

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES "SMC" : DELHI

BEFORE SHRI C.M. GARG, JUDICIAL MEMBER

ITA.No.638/Del/2019  
Assessment Year : 2010-11

Surender Kumar Goel,  
5, Chanan Singh Park,  
Hospital Road,  
Kirby Place,  
Delhi Cantt.,  
New Delhi.

Vs. ITO,  
Ward-60(5),  
New Delhi.

PAN : AAAPG7135J

(Appellant)

(Respondent)

For Revenue : Shri Om Parkash, Sr. DR  
For Assessee : Shri Prakesh Sinha, Advocate

Date of Hearing : 22.12.2022  
Date of Pronouncement : 04.01.2023

**ORDER**

This appeal filed by assessee is directed against the order of the  
CIT(A)-19, New Delhi, dated 24.12.2018 relating to the A.Y. 2010-11.

2. The grounds raised by the assessee read as under:-

*"1. Because on the facts and circumstances of the case and as per law, the order passed by the Ld. AO is bad in law as the Ld. AO has failed to take proper approval u/s 151 before issuing the notice u/s 148.*

*2. Because on the facts and circumstances of the case and as per law, the order passed by the Ld. AO is void as the notice u/s 143(2), which is prerequisite to trigger the assessment, was not valid.*

3. *Because on the facts and circumstances of the case and as per law, the Ld. AO has issued improper Show cause notice.*

4. *Because on the facts and circumstances of the case and as per law, the reassessment proceedings are bad in law as it was initiated on the basis of information received from Kolkata investigation wing and Ld. AO has no material to substantiate the allegation contained in the information.*

5. *Because on the facts and circumstances of the case and as per law, the Learned AO has failed to appreciate the evidence produced during the course of assessment like the Bank Statement, Right issue offer document, Share Certificate, DEMAT a/c, contract note and proceeded with a predetermined approach which was based on surmises and conjectures.*

6. *Because on the facts and circumstances of the case and as per law, the Ld. AO and Ld. CIT(A) has erred in invoking u/s 58 without appreciating all the documents of bonafide transaction.*

7. *Because on the facts and circumstances of the case, the Learned AO failed to provide an opportunity to the appellant for cross examination of the representative of the said company Nouveau Venture Global Limited.*

8. *Because on the facts and circumstances of the case and as per law, the Ld. AO and Ld. CIT(A) has erred in invoking u/s 69C on the basis of surmises and conjecture.*

9. *The Appellant carves the leave of the Honorable to submit any other documents and raise any other grounds of appeal at the time of hearing.*

*Prayer –*

*Under the circumstances it is more respectfully prayed that this Hon'ble may be please to –*

a. *Annul the impugned order passed by the Ld. CIT(A) dated 24.12.2018, in the interest of justice and fairness,*

b. *Pass any other order as this Hon'ble may deem fit under the circumstances.”*

3. The Id. Counsel for the assessee, pressing into service ground No.2 of the assessee, submitted that the AO in its reply dated 30.05.2022 to the Sr. DR has clearly stated that no notice u/s 143(2) of the Act has been issued as the assessee has not filed valid return of income in response to notice u/s 148 of the Act dated 31.03.2017. He also placed reliance on para 19 of the judgement of the Hon'ble High Court of Delhi in the case of PCIT vs. Silver Line to submit that merely because the assessee participated in proceedings pursuant to notice u/s 148 of the Act, it does not obviate mandatory requirement of AO to issue the assessee a notice u/s 143(2) of the Act before finalizing order of reassessment u/s 147 r.w.s. 143(3) of the Act.

4. Replying to the above, Id. Sr. DR submitted that since the assessee did not file any income-tax return for AY 2010-11 in response to notice u/s 148 of the Act dated 31.03.2017, there was no requirement to issue any notice u/s 143(2) of the Act. Therefore, ground No.2 of the assessee being misplaced deserves to be dismissed.

5. Placing a rejoinder to the above, the Id. Counsel again drew our attention to para 19 of the order of the Hon'ble High Court of Delhi in the case of Silver Line (supra) and submitted that even if the assessee did not file any return of income in response to notice u/s 148 of the Act, then also it is incumbent upon the AO to issue notice u/s 143(2) of the Act to assume valid jurisdiction to pass reassessment order.

6. On careful consideration of the above rival submissions, admittedly, no notice u/s 143(2) of the Act was issued to the assessee by the AO for AY 2010-11 in subsequent to notice u/s 148 of the Act dated 31.03.2017. It is also not in dispute that in response to the said notice u/s 148 the assessee did not file any return of income. In the present case, in response to notice u/s 148, the Id. AR of the assessee appeared before the AO on 25.04.2017 and submitted a copy of the original return of income filed by the assessee for AY 2010-11 which clearly reveals that the assessee requested the AO to consider original return of income filed u/s 139(1) of the Act as filed in response to notice u/s 148 of the Act. In identical facts and circumstances, the Hon'ble jurisdictional High Court in the case of *Silver Line (supra)* has held as follows:-

*"12. The Court first proposes to consider the question as to whether in terms of the proviso to Section 292BB of the Act, the Assessee was precluded, at the stage of the proceedings before the ITAT, from raising a contention regarding failure of the AO to issue a notice under Section 143(2) of the Act. The legal position appears to be fairly well settled that Section 292BB of the Act talks of the drawing of a presumption of service of notice on an Assessee and is basically a rule of evidence. In Commissioner of Income Tax v. Parikalpana Estate Development (P.) Ltd. (supra) in answering a similar question, the Court referred to its earlier decision in Commissioner of Income Tax v. Mukesh Kumar Agrawal (2012) 345 ITR 29 (All.) and pointed out that Section 292BB of the Act was a rule of evidence which validated service of notice in certain circumstances. It introduces a deeming fiction that once the Assessee appears in any proceeding or has cooperated in any enquiry relating to assessment or reassessment it shall be deemed that any notice under any provision of the Act that is required to be served has been duly served upon him in accordance with the provisions of the Act and the Assessee in those circumstances would be precluded from objecting that a*

*notice that was required to be served upon him under the Act was not served upon him or not served in time or was served in an improper manner. It was held that Section 292BB of the Act is a rule of evidence and it has nothing to do with the mandatory requirement of giving a notice and especially a notice under Section 143(2) of the Act which is a notice giving jurisdiction to the AO to frame an assessment. The decision of the Allahabad High Court in Manish Prakash Gupta v. Commissioner of Income Tax (supra) is also to the same effect.*

*13. In Pr. CIT v. Shri Jai Shiv Shankar Traders Pvt. Ltd. (supra), this Court has also discussed the distinction between a failure to 'issue' notice and a failure to 'serve' a notice on an Assessee. It was held, after noticing the decisions of the Allahabad High Court in Commissioner of Income Tax v. Rajeev Sharma (2011) 336 ITR 678 and Commissioner of Income-tax-II, Lucknow v. Salarpur Cold Storage (P.) Ltd. [2014] 50 taxmann.com 105 (All.) and the decision of the Madras High Court in Sapthagiri Finance & Investments v. Income Tax Officer (2013) 90 DTR (Mad) 289, that Section 292 BB of the Act would apply insofar as failure of 'service' of notice was concerned and not with regard to the failure to 'issue' notice. In other words, the failure of the AO, in re-assessment proceedings, to issue notice under Section 143(2) of the Act, prior to finalising the re-assessment order, cannot be condoned by referring to Section 292BB of the Act.*

*14. Consequently, the Court does not find merit in the objection of the Revenue that the Assessee was precluded from raising the point concerning the non-issuance of notice under Section 143 (2) of the Act in the present case in view of the proviso to Section 292BB of the Act.*

*15. The Court also finds merit in the contention of the Assessee that in any event as far as AYs 2005-06 to 2007-08 is concerned, Section 292BB of the Act would not apply since it is prospective in its application, i.e., applicable from AY 2008-09 onwards. The legal position in this regard appears to be well settled as explained in CIT v. Kuber Tobacco Producers P. Ltd. (supra) and Commissioner of Income Tax v. Mohammad Khaleeq (supra).*

*16. As regards the objection of the Revenue to the ITAT permitting the Assessee to raise the point concerning non-issuance of notice under Section 143(2) of the Act for the first time in the appeal before the ITAT, the Court is of the*

*considered view that in view of the settled legal position that the requirement of issuance of such notice is a jurisdictional one, it does go to the root of the matter as far as the validity of the reassessment proceedings under Section 147/148 of the Act is concerned. It raises a question of law as far as the present cases are concerned since it is not in dispute that prior to finalisation of the reassessment orders, notice under Section 143(2) of the Act was not issued by the AO to the Assessee. With there being no fresh evidence or disputed facts sought to be brought on record, and the issue being purely one of law, the ITAT was not in error in permitting the Assessee to raise such a point before it. This finds support in the decision of the Supreme Court in National Thermal Power Co. Ltd. v. Commissioner of Income Tax (supra) and the decision of this Court in Gedore Tools (P) Ltd. v. Commissioner of Income Tax (supra).*

*17. On the question of whether the notice under Section 143(2) of the Act was in the facts and circumstances mandatory, Mr. Sahni sought to distinguish the long line of decisions including the recent decision of this Court in Pr. CIT v. Shri Jai Shiv Shankar Traders Pvt. Ltd. (supra) on the ground that there was no occasion for the AO to issue any notice under Section 143 (2) of the Act since the Assessee had, in fact, not filed a return. He submitted that the original return was filed in the 'Sara Form' which had since been replaced with a different form for filing of returns. Consequently, the said return could not have been treated as a return filed pursuant to the notice issued to the Assessee under Section 148 of the Act. He further submitted that with no discrepancy having been found by the AO in the returns for AYs 2005-06 till 2007-08, which were processed under Section 143 (1) of the Act, there was no occasion for the AO to issue a notice under Section 143 (2) of the Act. Mr. Sahni submitted that in the circumstances, the action of the AO in finalising the reassessment orders without notice under Section 143 (2) of the Act was justified.*

*18. The wording of Section 143(2)(ii) of the Act, which is applicable in the present case, requires the AO to be satisfied on examining the return filed that prima facie the Assessee has "understated the income" or has „computed excessive loss" or has „underpaid the tax in any manner". The AO has the discretion to issue a notice under Section 143 (2) if he considers it „necessary or expedient" to do so. This exercise by the AO under Section 143 (2) of the Act is qualitatively different from*

*the issuance of a notice under Section 142(1) of the Act, which as noted hereinbefore, is in a standard proforma.*

*19. The Court is unable to accept the submission of the Revenue that in the present case, no return was filed by the Assessee pursuant to the notice issued to it under Section 148 of the Act. If after receiving the letter dated 1st April 2011 of the Assessee the AO was of the view that the return originally filed in the Saral Form could not be treated as the return pursuant to the notice under Section 148 of the Act, then he should have drawn the attention of the Assessee to that fact. In the present case all that the AO did was to send a notice under Section 142 (1) of the Act. The Assessee was not made aware as to why he was required to file a return. Had a notice been issued to him under Section 143 (2) of the Act, the AO would have been obliged to let the Assessee know why he was being asked to file a return notwithstanding his letter dated 1st April 2011. In the circumstances, the Assessee was justified in proceeding on the basis that it had not committed any default in communicating to the AO that the return already filed should be treated as the return filed pursuant to the notice under Section 148 of the Act.*

*20. The proposal to reopen an assessment under Section 147 of the Act is to be based on reasons to be recorded by the AO. Such reasons have to be communicated to the Assessee. However, merely because the Assessee participates in the proceedings pursuant to such notice under Section 148 of the Act, it does not obviate the mandatory requirement of the AO having to issue to the Assessee a notice under Section 143(2) of the Act before finalising the order of the reassessment.*

*21. In this context reference may be made to the decision of the Madras High Court in Saphthagiri Finance & Investments v. Income Tax Officer (supra) where again the Assessee did not file a return pursuant to Section 148 of the Act. The AO then issued a notice to it under Section 142(1) of the Act. The Assessee thereafter appeared before the AO and stated that the original return filed should be treated as the return filed in response to the notice under Section 148 of the Act. In those circumstances, the High Court observed that if there was some explanation that was required to be offered by the Assessee, notwithstanding the above submission made by it, the AO ought to have issued a notice under Section 143(2) of the Act. The Madras High Court observed:*

*"Merely because the matter was discussed with the Assessee and the signature is affixed it does not mean the rest of the procedure of notice under Section 143(2) of the Act was complied with or that on placing the objection the Assessee had waived the notice for further processing of the reassessment proceedings. The fact that on the notice issued u/s 143(2) of the Act, the assessee had placed its objection and reiterated its earlier return filed as one filed in response to the notice issued u/s 148 of the Act and the Officer had also noted that the same would be considered for completing of assessment, would show that the AO has the duty of issuing the notice under Section 143(3) to lead on to the passing of the assessment. In the circumstances, with no notice issued u/s 143(3) and there being no waiver, there is no justifiable ground to accept the view of the Tribunal that there was a waiver of right of notice to be issued u/s 143(2) of the Act."*

*22. The decisions of the Allahabad High Court in Commissioner of Income Tax v. Rajeev Sharma (supra) and Commissioner of Income-tax-II, Lucknow v. Salarpur Cold Storage (P.) Ltd. (supra) also reiterate the above legal position. As far as this Court is concerned, the decision in Director of Income Tax v. Society For Worldwide Interbank Financial Telecommunications (2010) 323 ITR 249 (Del) and the recent decision in Pr. CIT v. Shri Jai Shiv Shankar Traders Pvt. Ltd. (supra) hold likewise.*

*23. With the legal position being abundantly clear that a reassessment order cannot be passed without compliance with the mandatory requirement of notice being issued by the AO to the Assessee under Section 143(2) of the Act, the ITAT was in the present case right in concluding that the reassessment orders in question were legally unsustainable."*

7. In view of the above, I am compelled to hold that the reassessment order passed without compliance of mandatory requirement of notice u/s 143(1) of the Act is legally unsustainable. Therefore, respectfully following the proposition rendered by the Hon'ble jurisdictional High Court of Delhi, I hold that the reassessment proceedings and consequent reassessment order dated 28.12.2017 passed u/s 147/143(3) of the Act is not sustainable.

Therefore, I quash the same. Accordingly, ground No.2 of the assessee is allowed. Since, by the earlier part of this order, I have quashed the reassessment order, other grounds of the assessee are not being adjudicated as the same have become academic.

8. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 04.01.2023.

Sd/-

[CHANDRA MOHAN GARG]  
JUDICIAL MEMBER

Delhi, Dated, 04<sup>th</sup> January, 2023

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Copy to:

1. The appellant
2. The respondent
3. Ld. CIT(A) concerned
4. CIT concerned
5. DR ITAT "A" Bench, Delhi
6. Guard File

//By Order//

Assistant Registrar, ITAT, Delhi Benches,  
Delhi.