IN THE INCOME TAX APPELLATE TRIBUNAL

"F" BENCH, MUMBAI

BEFORE SHRI G.S. PANNU, PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1196/Mum./2018
(Assessment Year : 2009–10)

Jt. Commissioner of Income Tax (OSD)
Circle–15(3)2, Mumbai .... Appellant

v/s

M/s. U.S. Roofs Ltd.
115–116, J.K. Chambers
Sector no.17, Vashi ....Respondent
Navi Mumbai 400 705
PAN – AAACU3633L

ITA no.1960/Mum./2018
(Assessment Year : 2009–10)

M/s. U.S. Roofs Ltd.
115–116, J.K. Chambers
Sector no.17, Vashi .... Appellant
Navi Mumbai 400 705
PAN – AAACU3633L

v/s

Asstt. Commissioner of Income Tax
Circle–10(3), Mumbai ....Respondent

Assessee by : Shri Madhur Agrawal a/w
Shri Fenil Bhatt
Revenue by : Shri Ankush Kapoor

Date of Hearing – 09/05/2023	Date of Order – 26/05/2023

O R D E R

The present cross-appeal has been filed challenging the impugned order dated 29/12/2017, passed under section 250 of the Income Tax Act, 1961

(*"the Act"*) by the learned Commissioner of Income Tax (Appeals)–24, Mumbai, [*"learned CIT(A)"*], for the assessment year 2009–10.

2. Both sides have raised various grounds in their appeal. Apart from 25 grounds raised in its appeal, the assessee has also filed an application dated 29/05/2019 seeking admission of the following additional grounds of appeal:-

> *"ADDITIONAL GROUND*
> *GROUND NO. 26: FAILURE TO ISSUE VALID NOTICE U/S 143(2) OF THE ACT*
>
> *1. On the facts and in the circumstances of the case and in law, the Ld. Assessing Officer erred in passing the impugned reassessment order without issuing a valid notice u/s 143(2) of the Act.*
>
> *2. The Appellant prays that reassessment order passed without following the mandatory requirement of 143(2) of the Act is void and bad in law.*
>
> *The Appellant craves leaves to add to, alter, amend or delete the additional ground of appeal."*

3. Since, the issue raised by way of additional ground is a legal issue, which can be decided on the basis of material available on record, we are of the view that the same can be admitted for consideration and adjudication in view of the ratio laid down by the Hon'ble Supreme Court in NTPC Ltd vs CIT: 229 ITR 383.

4. The dispute raised by the assessee, by way of the aforesaid additional ground, is that the assessment in the present case has been concluded without issuing a valid statutory notice under section 143(2) of the Act. Since this is a jurisdictional issue, therefore, we deem it appropriate to deal with this jurisdictional aspect first and if necessary thereafter, to deal with the other issues raised in the present cross-appeal.

5. The brief facts of the case pertaining to this issue are: The assessee is a company engaged in the business of sale and purchase of plot rights in respect of agricultural lands acquired by the Government of Maharashtra. A survey action under section 133A of the Act was conducted on 19/11/2010 at the business premises of the assessee and M/s US Realty Private Limited. Consequently, proceedings under section 147 of the Act were initiated and notice under section 148 of the Act was issued to the assessee on 24/11/2010. In response to the aforesaid notice, the assessee filed its return of income on 31/03/2011 declaring a total income of Rs.67,33,525. The Assessing Officer ("*AO*") issued statutory notices under section 143(2) as well as section 142(1) of the Act and concluded the assessment vide order dated 24/08/2012 passed under section 143(3) read with section 147 of the Act computing the total income of the assessee at Rs.742,40,18,900 under normal provisions of the Act after making various additions. The learned CIT(A) vide impugned order granted partial relief to the assessee. Being aggrieved, both the parties are in appeal before us.

6. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that no valid notice under section 143(2) of the Act has been issued in the present case, and thus the order passed under section 143(3) read with section 147 of the Act is bad in law. The learned AR by referring to the assessment order submitted that, during the reassessment proceedings, the AO issued two notices under section 143(2) of the Act, however, none of them is a valid notice as per law. It was further submitted that the first notice was issued by the AO on 20/02/2011, i.e. prior to the filing of the return of

income by the assessee on 31/03/2011, and therefore, the said notice is non-est in law. While the second notice was issued on 17/10/2011, i.e. beyond the time limit prescribed under the provision of section 143(2) of the Act, and therefore, the said notice is also not valid in the eyes of the law.

7. On the contrary, the learned Departmental Representative ("*learned DR*") vehemently supported the assessment order and submitted that the return filed by the assessee, pursuant to the notice issued under section 148 of the Act, is not a valid return since it was filed beyond time period 30 days prescribed under the said notice and therefore there is no need for issuance of notice under section 143(2) of the Act. In support of his submission, the learned DR placed reliance upon the decision of the coordinate bench of the Tribunal in Sanjaykumar Ramkishan Mantri (HUF) vs ACIT, in ITA No. 1591/PN/2012.

8. We have considered the rival submissions and perused the material available on record. In the present case, consequent to the survey action under section 133A of the Act, reassessment proceedings under section 147 of the Act were initiated and notice under section 148 of the Act was issued on 24/11/2010. It is undisputed that during the reassessment proceedings, the AO issued a notice under section 143(2) of the Act on 20/02/2011, and thereafter, upon transfer of the case, fresh notice under section 143(2) of the Act was issued on 17/10/2011. Since the issue in dispute is pertaining to the validity of notice issued under section 143(2) of the Act, therefore, before proceeding further, it is pertinent to analyse the provisions of section 143(2) of the Act, as it stood at the relevant time, 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 shall,—

(i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:

Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003;

(ii) notwithstanding anything contained in clause (i), if he 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, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return:

Provided that no notice under clause (ii) 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."

9. Thus, section 143(2) of the Act would come into play when a return is furnished under section 139 or in response to a notice issued under section 142(1) of the Act. Clause (i) to section 143(2) of the Act is not relevant for the year under consideration. Insofar as clause (ii) to section 143(2) is concerned, from the perusal of the same, it is evident that it presupposes the existence of return of income since only thereafter the AO can verify whether the assessee has understated the income or has computed excessive loss or under-paid the taxes in any manner. Further, as per proviso to clause (ii), no notice 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.

10. In the present case, undisputedly no return of income was originally filed by the assessee, and only pursuant to the notice issued under section 148 of the Act the assessee filed its return of income on 31/03/2011. Thus, the first notice dated 20/02/2011 under section 143(2) of the Act was issued when no return of income was available on record and therefore, this notice cannot be said to have been issued to verify whether the assessee has understated the income or has computed excessive loss or under-paid the taxes in any manner. Hence the first notice issued under section 143(2) of the Act in the present case is a mere empty formality, without any legal consequence, and therefore, cannot be treated as a notice on a return filed by the assessee. We find that the Hon'ble Delhi High Court in DIT v/s Society for Worldwide Interbank Financial, Telecommunications, [2011] 9 taxmann.com 142 (Delhi) held that the provisions of section 143(2) make it clear that the notice can only be served after the AO has examined the return filed by the assessee. Thus, in view of the above, the first notice issued under section 143(2) is not a valid notice as per the provisions of the Act.

11. Further, since the return of income was filed by the assessee on 31/03/2011, therefore, the time limit for issuance of notice under section 143(2) of the Act, as per proviso to clause (ii), was available only till 30/09/2011. However, the second notice under section 143(2) of the Act was issued on 17/10/2011, i.e. beyond the time limit prescribed under the provisions of section 143(2) of the Act. Therefore, the second notice is also invalid as per the provisions of section 143(2) of the Act.

12. As per the learned DR, since the return has been filed by the assessee beyond the time prescribed under the notice issued under section 148 of the Act, therefore, the said return is not a valid return and there is no requirement to issue notice under section 143(2) of the Act. In support of his submission, the learned DR placed reliance upon the following observations of the coordinate bench of the Tribunal in Sanjaykumar Ramkishan Mantri (HUF) (supra):-

> *"20. We find no merit in the plea of the assessee in this regard. The issue is to be looked into from the perspective of the provisions of the Act and whether the assessee had followed the same in true spirit. The requirements of various provisions of the Act have to be complied with and in case the assessee fails to comply with the provisions, the whole machinery of assessment fails and the assessee cannot be allowed to do so. On the one hand, the assessee furnishes all the information for scrutiny assessment but fails to comply with the direction issued by the Assessing Officer under section 148 of the Act on 30.03.2010 to file return of income within period of 30 days. The assessee does not file any return of income. Even thereafter, scrutiny assessment proceedings were taken up and the assessee had participated in the scrutiny assessment proceedings. Thereafter, the alleged return of income is claimed to be filed vide letter dated 10.11.2010, but the said return of income filed by the assessee is an invalid return and non-est. The return of income which was filed beyond the time allowed under the Act or even within reasonable time could have been accepted, but the assessee claims to have filed the said return at the fagend of assessment proceedings and such a return of income filed by the assessee is invalid and non-est and there is no requirement to issue notice under section 143(2) of the Act. Accordingly, we hold that the reassessment completed in the case is valid and under the provisions of the Act. The Assessing Officer had issued requisite notices of hearing to the assessee and the assessee having participated in the said proceedings, cannot be aggrieved at this stage by the fact that no notices under section 143(2) of the Act was issued after alleged filing of the return of income belatedly. We have already held in the paras hereinabove that the said return of income filed by the assessee is invalid and nonest and hence, no requirement to issue notice under section 143(2) of the Act."*
>
> (emphasis supplied)

13. From the above findings of the coordinate bench, it is evident that since the taxpayer has filed the return at the fag-end of the assessment proceedings, such return of income was treated as invalid and non-est. The coordinate bench of the Tribunal, however, noted that the return of income

which was filed beyond the time allowed under the Act or even within the reasonable time could have been accepted. In order to test this argument of the learned DR, it is relevant to examine the provisions of section 148 of the Act, as it stood at the relevant time, which reads as under:-

> *"148. (1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve 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 :*

14. Thus, section 148 of the Act mandates that before making the assessment/reassessment under section 147, the AO has to serve notice on the assessee requiring him to furnish, within such period as may be specified in the notice, inter-alia, a return of his income. It is pertinent to note that section 148 of the Act further provides that such return should be in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed. Further, the provisions of the Act shall apply as if such return is a return required to be furnished under section 139 of the Act. Therefore, for all intent and purpose, the return filed pursuant to the notice issued under section 148 of the Act is treated as a return furnished under section 139 of the Act. As per sub-section (4) of section 139 of the Act, the assessee can furnish his return of income belatedly. Section 139(4) of the Act, as it stood at the relevant time, reads as under:-

> *"(4) Any person who has not furnished a return within the time allowed to him under sub-section (1), or within the time allowed under a notice issued under sub-section (1) of section 142, may furnish the return for any previous year at*

> *any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier :"*

15. In the present case, since the assessee did not furnish its return of income within the time allowed under section 139(1), therefore, as per section 139(4) of the Act, the assessee had time till 31/03/2011 to furnish its return of income, i.e. one year from the end of the relevant assessment year 2009-10. Accordingly, the return of income filed by the assessee on 31/03/2011, in the facts of the present case, is within the time allowed under the Act. Thus, even in view of the decision relied upon by the learned DR, the said return is acceptable. It is pertinent to note that in the aforesaid decision, the coordinate bench of the Tribunal accepted the proposition that in case a return of income is validly filed in response to notice under section 148, the requirement of the Act is to issue the notice under section 143(2) of the Act. The relevant findings of the coordinate bench, in this regard, are as under:-

> *"22. We are in agreement with the proposition raised by the Ld. Authorized Representative for the assessee that in case return of income is validly filed in response to notice under section 148, the requirement of the Act is to issue notice under section 143(2) of the Act. But all the acts have to be done within the time frame provided under the Act or at best within reasonable time….."*

16. Therefore, even by applying the decision relied upon by the learned DR, the return of income filed by the assessee is a valid return, and thus the requirement of issuance of valid notice under section 143(2) of the Act cannot be dispensed with. Before concluding, it is pertinent to note that the legislature vide Finance Act, 2023 has inserted a third proviso to section 148 w.e.f. 01/04/2023, which now specifically provides that any return of income, required to be furnished by an assessee under this section and furnished beyond the period allowed shall not be deemed to be a return under section

139 of the Act. However, during the year under consideration, such a provision was not in the Act. Therefore, in view of the above, we find no merits in the aforesaid submission made by the learned DR.

17. In any case, it cannot be disputed that the AO in the present case has accepted the return of income filed by the assessee and has concluded the assessment under section 143(3) read with section 147 of the Act. Further, the mandatory requirement of issuance of notice under section 143(2) of the Act is quite clear from the decision of the Hon'ble Supreme Court in ACIT vs Hotel Blue Moon [2010] 321 ITR 362 (SC).

18. Since in the present case, no valid notice under section 143(2) of the Act was issued by the AO and the assessment was completed without following the mandatory requirement of the Act, therefore, the entire assessment proceedings concluded under section 143(3) read with section 147 of the Act is rendered null and void, and is accordingly quashed. As we have quashed the assessment proceedings for this short reason, we see no need to deal with other issues raised by the parties in the present cross-appeal. Those aspects of the matter, as of now, are academic and infructuous.

19. In the result, the appeal by the assessee is allowed, while the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 26/05/2023

Sd/- **G.S. PANNU** **PRESIDENT**	**Sd/-** **SANDEEP SINGH KARHAIL** **JUDICIAL MEMBER**

MUMBAI, DATED: 26/05/2023

<u>Copy of the order forwarded to</u>:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Mumbai; and

(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai