

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “SMC”, MUMBAI**

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER

**ITA No.1839/M/2022
Assessment Year: 2009-10**

Legal Heir of Late Shri Satish Indra Sharma, B-604, Prime Avenue, S.V. Road, Vile Parle (West), Mumbai – 400 056 PAN: AOHPS7105R	Vs.	Income Tax Officer- 19(3(2), Matru Mandir, Tardeo, Mumbai - 400034
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Deepak Tralshawala, A.R.
Revenue by : Shri Anil Gupta, D.R.

Date of Hearing : 04 . 10 . 2022
Date of Pronouncement : 30 . 11 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, Legal Heir of Late Shri Satish Indra Sharma (hereinafter referred to as ‘the assessee’) by filing the present appeal, sought to set aside the impugned order dated 15.10.2019 passed by Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2009-10 on the grounds inter-alia that :-

“A) Ld. Commissioner of Income Tax (A) – 30 erred in not holding the assessment order as bad in law, non-est and void ab initio on the grounds that:

i. Notice u/s 148 was issued without obtaining the sanction of the relevant authority,

- ii. No satisfaction of the approving authority was produced for issue of notice u/s 148*
- iii. No notice was issued u/s 143(2)*
- iv. The assessment order u/s 143(2)/147 dt 25.3.2015 was passed without considering the assessee's objections to the said notice*
- v. The assessee's objections were perfunctorily dealt with only on 30.3.2015, i.e after passing the assessment order on 25.3.2015*
- vi. The Notice of Demand was signed on 19.3.2015, before passing the assessment order on 25.3.2015*

B) Without Prejudice, Ld Commissioner of income Tax (A)-30 erred in

- i. Framing the appellate order on a deceased person, instead of on the legal heirs.*
- ii. Enhancing to 100% the addition of 12.5% of 'bogus purchases' made by the AO.*
- iii. Although all details of purchases and sales were given to the AO*
- iv. Without considering that there cannot be sales without purchases, and the purchases were never doubted*
- v. Without furnishing to the assessee the statements of the parties who allegedly issued accommodation bills to the assessee*
- vi. Without giving the assessee the opportunity of cross examination of those parties at (ii) above*
- vii. Ignoring that all payments were made by cheque, thereby establishing the genuineness of the recipient parties*
- viii. Without ascertaining whether the cheque payments made by the assessee were returned in cash."*

2. Briefly stated facts necessary for adjudication of the issue at hand are: the assessee is engaged in the business under the proprietary concern M/s. Continental Engineering Enterprises who has filed return of income for the year under consideration on 25.09.2009 declaring total income of Rs.5,93,200/-. On the basis of information received from the Director General of Income Tax (DGIT), Investigation Wing, Mumbai that a scam has been unearthed by Sales Tax Department regarding issue of hawala bills/accommodation entries by several parties in Mumbai and assessee is one of such beneficiaries. Assessee alleged to have availed of benefits of accommodation bills from 30 parties of the total bill amount of Rs.2,08,34,218/-. On the basis of this material

Assessing Officer (AO) “recorded reason” to believe that the assessee has taken accommodation entries from 30 parties to the tune of Rs.2,08,34,218/- thus escaped assessment for A.Y. 2009-10 and thereby initiated the reopening of assessment under section 147/148 of the Income Tax Act, 1961 (for short ‘the Act’). Notices along with questionnaire under section 142(1) and 143(2) of the Act were issued and served on the assessee. In order to verify the genuineness of the purchases made by the assessee notices under section 133(6) of the Act were also issued but received back with the remarks by the postal authorities as not known/left. Declining the contentions raised by the assessee the AO proceeded to make an addition of Rs.26,04,277/- being 12.50% of the total bogus purchases of Rs.2,08,34,218/- and thereby AO accordingly framed the assessment under section 143(3) read with section 147 of the Act.

3. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has enhanced the addition/income to Rs.2,08,34,218/- being 100% of bogus purchases from Rs.26,04,277/- by dismissing the appeal filed by the assessee. Feeling aggrieved assessee has come up before the Tribunal by way of filing present appeal.

4. I have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.


5. Before proceeding further it is necessary to peruse the reasons recorded by the AO for the purpose of reopening of assessment under section 147 of the Act for ready perusal, which are as under:

Name & Address of the assessee	SATISH INDRA SHARMA 18 EVEREST ,PEDDAR ROAD PADAM TEKRI MUMBAI - 400026		
Status	INDIVIDUAL		
PAN	AOHPS7105R		
ASST.YEAR	2009-10		

Reasons for re-opening of the assessment u/s. 147 of the Act.


- The above mentioned assessee has filed his return of income on **25.09.2009** declaring total income at **Rs. 5,93,200 /-**. The return is processed u/s 143(1) of the I. T Act.
- Information has been received from the DGIT (Inv.) Wing, Mumbai, that there was a scam unearthed by the Sales Tax Department regarding issue of hawala bills or accommodation entries by several parties in Mumbai which is availed of by several assessee in order to inflate the purchases or expenses and thereby reduce the tax liabilities.
- The records of the above assessee for the year under consideration reveal that the assessee has adopted this modus operandi during the year under consideration.
- Details of the parties who have issued accommodation bills to the assessee are as under:-

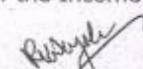
SURACHI MULTITRADE PRIVATE LIMITED	R.B	AAKCS8208B	2008-09	717,615
NIDDHISH IMPEX PVT LTD		AACCN6984H	2008-09	802,316
N B ENTERPRISES	R.B	AAYP7154J	2008-09	158,328
TARA ENTERPRISES	R.B	AWTP50269A	2008-09	1,073,015
RAJ INTERNATIONAL	R.B	AJUPR8186K	2008-09	214,373
DEEP ENTERPRISES		AMTP59884P	2008-09	985,298
V3 ENTERPRISES	R.B	ABMPJ0949G	2008-09	1,100,745
KIRAN SALES CORPORTION/NIDHI IMPEX INDIA	R.B	ALKPP1442N	2008-09	272,645
MANISH INDUSTRIL CORPORATION	R.B	AALFM3174C	2008-09	409,344
DHANERA METAL CORPORATION	R.B	AISPP1224H	2008-09	1,648,814
PRAKASH STEEL INDIA	R.B	AABPD8304M	2008-09	528,476
S S ENTERPRISES		ABGFS2578E	2008-09	79,560
SIVAMANI TRADERS PRIVATE LIMITED	R.B	AAKCS4401J	2008-09	175,286


Sharad P. Gokani
 Chartered Accountants

1	S M TRADING CO.	AAVPS1344J	2008-09	2,325,002
2	P K TRADING CO	AAIPF6144J	2008-09	455,772
3	KOTSONS IMPEX PRIVATE LIMITED	AACCK9104C	2008-09	407,335
4	SKAND INDUSTRIES	ACZPV3215F	2008-09	524,897
5	K V TRADING CO	AABPC3023G	2008-09	835,487
6	JAI MATA DI TRADING CO	AHUPK6877A	2008-09	1,074,157
7	MEENAKSHI TRADE LINKS	AAYP5557Q	2008-09	121,887
8	MAHIMA INCORPORATION	AAHPS4629Q	2008-09	167,648
9	JAGDISH MATELS (INDIA)/ SUNSHINE ENTERPRISES	AXAPP2952K	2008-09	1,500,980
10	SACHI MERCANTILE PVT. LTD.	AAKCS8209A	2008-09	691,200
11	JAIN STEEL (INDIA)	ANXPP6892P	2008-09	566,992
12	AMAR ENTERARISE	AOXPS9236H	2008-09	336,350
13	AAYUSHI ENTERPRISES	AGQPP3867N	2008-09	21,051
14	CIMCO CORPORATION		2008-09	650,172
15	RAJHANS STEEL	ANKPP0198B	2008-09	744,541
16	ALANKAR STEELS	AAXPS0012M	2008-09	1,324,258
17	HANUMAN STEEL	ADCPD3027H	2008-09	920,664
Total-				2,08,34,218

5. On the basis of the aforesaid information available with the undersigned, I have reason to believe that income chargeable to tax, as indicated above, to the tune of **Rs. 2,08,34,218/-**, or any other income chargeable to tax which comes to my notice subsequently in the course of proceedings for re-assessment, has escaped assessment within the meaning of section 147 of the IT Act 1961. The assessee has, therefore, failed to disclose true and complete particulars of **his/her** income for the year under consideration. Accordingly, the case is being re-opened u/s. 147 of the Income Tax Act for **A.Y. 2009-10**.


Sharad P. Gokani
 Chartered Accountants
 1st Floor, Satya Vijay Buildi
 260, Bazar Gate Street, Fort,
 Mumbai-400 001.


प्रमोद के. नायक
 आयकर अधिकारी 19 (3) (2), मुंबई
PRAMOD K. NAYAK
 Income Tax Officer-19 (3) (2), Mumbai

Sharad P. Gokani
 Chartered Accountants

6. At the very outset, the Ld. A.R. for the assessee contended that the entire reopening proceedings initiated by the AO under section 147/148 of the Act are vitiated, non-est as “no notice under section 143(2)” has been issued on 12.12.2014 as recorded in assessment order and relied upon the decision rendered by Hon’ble

Bombay High Court in case of CIT vs. Sodder Builder & Developers (P.) Ltd. (2020) 115 taxmann.com 251 (Bombay), decision rendered by Hon'ble Apex Court in case of CIT vs. Laxman Das Khandelwal (2019) 417 ITR 325 (SC) and order passed by the co-ordinate Bench of the Tribunal in case of Sapankumar U Jain vs. ITO (2022) 94 ITR (Trib) 216 (Mumbai).

7. However, on the other hand, in order to repel the arguments addressed by the Ld. A.R. for the assessee, the Ld. D.R. for the Revenue by relying upon the order passed by the AO and Ld. CIT(A) contended that after recording reasons notice was issued under section 142(1) and 143(2) along with questionnaire and on the basis of objection raised by the assessee to the reopening order was passed by the AO after dismissing the objections.

8. Undisputedly reopening under section 147/148 of the Act was initiated on the basis of information received from DGIT(Inv.) Wing, Mumbai that assessee has availed of the benefit of bogus bills from 30 parties. It is also not in dispute that in para 6 of the assessment order the AO has specifically recorded the finding that;

“In view of change of jurisdiction, the notices u/s. 143(2) and 142(1) were issued on 12th December, 2014 and duly served on the assessee along with intimation letter dated 12th December, 2014 regarding change of jurisdiction.”

9. In order to support his arguments that no notice under section 143(2) was ever issued by the AO after initiating the reopening of assessment proceedings the Ld. A.R. for the assessee drew my attention towards application moved by the assessee as annexure 'A' for obtaining information under the Right to Information Act

(RTI Act), 2005 available at page 15 of the paper book-1, which is extracted as under for ready perusal:

Information desired from ITO-19(3)(2), Mumbai

**ANNEXURE "A",
(See Rule 3)
Format of application for obtaining information under the
Right to Information Act, 2005**

The Central Public Information Officer,
Principal Commissioner of Income Tax 19
[Address]
Mumbai

(1) Full name of the applicant: MRS.NIMISHA SHARMA EXECUTOR OF
WILL of late Shri Satish Indra Sharma
PAN: AOHP57105R

(2) Address: B-604, PRIME AVENUE, S.V.ROAD,
VILE PARLE (WEST), MUMBAI- 400056

(3) Particulars of information required:

(i) Subject matter for information: Dates of service of various
notices sent by ITO-19(3)(2),
Mumbai FOR ASST. YEAR
2009-10

(ii) Period for which information
relates IN RESPECT OF AY 2009-10

(iii) Description of the information
required:

Copy of :

- i. Proof of date of dispatch of notice u/s 148
- ii. Notice u/s 143(2) dt 12.12.2014
- iii. Proof of Service of above notice u/s 143(2)
- iv. Proof of Service of Reasons for Reopening Assessment

 **Sharad P. Gokani**
Chartered Accountants
1st Floor, Sayya Vijay Buildi
260, Bazar Gate Street, Fort,
Mumbai-400 001.



10. Then Ld. A.R. for the assessee drew my attention towards order passed by the Central Public Information Officer (CPIO) under section 7(1) of the Right to Information Act, 2005 available at page 17 of the paper book-1 which is also extracted as under for ready perusal:

GOVERNMENT OF INDIA CENTRAL PUBLIC INFORMATION OFFICER INCOME-TAX OFFICER 19(3)(1), MUMBAI. Room No. 202, 2nd Floor, Matru Mandir Income-Tax Office, Tardeo Road, Grant Road-West, Mumbai – 400 007.		
No: ITO 19(3)(1)/RTI/2019-20		
Date: 12.07.2019		
1	Full name of the applicant.	Mrs. Nimisha Sharma, Executor of Will of Late Shri Satish Indra Sharma
2	PAN	AOHPS7105R
3	Address of the applicant as indicated in the application	B-604, Prime Avenue, S. V. Road, Ville Parle (W), Mumbai- 400056
4	Date of application	14.06.2022
5	Date of order	12.07.2022

ORDER U/s. 7(1) OF THE RIGHT TO INFORMATION ACT, 2005

The RTI application dated 14.06.2022 has been received in this office through The O/o The ITO (Tech), CIT-19, Mumbai, on 17.06.2022. The applicant Mrs. Nimisha Sharma, Executor of Will of Late Shri Satish Indra Sharma has sought to provide the copy of following information in respect of A.Y. 2009-10.

Sr. No.	Information Sought	Remark
1	Proof of date of dispatch of notice u/s. 148	Yes, enclosed as Annexure-1
2	Notice u/s. 143(2) dated 12.12.2014	There are no notice u/s. 143(2) has been issued on 12.12.2014 (As per record)
3	Proof of service of above notice u/s. 143(2)	Not applicable ✓
4	Proof of Service of Reason for Reopening assessment	Yes, enclosed as Annexure-2
5	Assessee's objections to re-opening u/s. 148	Yes, enclosed as Annexure-3
6	Proof of service of ITO's Reply to objections to Notice u/s. 148	Yes, enclosed as Annexure-4
7	Proof of Service of order u/s. 143(3) r.w.s. 147	Assessee has filed appeal against the order u/s. 143(3) r.w.s 147 of I.T. Act 1961. Hence, it is cleared that the order u/s. 143(3) r.w.s 147 of I.T. Act 1961 has been duly served upon the assessee.
8	Proof of service of notice of Demand	Assessee has filed appeal against the order u/s. 143(3) r.w.s 147 of I.T. Act 1961. Hence, it is cleared that the notice of demand u/s. 156 of I.T. Act 1961 has been duly served upon the assessee.
9	Proof of service of CIT-A' order dated 15.10.2019	The required information is not available in this charge.

The applicant can also file an appeal against this order to the first Appellate Authority i.e. the IT. CIT, Range-19(3), Mumbai, 2nd floor, Matru Mandir, R. No.208, Mumbai-400 007 within 30 days from the date of receipt of this order.

(Bheem Singh Charan)
Central Public information officer,
Income-Tax Officer 19(3)(1)
Mumbai.

Copy to: - 1. The applicant
2. The ITO (Tech), CIT-19, Mumbai
3. IT - 19 (3), Mumbai

Central Public information officer,
Income-Tax Officer 19(3)(1)
Mumbai.

Sharad P. Gokani
Chartered Accountants
1st Floor, Sayajivji Building
60, Bazar Gate Street, Fort,
Mumbai-400 001.

11. Bare perusal of the application moved by the assessee under Right to Information Act, 2005 seeking inter-alia copy of notice alleged to have been issued under section 143(2) dated 12.12.2014, proof of service of notice under section 143(2) etc. Central Public

Information Officer vide its order dated 12.07.2019 passed under section 7(1) of the Right to Information Act, 2005 held and intimated to the assessee that “there is no notice under section 143(2) has been issued on 12.12.2014 (as per record)”. When no notice under section 143(2) has ever been issued by the AO the entire reopening proceedings initiated under section 147/148 of the Act are non-est, vitiated and not sustainable in the eyes of law.

12. Hon’ble Bombay High Court in case of Sodder Builder & Developers (P.) Ltd. (supra) has decided this issue by following the decision rendered by Hon’ble Apex Court in case of Asst. CIT and Anr. Vs. Hotel Blue Moon (2010) 229 CTR (SC) 219 : (2010) 35 DTR 1 (SC) that issuance of notice under section 143(2) of the Act is mandatory requirement and not a mere procedural irregularity which can be said to be curable by returning following findings:

"7. The issue relating to service of notice under s. 143(2) of the said Act, is an issue which goes to the root of the matter. The Hon'ble apex Court in the case of Asstt. CIT and Anr. vs. Hotel Blue Moon (2010) 229 CTR (SC) 219 : (2010) 35 DTR 1 (SC) has now held that issuance of notice under s. 143(2) of the said Act is a mandatory requirement and not some mere procedural irregularity which can be said to be curable. In this decision, the apex Court, in clear terms, has held that omission on the part of the assessing authority to issue a notice under s. 143(2) cannot be regarded as a procedural irregularity which is curable. Therefore, the requirement of notice under s. 143(2) cannot be dispensed with."

13. Hon’ble Apex Court in case of Laxman Das Khandelwal has also decided the validity of the assessment in the absence of notice under section 143(2) of the Act by returning following findings:

"Assessment—Validity—Absence of notice under s. 143(2)—Notice under s. 143(2) is mandatory for the purpose of making the assessment under s. 143(3)—Sec. 292BB does not save complete absence of notice—For s. 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—Since in

the instant case no notice under s.143(2) was ever issued by the Department the assessment has been rightly quashed"

14. Co-ordinate Bench of the Tribunal in case of Sapankumar U Jain (supra) also decided the identical issue in favour of the assessee by following the decision rendered by Hon'ble Supreme Court in case of Laxman Das Khandelwal (supra).

15. In view of what has been discussed above, I am of the considered view that when it is proved on record that no notice under section 143(2) of the Act has ever been issued by the AO further proceedings initiating the reopening of assessment under section 147/148 of the Act are non-est and the assessment framed by the AO under section 143(3) read with section 147 of the Act is liable to be quashed.

16. The contention of the Ld. D.R. that issuance of notice under section 143(2) of the Act is a procedural irregularity and as such is curable under section 292BB of the Act but this question has already been decided by the Hon'ble Supreme Court in negative in the case of Laxman Das Khandelwal (supra) by holding that non issuance of notice under section 143(2) of the Act is jurisdictional defect and cannot be cured by section 292BB of the Act.

17. Since the re-assessment framed under section 143 read with section 147 of the Act on the basis of reopening does not withstand the judicial scrutiny hence quashed, the other ground raised by the assessee for challenging the addition made on account of bogus purchases need not be decided as they have become merely academic.

18. Resultantly, appeal filed by the assessee is hereby allowed.

Order pronounced in the open court on 30.11.2022.

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 30.11.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.