आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ

**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**RAJKOT BENCH, RAJKOT**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER**
**And**
**MS. MADHUMITA ROY, JUDICIAL MEMBER**

आयकरअपीलसं./**ITA Nos. 31 & 32/Rjt/2020**
**निर्धारणवर्ष/Asstt. Years:2011-12, 2012-13**

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| Girishbhai Nanjibhai Solanki<br>A-202, Shyamal Plaza, Nr. Raiya Circle, Raiya Road, Rajkot<br><br>**PAN: AFPPB7122Q** | Vs. | ITO<br>Ward-1(1)(2),<br>Rajkot |
| **(Applicant)** | | **(Respondent)** |

आयकरअपीलसं./**ITA Nos. 38,39 & 40/Rjt/2020**
**निर्धारणवर्ष/Asstt. Years:2010-11, 2011-12 & 2012-13**

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| Chandresh Nanjibhai Bhayani<br>A-202, Shyamal Plaza, Nr. Raiya Circle, Raiya Road, Rajkot<br><br>**PAN: AGTPB2935N** | Vs. | ITO<br>Ward-1(1)(2),<br>Rajkot |
| **(Applicant)** | | **(Respondent)** |

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| Assessee by : | Shri Kalpesh Doshi, A.R. |
| Revenue by : | Shri B. D. Gupta, Sr. DR |

सुनवाईकीतारीख/**Date of Hearing : 03/01/2023**
घोषणाकीतारीख/**Date of Pronouncement: 01/03/2023**

**आदेश/O R D E R**

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

The captioned appeals have been filed at the instance of the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-1 (in short the Ld. CIT(A)), Rajkot dated 31/12/2019 arising in the matter of assessment order passed under Section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Years 2010-11 to 2012-13.

2. At the outset, we note that in all these 5 appeals filed by two assessee, the validity of the assessment order has been challenged vide additional grounds of appeal. One of the ground raised on validity is that the notice under section 143(2) of the Act was issued after statutory time limit provided under the provisions of law. The facts of case in ITA No. 31/RJT/2020 in the case of *Shri Girishbhai Nanjibhai Solanki* have been adopted as the lead case for the sake of brevity and convenience. Accordingly, we hereby proceed to adjudicate the issue in ITA No. 31/RJT/2020 only. However, the finding will be applicable for all the 5 appeals specified under the heading.

3. The assessee has vide application dated 23rd December 2022 pleaded before us for admitting the additional ground of appeal which reads as under:

> *"1. The appellant most respectfully prays before the Hon'ble Income Tax Appellate Tribunal, Rajkot to allow the following additional ground of appeal to be raised in the above matters:*
>
> ***Ground no. 1 "That, the Ld. AO has wrongly reopened assessment u/s 148 of the I.T. Act."***
>
> ***Ground no. 2 : "That, the order u/s 143(3) r.w.s. 147 of the I.T. Act, 1961 is bad-in-law as the notice u/s 143(2) is issued beyond the statutory time limit."***
>
> *2. This ground goes to the root of the matter and it is a legal ground as to the validity of the reassessment.*
>
> *3. The legal ground can be taken up at any stage, in this regards reliance is placed on decision of Supreme Court in case of National Thermal Power Co. Ltd. vs. CIT (1998) 229 ITR 383 (SC).*
>
> *4. In view of above, the appellant therefore makes this prayer to allow to raise this additional ground of appeal with a further prayer that the same may kindly be adjudicated upon."*

3.1 Since the issue raised by the assessee in additional ground of appeal is legal in nature and goes to the root of the matter, we, after considering the principles of law laid down by the Hon'ble Supreme court in this regard in the case of National Thermal Power Co. Ltd vs. CIT reported in 229 ITR 383, hereby allow the same.

The facts in brief are that the income escapement proceedings under section 147 of the Act were initiated in the case of assessee by issuing notice under section 148 of the Act dated 13-08-2015. Thereafter, the AO framed the assessment under section 147 r.w.s. 143(3) of the Act vide order dated 30-12-2016 after making certain additions to the total income of the assessee.

4. On appeal by the assessee, the learned CIT(A) also confirmed the addition made by the AO on the merit of the case.

5. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us and filed additional ground of appeal and challenged the validity of the assessment.

6. The learned AR for the assessee before us contended that the appellant assessee vide letter dated 24-10-2015 in response to the notice issued under section 148 of the Act submitted that the original return filed under section 139 of the Act, should be treated as return filed under section 148 of the Act. The AO to acquire the jurisdiction to assess the income of the assessee was required to issue notice under section 143(2) of the Act within the time limit prescribed i.e. six months from the end of financial year in which return of income was furnished. In the given case, the assessee furnished return of income date 24-10-2015 and the AO was required to issue notice under section 143(2) of the Act on or before 30$^{th}$ September 2016. However, the notice was issued dated 07-12-2016 which was beyond the time limit provided under the statute. Hence, the notice issued under section 143(2) of the Act was invalid. Therefore, the AO was not having valid jurisdiction to pass the assessment order in the absence of valid notice under section 143(2) of the Act. The learned AR in support of his contention relied on various case laws which are kept on record.

7. On the other hand, the learned DR before us contended that the assessee has never challenged the validity of the assessment framed under section 147 of the Act on the reasoning that notice under section 143(2) of the Act was issued

beyond the time limit prescribed under the Act. As per the learned DR, it is not the case here that the notice was not issued under section 143(2) of the Act. Accordingly, such defect can be cured under the provisions of section 292BB of the Act in view of the judgement of Hon'ble Supreme Court of India the case CIT versus Laxmandas Khandelwal reported in 108 Taxman.com 183 wherein it was held that if there is any issue or infirmity in relation to the service of notice the same can be cured under the provisions of section 292BB of the Act.

8. It was also pointed out by the learned DR that undoubtedly the notice under section 143(2) of the Act was issued belatedly but before the completion of the assessment. Furthermore, this issue was not challenged before the authorities below, therefore the same can be cured under the provisions of section 292BB of the Act. The DR to this effect has also filed the written submissions running into 1 to 11 pages.

9. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the instant case raises the situations as detailed under:

1- Whether the issue of notice under section 143(2) of Act was mandatory to frame assessment under section 143(3) r.w.s. 147 of the Act.
2- Whether the assessment made under section 143(3) read with section 147 of the Act is valid in a situation where the notice under section 143(2) was issued beyond the statutory time limit prescribed under the Act.
3- Whether the provision of section 292BB of the Act is attracted in the given facts and circumstance so as to make the assessment valid.

10. It is settled position of law that the once notice for reopening assessment under section 148 of the Act was issued, the assessee is required to furnish return of income in response to such notice. It is further provided that the return filed under section 148 of the Act is deemed to have filed under section 139 of the Act. Therefore, all the provisions specified under section 139 of the Act comes into play

to a return filed under section 148 of the Act. The relevant provisions of section 148 of the Act read as under:

> *[**Issue of notice where income has escaped assessment.***
>
> ***148.** [(1)] Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve[49] on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 :]*

11. We further note that the expression used under section 148 of the Act i.e. ***"so for as may be"*** has been interpreted by the Hon'ble Apex court in the case of R Dalmia Vs. CIT reported in 236 ITR 480, that once the return filed under section 148 of the Act then in making the assessment and the reassessment under section 147 of the Act, the provisions subsequent to the provision of section 139 of the Act have to be followed. The relevant extract of the judgment is reproduced as under:

> *"It is no doubt that assessments under section 143 and assessments and reassessments under section 147 are different, but in making assessments and reassessments under section 147 the procedure laid down in sections subsequent to section 139, including that laid down by section 144B, has to be followed"*

11.1 From the above judgment, there remains no ambiguity that the procedural provisions for making the assessment under section 143(3) of the Act has to be followed. Therefore, it is mandatory upon the Revenue to ensure the service of notice under section 143(2) of the Act even in the assessment framed under section 147 of the Act.

11.2 We also find support and guidance from the order of Special Bench of Delhi Tribunal in the case of Raj Kumar Chawla v/s ITO reported in 145 Taxman 12 wherein it was held as under:

> *"Section 148 does not provide any methodology for computing the income on reassessment or assessment. On the contrary, it creates a legal fiction that such return shall be treated as one made under section 139. By the creation of such legal fiction all the procedures prescribed in and subsequent to section 139 automatically apply in toto. It is a*

*settled principle that a legal fiction has to be taken to its logical conclusion and, therefore, what is valid for a return under section 139 will be valid with equal force to a return filed under section 148. Therefore, the proviso will apply to a return filed in response to notice under section 148. Clause (b) of section 158BC specifically talks of the applicability of section 142, sub-sections (2) and (3) of section 143. There is an omission of sub-section (1) of section 143. This Chapter clearly prescribes its own return, form of own methodology for computation of income but falls back on the provisions of sections 142, 143 and 144 etc., only for procedural aspect. If the proviso is made applicable, then a clash erupts between the provisions of Chapter XIV-B with section 143(2) as the assessment is mandatory under this Chapter. [Para 31"*

11.3 We also find support and guidance from the judgment of Hon'ble Kerala High Court in the case of Lally Jacob v/s ITO reported in 197 ITR 439 wherein it was held as under:

*"A reading of sections 147 and 148 makes it clear that, at any rate, an assessment for the first time made by resort to section 147 is a regular assessment. Section 148 enjoins the Income-tax Officer before making an assessment under section 147 to serve a notice on the assessee containing all or any of the requirements which may be included in a notice under sub-section (2) of section 139. The further provision in that section is very significant which provides that the aforesaid notice has to be treated as if it is a notice under section 139(2) and that all the provisions of the Act shall apply to the subsequent procedure and the final assessment. In other words, the notice issued under section 148 has to be deemed to be a notice under section 139(2) and, if the other provisions of the Act have to be applied, an assessment in pursuance of that can be made only under section 143 or section 144. We were not shown any other provision by which the Income-tax Officer is authorised to make an order of assessment under the Act. The provisions contained in section 140A also give an indication that an assessment made in pursuance of a notice under section 148 is a regular assessment under section 143 or section 144, for section 140A(2) provides that any admitted tax paid in pursuance of section 140A(1) shall be deemed to have been paid towards the regular assessment under section 143 or section 144. It is pertinent to note that section 140A(1) deals with a return required to be furnished under section 139 or section 148. That makes the provision clear that an assessment made under section 147 also will be a regular assessment under section 143 or section 144. Accordingly, we hold that any assessment made for the first time by resort to section 147 will also be a regular assessment for the purpose of invoking section 217 of the Act. With great respect, we dissent from the view expressed in certain decisions referred to earlier in this judgment which take a contrary view." (p. 452)"*

12. Thus in view of the above we conclude that the AO was under the obligation to issue a notice under section 143(2) of the Act for making the assessment or reassessment as the case may be. In case AO has not done so, the order framed under section 143(3) read with section 147 of the Act becomes invalid.

13. Now coming to second question whether the notice under section 143(2) issued beyond the statutory time limit provided under the Act can be held invalid or the provisions of section 292BB of the Act come to rescue the revenue. In this regard, we refer the provision of section 143(2) of the Act which reads as under:

> *(2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, 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 excessive loss or has not under-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 Assessing Officer or to produce, or cause to be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return:*
>
> ***Provided** that no notice under this sub-section shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished.]*

13.1 From the perusal of the above it clear that where return has been filed under section 139 of the Act (here u/s 148 of the Act) and the AO consider it necessary to determine the correct income as per the provision of the Act. Then, the AO is required to issue notice under said sub-section (2) of section 143 of the Act but the same cannot be issued after the expiry of 6 months from the end of financial year in which return has been filed. In the case of hand, the assessee in response to notice under section 148 of the Act filed letter dated 24th October 2015 stating to treat the original return filed as return under section 148 of the Act. Thus it transpired that the assessee had filed return of income dated 24th October 2015. To carry out the assessment of such return, the AO was required to issue notice under section 143(2) of the Act on or before 30th September 2016 i.e. 6 months from 31st March 2016. However, the notice was issued dated 07th December 2016. Thus, in our considered opinion, the notice issued after the prescribed time limit is not valid for the reason that the AO has no power to issue such notice after expiry of 6 months from the end of financial year in which return has been field. Therefore, any assessment made based on notice which itself is not valid will also become void ab initio. In holding so we also draw support and guidance from the judgment of Hon'ble Gujarat High Court in case of DCIT vs. Mahi Valley Hotels & Resorts reported in 287 ITR 360 wherein it was held as under:

*Section 143(2) requires that where a return has been made by an assessee, if the Assessing Officer considers it necessary or expedient to ensure that the assessee has not understated the income, or has not computed excessive loss, or has not underpaid tax in any manner, he shall serve on the assessee a notice requiring him either to attend his office, or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return. Therefore, the language of the main provision requires the Assessing Officer to prima facie arrive at satisfaction of existence of any one of the three conditions. The proviso under the said sub-section states: "provided that no notice under this sub-section shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished". On a plain reading of the language in which the proviso is couched it is apparent that the limitation prescribed therein is mandatory, the format of the provision being in negative terms. The position in law is well-settled that if the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, such requirement are, in all cases absolute and neglect to attend to such requirement will invalidate the whole proceeding.*

13.2 We further note that the provisions of section 292BB of the Act deals with the situation where notice is not served or not served on time or served in improper manner viz a viz the assessee does not raise objection before the completion of the assessment. As such, the provision of section 292BB of the Act does not deal about the issuance of notice. In the present case, the issue is whether the assessment framed under section 147/143(3) of the Act is valid in a situation where the mandatory notice under section 143(2) of the Act was issued beyond statutory time limit prescribed. Accordingly, we hold that, the provision of section 292BB of the Act does not extend any benefit to the Revenue.

14. In holding so we find support and guidance from the judgment of Hon'ble Gujarat High Court in the case of PCIT v/s Marck Biosciences Ltd. reported in 106 Taxmann.com 399 wherein it was held as under;

*"The facts as emerging from the record show that it is an admitted position that no notice under section 143(2) had been issued after the assessee informed the Assessing Officer to treat the earlier return of income as the return filed in response to the notice under section 148 of the Act. In other words, no notice under section 143(2) was issued after the filing of the return of income. The question that, therefore, arises for consideration is whether the assessment order framed under section 143(3) read with section 147, would be rendered invalid in the absence of a notice under section 143(2) of the Act?*

*On a plain reading of provision of section 143(2), it is manifest that it contemplates that when an assessee files a return under section 143 and the Assessing Officer finds that any claim as described therein is inadmissible, he is required to serve a notice to the assessee specifying particulars of such claim and a date on which he should produce or cause to be produced, any evidence or particulars specified therein on which the assessee may rely in support of such claim.*

*Further, from the language employed in section 292BB of the Act, it emerges that a notice would be deemed to be valid in the three circumstances provided therein, namely, where the assessee has participated in the proceedings it would not be permissible for him to raise objection that (i) the notice was not served upon him; or (ii) was not served upon him in time; or (iii) was served upon him in an improper manner*

*Thus, all the circumstances contemplated under section 292BB of the Act are in a case where a notice has been issued, but has either not been served upon the assessee or not served in time or has been served in an improper manner. The said provision clearly does not contemplate a case where no notice has been issued at all*

*In the facts of the present case, if the contention of the assessee were to be accepted, it would amount to dispensing with the notice under section 143(2) of the Act in view of the fact that it is an admitted position that no such notice had been issued after the return of income was filed by the assessee. After the filing of the return of income, unless a notice under section 143(2) of the Act is issued to the assessee, he would have no means of knowing as to whether or not the Assessing Officer has accepted the return of income as filed by him. As held by the Supreme Court, omission to issue a notice under section 143(2) is not a procedural irregularity and is not curable. It is, therefore, mandatory to issue notice under section 143(2) of the Act.*

*Section 292BB provides for a deeming provision that any notice under any provision of the Act, which is required to be served upon the assessee, has been duly served upon him in time, in accordance with the provisions of the Act. This section would be applicable where a notice has, in fact, been issued and a contention is raised that such notice has not been served upon the assessee or has not been served in time or has not been served properly, namely, where there is a defect in the service of notice. This provision does not apply to a case where no notice has been issued at all. In the facts of the present case, at the cost of repetition, it may be stated that no notice under section 143(2) has been issued after the assessee had filed its return of income and hence, section 292BB would not be attracted.*

*In the light of the fact that non-issuance of a notice under section 143(2) is not a procedural irregularity, the same cannot be cured under section 292BB of the Act and hence, the assessment order passed without issuance of notice under section 143(2) would be rendered invalid. The Tribunal as well as the Commissioner (Appeals), therefore, did not commit any error in holding that the notice issued prior to the filing of the return of income was invalid and that, in absence of a valid notice under section 143(2) the assessment order was rendered invalid."*

15. We also find important to refer the judgment of Hon'ble Gujarat High Court in the case of CIT Vs. Panorama Builders Pvt. Ltd. reported in 45 taxmann.com 159 wherein it was held as under:

***"14.*** *Therefore, we are of the considered opinion that section 292BB does not apply to issuance of notice, neither it cures the defect or enlarges statutory period where a mandatory notice under section 143(2) of the Act is required to be issued within limitation fixed under the Act. In absence of issuance of the notice under the proviso to section 143(2) of the Act within a period of 12 months from the end of the month in which return was furnished by the assessee, the proceedings initiated by the Assessing Officer with regard to block assessment period 1.4.1997 to 25.7.2002 on the basis of notice issued on 6.7.2006 under section 143(2), after about 20 months, was time barred and the entire proceedings in pursuance of such notice is null and void."*

15.1 In view of the above, we conclude that there was not issued the valid statutory notice under section 143(2) of the Act within the prescribed time. The Ld. DR has also not brought anything on record contrary to the arguments advanced by the Ld. AR for the assessee. Thus in the absence of the valid statutory notice, the assessment framed under section 143(3)/147 of the Act is not sustainable. Hence, the ground raised by the assessee is allowed.

16. As we have addressed the technical issue raised by the assessee vide ground No-2 of additional ground of appeal and quashed the assessment, accordingly we refrain ourselves from adjudicating the other issues raised by the assessee on merit as well as on technical count. As such the other issues raised by the assessee on merit as well as technical count become infructuous and no separate adjudication is required. Accordingly, we dismiss the issues raised by the assessee on merit.

17. In the combined result, all the appeals filed by the **assessee are partly allowed.**

**Order pronounced in the Court on 01/03/2023 at Ahmedabad.**

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| **Sd/-** | **Sd/-** |
| **(MADHUMITA ROY)** | **(WASEEM AHMED)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

**(True Copy)**

Ahmedabad; Dated 01/03/2023

*Tanmay/Manish, Sr. PS*