

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F' NEW DLEHI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI N.K. CHOUDHRY, JUDICIAL MEMBER**

**ITA No. 5150/Del/2018
Assessment Year: 2007-08**

Ranju Dhingra, C/o Malik &
Co., 305/7, Thapar Nagar,
Meerut.

PAN: ABCPD0746M
(Appellant)

Versus Income-tax Officer,
Ward 2(2), Meerut.

(Respondent)

Appellant by : Sh. Sankalp Malik, Ld. Adv.

Respondent by: Sh. Ajay Kumar Arora, Ld.Sr. DR

Date of hearing : 02.01.2023

Date of order : 16.01.2023

ORDER

PER N.K. CHOUDHRY, J.M.

This appeal has been preferred by the Assessee against the order dated 24.03.2017, impugned herein, passed by the learned Commissioner of Income-tax (Appeals)- Meerut (in short "Ld. Commissioner"), u/s. 250 of the Income-tax Act, 1961 (in short 'the Act') for the assessment year 2007-08.

2. In the instant case, the original return of income was filed by the Assessee on dated 31.03.2008 whereby the Assessee had declared total income of Rs.1,70,400/-, which was processed u/s. 143(1) of the Act. Subsequently, it came to the notice of the Revenue Department that the Assessee in her individual capacity sold a property, i.e., house No. 88, Hill Street, Meerut on a consideration of Rs.76 lacs on dated 03.05.2006, whereas the market value of the same was Rs.93.7 lacs. The Assessee claimed to have purchased the said property for a consideration of Rs.4 lacs on 13.05.1997 as per purchase deed. However, the Assessee neither disclosed this transaction before the department nor claimed any long-term capital gain and paid the relevant taxes in the year under consideration. Therefore, a notice u/s. 148 of the Act dated 08.10.2013 was issued to the Assessee, in response to which, the Assessee failed to file its return of income. Therefore, reminders dated 12.11.2013 and 27.11.2013 have also been issued. Ultimately, the Assessee by filing her return of income on dated 21.03.2014 declared a taxable income of Rs.1,95,600/- with the note, *'In the original return of income no rent was received from Kothi No. 88, Hill Street, Meerut amounting to Rs.36000/- as there was dispute with the tenants. On the receipt of notice u/s. 148, the rental income amounting to Rs.36,000/- has been disclosed on accrual basis like last year to extend the cooperation with the department'*.

2.1 The Assessing Officer perused the aforesaid note appended below the computation of income by the Assessee and observed that it is also interesting to mention here that the Assessee in her original return of income had shown the income of Rs.10,000/- from other sources, while in the revised return filed on 21.03.2014, the same has been concealed.

2.2 The Assessee also sought the reasons recorded by the Assessing Officer for initiating proceedings u/s. 148 of the Act. In response to that, the reasons recorded were supplied to the Assessee on 08.09.2014. Thereafter, the Assessee also disputed the proceedings u/s. 148 of the Act on the pretext that the notice dated 08.10.2013 was not served upon the Assessee.

2.2.1 The Assessing Officer justified the initiation of proceedings u/s. 147 of the Act and issuance of notice u/s. 148 of the Act as valid and legal and computed the income of the Assessee as under:

Market value of the sold off property house No.88,Hill Street, Meerut Cantt. as discussed above	Rs.93,70,000/-
Less: Cost of inflation as per Indexation price (Rs.4,32,000 x 519/331)	Rs. 6,77,365/-

To this the following, as shown, will also be added-

i)	Director's remunerations from M/s Raj Mahal Motels Pvt. Ltd. as shown	Rs.1,20,000/-
ii)	Net rental income for house No.88, Hill Street, Meerut Cantt. and house No.257, Circular Road, Meerut as shown in net	Rs.75,600/-
iii)	Income from other sources as disclosed in the original return	Rs.10,000/-
	Gross total income / Net assessable income	Rs.88,98,235/-
	Or r/o	Rs.88,98,240/-

3. The Assessee, being aggrieved, challenged the Assessment order passed by the Assessing Officer in appeal before the Id. Commissioner mainly on the notice u/s. 148 of the Act. The Id. Commissioner by analyzing the factual aspects of the case, dismissed the appeal of the Assessee, by concluding as under:

**3. Decision and reasons:
Grounds nos. 1 to 5**

I have carefully considered the submissions made by A.R in appellate proceedings and material placed before A.O in assessment proceedings.

The appellant has taken the ground of validity of proceedings u/s 148 of The Act on account of validity of service of notice u/s 148 of The Act and framing of order consequent to the said notice.

The Assessee had filed return of income in pursuance to notice u/s 148 and Assessee has participated in assessment

proceedings before A.O. In view of provisions contained in sec 292BB of the Act, when Assessee has filed return of income in compliance to notice issued u/s 148 and participated in assessment proceedings, the validity of assessment proceedings cannot be questioned and the order passed in pursuance to the notice issued u/s 148 of The Act is valid. The Id. AR is only trying to complicate matter by making copious arguments and doing hair splitting on the issue of service of Notice where as the conduct of the Assessee of filing return and participating in the reassessment proceedings proves that there is no infirmity in the service of notices as well as the consequential reassessment order u/s 148/143(3) of the Act.

Accordingly, Grounds of Appeal relating to this issue are hereby rejected.

The other issue involved in the appeal is addition on account of capital gains on sale of house property No 88 , Hill street, Meerut Cantt. The A.O has made addition as the resultant capital gains were not offered for taxation on sale of house property. The addition has been made by applying the provisions of sec 50C of The Act. The only argument of the A.R in appellate proceedings is that the Assessee has not given the possession of the property, so the capital gains have not accrued to the Assessee, so the provisions of sec 50C are not applicable.

*The property has been sold by executing a registered sale deed on the basis of registered power of attorney of the Assessee and consideration has been received. This is a case where property has been transferred by executing a registered sale deed. In fact the scope of transfer for the purpose of capital gains tax has been expanded by including those cases also where possession has been handed over without executing the sale deed. This is a case where sale deed has been executed at a value less than the circle rate. The A.O has rightly taken the value as per circle rate and calculated the capital gains. There is no infirmity in the order of A.O and it requires no interference. **The order of A.O is confirmed.***

Ground No. 6 is consequential in nature.

4. In the result, the appeal is dismissed.”

4. The Assessee, being aggrieved, is in appeal before us and during the pendency of this appeal, filed an application dated 06.10.2022 alongwith a duly sworn affidavit dated 06.10.2022, for admission of additional grounds, which reads as under :

- “1. *That having regard to the facts and circumstances of the case, Ld. A.O. has erred in law and in facts in framing the impugned reassessment order and that too without assuming jurisdiction as per law and without complying with mandatory conditions u/s 143(2) of the Act.(Affidavit Encl.)*

2. *That having regard to the facts and circumstances of the case, Ld. A.O. has erred in law and on facts in reopening of the assessment of Assessee and that too without issuing the mandatory notice u/s 143(2), that too within the time stipulated under the provision.”*

4.1 The Assessee by raising additional grounds of appeal raised the issue that in the instant case, the Assessing Officer has not assumed the jurisdiction as per law and without complying with the mandatory conditions as set out u/s. 143(3) of the Act. Further, the Assessing Officer has erred in law and on facts in reopening the assessment of the Assessee and that too without issuing the mandatory notice u/s. 143(2) of the Act, that too

within the time stipulated under the provisions of the Act. Since the above ground does not require fresh facts to be investigated and goes to the root of the matter, it is prayed that it may please be admitted in view of the Hon'ble Supreme Court decision in the case of NTPC Limited 229 ITR 383 (SC).

4.2 On the contrary, Id. DR refuted the claim of the Assessee.

4.3 We have heard the parties on the point of admission of additional grounds and given thoughtful consideration to the peculiar facts and circumstances, with regard to raising of additional grounds and are of the considered view that the grounds raised by the Assessee are purely legal in nature and goes to the root of the assessment order itself, hence, we are allowing and admitting the additional grounds raised by the Assessee and proceeding to decide the case on merit.

5. Heard the parties on additional grounds and perused the material available on record. The Assessee drew our attention directly to para No. 8 of the assessment order, wherein, a reference of an application dated 29.12.2014 has been given, by which the Assessee demanded to supply some documents and name and particulars of the person who received the notice u/s 148 of the Act. The reply was given on 01.01.2015 by the

Assessing Officer, wherein the following facts have been disclosed:

a) Supply of copies of order sheet entries is not possible. However, you are free to make the inspection of the same after producing a copy of challan deposited of the required and prescribed fee for the purpose.

b) Copy of reasons recorded for your case u/s 148 of the Act have already been supplied to you. However, as demanded, copy of notice issued u/s 148 of the Act dt.08-10-2013 is also provided to you.

c) Copies of notices issued u/s 142 (1) of the Act dt.18-09-14 (fixing the date of hearing for 26- 09-14 and an adjournment on this date was sought) and dt.03-12-2014 (upon which, on the date fixed for 16-12-14, further an adjournment was allowed for 24-12-2014. On this date too, nobody has attended the office nor any application for any adjournment was filed), as demanded, are enclosed herewith. There is no notice issued u/s 143 (2) of the Act.

d) As the col. C) is self explanatory, there is no need to make any comment on this issue.

5.1 From the reply of the Assessing Officer, as mentioned in column No. (c), it appears that no notice has been issued u/s. 143(2) of the Act.

5.2 The Assessee challenged the assessment order before the Id. Commissioner on merit as well as on the ground of validity/not serving of the notice u/s. 148 of the Act. However raised the issue qua non-issuance of notice u/s. 143(2) of the Act, first time before us only.

5.3 The claim of the Assessee is that before finalizing an assessment order u/s. 143(3) of the Act, issuance of notice u/s. 143(2) of the Act is mandatory and in the absence of notice u/s. 143(2) of the Act, the assessment order shall be *void ab initio*. The Assessee in support of its contention, also relied upon the judgment passed by Hon'ble Allahabad High Court in the case of U.P. State Industrial Development Corporation Ltd. vs. CIT-II, Kanpur, 2016 SCC Online (All) 2348.

6. On the contrary, the Id. DR refuted the claim of the Assessee by submitting that it may be possible that inadvertently, the Assessing Officer has mentioned in reply that there is no notice issued u/s. 143(2) of the Act. Therefore, without seeing the reply minutely and in detail, the case cannot be decided alone on the basis of said contents of the reply referred to above. The Id. DR further claimed that once the Assessee appeared/participated in the assessment proceedings, then as per section 292BB of the Act, it shall be presumed that

the notice which was required to be served upon the Assessee, has been served and the Assessee would be barred from taking any objection about not serving the notice or in time or in proper manner.

7. On the rival claims of the parties, the issue emerge, once the Assessee participated in the assessment proceedings and did not raise any objection with regard to non-issuing of the notice u/s. 143(2) of the Act **or** not serving such notice in time **or** service of such notice in improper manner, during the assessment and appellate proceedings before the AO and the Id. Commissioner respectively, then as per the provisions of section 292BB of the Act, whether the Assessee would be precluded from challenging the Assessment order, for non-issuance of notice or non-service of notice within time or service of notice in improper manner ?

7.1 Hon'ble Apex Court in the case of ACIT vs. Hotel Blue Moon (2010) 321 ITR 362 (supra) has clearly approved the view of Hon'ble High Court to the effect that the provisions of section 142 and sub-section (2) and (3) of section 143 will have mandatory application. Further, Hon'ble Apex Court in the case of CIT vs. Laxman Das Khandelwal (Civil Appeal No. 6261 – 6262 of 2019) decided on 13.08.2019, while considering the judgment by the

Hon'ble Apex Court in the case of Hotel Blue Moon (supra) has also held as under:

“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 infraction 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.”

7.2 From the judgments of the Hon'ble Apex Court referred to above, it is clear that the requirement of notice u/s. 143(2) is mandatory and in complete absence of such notice, the provisions of section 292BB of the Act would become otiose and will not save the Assessment Order. Hence, on the aforesaid analysis, we are of the considered view that issuance of notice u/s. 143(2) before passing an assessment order u/s. 143(3), is mandatory and if no notice has ever been issued u/s 143(2) of the Act, then as per legal fiction as enumerated u/s. 292BB of the Act as well, the participation in the assessment proceedings and/or not challenging the assessment proceedings before passing Assessment order or Appellate proceedings before Ld. Commissioner, on the ground of non-issuance of notice or non-service of notice within time or service of notice in improper

manner u/s. 143(2) of the Act, would not validate the Assessment order and would also not curtail the rights of the Assessee to challenge the same on the point of notice u/s 143(2) of the Act, before the higher Court(s).

7.3 Coming to the instant case, in the assessment order, in reply given by the Assessing Officer on dated 01.01.2015 to the application dated 29.12.2014, it has been mentioned that there is no notice issued u/s. 143(2) of the Act. However, we realize that it is just a reply but not the determination of the facts by which it can be presumed that no notice u/s. 143(2) of the Act has ever been issued to the Assessee in the assessment proceedings. Hence, for the ends of litigation and for just decision of the case and in the interest of justice, we deem it appropriate to remit the additional grounds/issue raised by the Assessee before us, to the file of the Id. Commissioner for adjudication by examining the facts qua notice u/s 143(2) of the ACT, in its right perspective by perusing the Assessment record and/or seeking remand report from the Assessing Officer, if any, to be needed for just decision of the case.

We also direct the Assessee to extend its full cooperation and participation before the Id. Commissioner and to file the relevant documents, if any, to be needed by the Id. Commissioner.

Order accordingly.

8. In the result, in the aforesaid terms, the appeal filed by the Assessee stands allowed for statistical purposes.

Order pronounced in the open court on 16/01/2023.

Sd/-

(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Sd/-

(N.K. CHOUDHRY)
JUDICIAL MEMBER

*aks/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Assistant Registrar
ITAT New Delhi

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