

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

**BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

ITA Nos.1671 & 1672/Mum/2020

(A.Y. 2009-10 & 2010-11)

Hemu Real Estate Developers Pvt. Ltd. B-117, Kamla Niwas, Bajaj Road, Vile Parle (W) Mumbai – 400056	Vs.	ITO 10(1)(3) Aayakar Bhavan Mumbai - 400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AABCH1281Q		
Appellant	..	Respondent

Appellant by :	Margav Shukla
Respondent by :	Sanjeev Ranjan

Date of Hearing	09.05.2023
Date of Pronouncement	16.05.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

Both these 2 appeals filed by the assessee are directed against the orders of ld. CIT(A) -17 Mumbai dated 26.02.2020 and 03.03.2020 respectively pertaining to A.Y. 2010-11 and A.Y. 2009-10. Since these appeals are based on identical fact and similar issue, therefore, for the sake convenience both these appeals are adjudicated together by taking the ITA No. 1671/Mum/2020 as a lead case and its finding will be applied mutatis mutandis to the other appeal wherever applicable.

ITA No.1671/Mum/2020

“Re NO PROPER OPPORTUNITY:

1. The learned Commissioner of Income-tax- 17, Mumbai, [“the ld. CIT (A).”] erred in passing order under section 250 of the Income tax Act, 1961 (the

Act) without giving sufficient, proper and adequate opportunity of being heard to the Appellant while passing the order.

WITHOUT PREJUDICE TO THE ABOVE

Re: REASSESSMENT:

2.1 *The Id. CIT (A) erred in not adjudicating the ground challenging the action of the Assessing Officer ("the A.O.") in assuming jurisdiction under section 147 of the Act reopening the assessment of the Appellant.*

Without prejudice to the above

2.2 *The A.O. erred in initiating reassessment proceedings and framed assessment of the appellant by invoking the provisions of section 147 r.w.s 148 of the Act.*

2.3 *The A.O. failed to appreciate that the case of the appellant did not fall within the parameters laid down by section 147 r.w.s 148 of the Act, as the necessary condition for initiation as well as completion thereof were not fulfilled*

2.4 *It is submitted that in the facts and the circumstances of the case, and in law, the reassessment framed is bad, illegal and void.*

2.5 *The appellant prays that the reassessment so framed be held as bad and illegal and be quashed.*

Re.: ADDITION OF SHARE APPLICATION MONEY:

3.1 *The Id. CIT (A) erred in confirming the addition of Rs. 2,88,95,000/- made by the AO under section 68 of the Act on account of share application monies received by the Appellant from, different companies*

3.2 *While doing so, the CIT (A) failed to appreciate that:*

(i) *The share application monies received by the Appellant were genuine, and*

(ii) *The Appellant had produced all the necessary details, including confirmations and PA. No. of the applicants, Audited accounts, copy of ITR, letter of application, copy of board resolution, reply to notices u/s 133(6) etc, to prove genuineness of the share application monies received by it, during the appellate proceedings.*

3.3 *It is submitted that in the facts and the circumstances of the case, and in law, no such addition was called for.*

Re.: LIBERTY:

4. *The Appellant craves leave to add, alter, delete or modify all or any the above ground at the time of hearing."*

2. Fact in brief is that return of income declaring nil income was filed on 28.09.2009. The return was processed u/s 143(1) of the Act.

Subsequently, the case was reopened by issuing of notice u/s 148 of the Act on 27.03.2015. The assessee vide letter dated 22.04.2015 requested the A.O to treat the original return as return filed in response to notice u/s 148 of the Act. The assessee is engaged in the business of Real Estate Development and manufacturing of engineering goods. The case of the assessee was reopened on the basis of information received from the investigation wing that as per search action carried out on Shri Praveen Kumar Jain and his group on 01.10.2013 it was found that assessee company has obtained accommodation entries in the form of share capital from the companies floated by Shri Praveen Kumar Jain. It was found during the course of search action in the case of Shri Praveen Kumar Jain that through various companies floated by him, he was engaged in providing accommodation entries of various nature like bogus unsecured loan, bogus share application and bogus sale etc. From the perusal of the beneficiary list the AO observed that the assessee company was also one of the beneficiary of having taken accommodation entries in the nature of share application money. Therefore, it was held that the share application money of Rs.2,88,95,000/- received from the following parties were not genuine:

Sr. No.	Name of the shareholder	Amount
1.	Alka Diamond Industries Ltd.	49,35,000
2.	Anchal Properties Pvt. Ltd.	12,92,500
3.	Nakshatra Business Pvt. Ltd.	23,50,000
4.	Kush Hindustan Entertainment ltd.	54,05,000
5.	Triangular Infocom Ltd.	57,47,500
6.	Olive Overseas Pvt.Ltd.	61,10,000
7.	Yash V Jewels Ltd.	30,55,000
	Total	2,88,95,000

Therefore, assessment was completed u/s 143(3) r.w.s 147 of the Act on 16.03.2016 after making addition of Rs.2,88,95,000/- u/s 68 of the Act on account of share application money.

3. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(AO) has dismissed the appeal of the assessee.

4. During the course of appellate proceedings before us the assessee has filed additional ground of appeal vide letter dated 05.04.2023 the same is as under:

- “2.6. On the given facts, circumstances and judicial pronouncements Ld. Assessing Officer has erred in completing the assessment without valid issue of notice under section 143(2) of the Income Tax Act and thus assessment order passed without valid issue of notice under section 143(2) is erroneous in facts and bad in law and liable to be quashed.*
- 2.7. On the given facts, circumstances and judicial pronouncements, Ld. Assessing Officer has erred in completing the assessment without valid service of notice under section 143(2) of the Income Tax Act and thus assessment order passed without valid service of notice under section 143(2) is erroneous in facts and bad in law and liable to be quashed.*
- 2.8 On the given facts, circumstances and judicial pronouncements, Ld. Assessing Officer erred in issuing the notice under section 148 of the Act without having valid approval required under section 151 of the Act and such assessment order passed pursuant to such approval is erroneous in facts and bad in law and liable to be quashed.*
- 2.9 On the given facts, circumstances and judicial pronouncements, Ld. Assessing Officer erred in framing the assessment on the basis of statement of Mr. Pravin Kumar Jain and not granting the opportunity for cross examination of Mr. Pravin Kumar Jain and such assessment completed without giving opportunity to cross examine is erroneous in facts and bad in law and liable to be quashed.”*
- 2. We would further like to submit that we have recently appointed M/s Jayesh Sanghrajka & Co LLP. to represent in the matter post which the RTI Application was filed them.*
- 3. Based on the details received from the Assessing Officer by way of RTI Application, the Additional Grounds are proposed to be raised.*
- 4. Hon Bench is hereby requested to admit the above grounds as additional grounds and kindly adjudicate the same.*
- 5. Reliance in this regard is placed on judgment in case of National Thermal Power Corporation by Hon. Apex Court and Ahmedabad Electricity by the Hon. Jurisdictional Bombay high Court.”*

5. The ld. Counsel further submitted that additional ground is the legal ground challenging that no valid notice u/s 143(2) of the Act was issued in the case of the assessee. After considering the decision of the Hon’ble Supreme Court in the case of National Thermal Power Company

Vs. CIT (229 ITR 383) these grounds of appeal are taken for adjudication.

6. In respect of limited issue of additional ground, during the course of appellate proceedings before us the ld. Counsel vehemently contended that during the course of assessment the A.O had not issued any notice u/s 143(2) of the Act. He further submitted that issuing of notice u/s 143(2) of the Act is mandatory before completing assessment u/s 143(3) r.w.s 147 of the Act. The ld. Counsel has placed reliance on the following judicial pronouncements:

- (i) CIT Vs. Laxmandas Khandelwal (2019) 417 ITR 325 (SC);
- (ii) ACIT Vs. Geno Pharmaceuticals Limited (2013) 32 taxmann.com 162 (Bombay);
- (ii) Oracle Financial Services Software Ld. Vs. DCIT (2020) 117 taxmann.com 474 (Mumbai- Tribunal).

On the other hand, the ld. D.R submitted that assessee has not raised this issue before the A.O and CIT(A) at the time of assessment and appellate proceedings. He also submitted that as per report received from the assessing officer dated 11.04.2023 as per record no notice u/s 143(2) was issued in the case of the assessee.

7. Heard both the sides and perused the material on record, with regard to the limited issue of non issuing of notice u/s 143(2) of the Act before completing assessment u/s 143(3) r.w.s 147 of the Act in the case of the assessee. The case of the assessee was reopened by issuance of notice u/s 148 of the Act on 27.03.2015. The assessment u/s 143(3) r.w.s 147 of the Act was completed on 16.03.2016. The ld. Counsel has filed paper book comprising copies of the document and notices received from the assessing officer and submission made by the assessee during the course of assessment proceeding. The ld. Counsel submitted that

as per copies of notices placed in the paper book, the A.o has issued notices u/s 142(1) of the Act on 13.07.2015 and 13.01.2016 but no notice u/s 143(2) of the Act was issued before completing the assessment u/s 143(3) r.w.s 147 of the Act in the case of the assessee. The ld. D.R submitted a report of the assessing officer dated 11.04.2023 stating that no notice u/s 143(2) is placed in the file nor visible in the online database, (ITD)(ITBA) for the assessment year 2009-10 & 2010-11. It is evident from the report of the assessing officer and submission of the ld. D.R that no notice u/s 143(2) was issued before completion of assessment u/s 143 r.w.s 147 of the Act in the case of the assessee.

8. In this regard we have perused the decision of Hon'ble Supreme Court in the case of (i) CIT Vs. Laxmandas Khandelwal (2019) 417 ITR 325 (SC) wherein the impact of section 292BB is considered in case notice u/s 143(2) was not issued prior to completion of assessment u/s 143(3) and it is held that for Sec. 292BB to apply, section 143(2) notice must have emanated from the department and it is only the infirmities in the manner of service of notice that section seeks to cure and it is not intended to cure complete absence of notice itself.

9. The Hon'ble jurisdictional High Court in the case of ACIT Vs. Geno Pharmaceuticals Limited (2013) 32 taxmann.com 162 (Bombay) held that notice u/s 143(2) is mandatory, and in absence of such service, Assessing Officer cannot proceed to make inquiry on return filed in compliance with notice issued u/s 148 of the Act.

10. We have also perused the decision of ITAT, Mumbai in the case of Oracle Financial Services Software Ltd. (2020) 117 taxmann.com 474 (Mumbai) wherein after following decision of Hon'ble Supreme Court in the case of CIT Vs. Laxmandas Khandelwal (2019) 417 ITR 325 (SC) and in the case of Hon'ble High Court in the case of ACIT Vs. Geno Pharmaceuticals Limited (2013) 32 taxmann.com 162 (Bombay) it is

held that where no notice u/s 143(2) has been issued while making assessment u/s 143(3) r.w.s 147 of the Act assessment so framed was bad in law and deserved to be quashed.

11. Considering the above facts and ratio of judicial pronouncement as referred supra we consider that assessment order passed u/s 143(3) r.w.s. 147 of the Act in the case of the assessee without issuing mandatory notice u/s 143(2) of the Act is bad in law. Therefore, we quash the proceedings initiated by the A.O u/s 147 of the Act. Since we have allowed the aforesaid additional ground of appeal of the assessee and the ld. Counsel have not discussed the other grounds of appeal therefore, all the other grounds of appeal filed by the assessee are left open.

ITA No. 1672/Mum/2020

12. Since the facts and issue in this appeal are similar to the ITA No. 1671/Mum/2020 which we have adjudicated supra therefore applying its finding as mutatis mutandis to this appeal the additional ground of appeal of the assessee for not issuing of notice u/s 143(2) before completing the assessment u/s 143(3) is allowed and other grounds of appeal filed by the assessee are left open.

13. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 16.05.2023

Sd/-

(Vikas Awasthy)
Judicial Member

Sd/-

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 16.05.2023

Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.