ltd. -reg.

Ref: No. Addl.CIT(AU)-10(1)/Notice/2022-23 dated 16.11.2022

Kindly refer to the above.

2. It is hereby mentioned that vide above referred letter it was requested to confirm whether notice u/s 143(2) was issued in this case. In view of the above it is stated that as per details available with this office, no details pertaining to notice u/s 143(2) is found.

Submitted for necessary action.

Yours faithfully,

Copy to:

1. Addl.CIT-2(3), Mumbai
2. Addl.CIT-(AU)-10(1), Mumbai

Sd/-
(Amarjeet)
Income Tax Officer-10(3)(1), Mumbai"

8. Thus, the Revenue neither could produce the notice issued under section 143(2) of the Act nor could provide the details of the said notice before us. In addition to the above, learned DR submitted that issuance of notice under section 143(2) of the Act is immaterial since the assessee had participated in the assessment proceedings and therefore non-issuance of notice under 143(2) of the Act will not invalidate the assessment proceedings and the consequent assessment order in view of section 292BB of the Act.

9. We find that a similar issue came up for consideration before the Hon'ble Supreme Court in CIT vs Laxman Das Khandelwal, [2019] 417 ITR 325 (SC), wherein the Hon'ble Supreme Court after noting the importance of issuance of notice under section 143(2) of the Act, as laid down in its earlier

decision rendered in ACIT vs Hotel Blue Moon [2010] 321 ITR 362 (SC), held that for section 292BB to apply, section 143(2) notice must have emanated from the department and it is only infirmities in the manner of service of notice that the section seeks to cure and it is not intended to cure the complete absence of notice under section 143(2) of the Act itself. The relevant observations of the Hon'ble Supreme Court are as under:

"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 Hotel Blue Moon's case (supra). 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.

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."

10. Therefore, in view of the aforesaid decision of the Hon'ble Supreme Court, we are of the considered view that the entire reassessment proceedings under section 143(3) read with section 147, in the present case, stood vitiated as the AO lacked jurisdiction in absence of notice under section 143(2) of the Act. Hence, the assessment order passed under section 143(3) read with section 147 of the Act is quashed. As a result, ground No. 2 raised in assessee's appeal is allowed.

11. As we have quashed the assessment order for this short reason, the other issues raised in this appeal are kept open.

12. In the result, the appeal by the assessee is allowed.
Order pronounced in the open Court on 01/12/2022

Sd/-
OM PRAKASH KANT
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 01/12/2022

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai