

IN THE INCOME TAX APPELLATE TRIBUNAL  
INDORE BENCH: DB: INDORE

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER  
AND  
SHRI BHAGIRATH MAL BIYANI, ACCOUNTANT MEMBER

ITA No.135/Ind/2019  
Assessment Year: 2009-10

Mohan Yadav, M-116, Veena Nagar, Near ITI, Indore, MP 452010  PAN AXPY 1736 C	vs.	ITO-3(1) Indore 425011
(Appellant)		(Respondent)

For Assessee :	None
For Revenue :	Shri. P.K. Mishra, CIT (DR)

Date of Hearing :	22.02.2023
Date of Pronouncement :	18.05.2023

**ORDER**

**PER CHANDRA MOHAN GARG, J.M.**

1. This appeal has been filed by the assessee against the order of Commissioner of Income Tax (Appeals)-II, Indore dated 01.11.2018 for AY 2009-10.

Request of assessee for admission of additional ground no. 3

2. The learned counsel submitted that the assessee is challenging the validity of assessment order on the legal ground of non-issuance of notice u/s. 143 (2) of the Income Tax Act, 1961 by the AO as per judgement of Hon'ble Supreme Court in the case of Collector Land Acquisition, ... vs Mst. Katiji & Ors reported in 1987 AIR 1353 the legal issue can be raised first time before the Tribunal which goes to the root of the matter and can be adjudicated on the basis of material already available on record without any other documentary evidence or exercised. The Id. CIT(DR) opposed to the

admission of additional ground. The additional ground sought to be raised by the assessee reads as follows:-

*The assessment is null and void as no notice was issued u/s. 143(2) within time.*

3. On careful consideration of above we are of view that the assessee seeks to raise legal contention based on factual position of the case. Undisputedly, this issues was not raised before the Id. CIT(A) but as per preposition rendered by Hon'ble Supreme Court (supra) and other various judgments of Hon'ble High Court the legal issue which goes to the root of the matter and can be decided on the basis material available on record can be raised first time before the Tribunal and the same deserve to be admitted and adjudicated. Hence additional ground of assessee, as noted above, is admitted for adjudication.

4. The learned counsel submitted that despite several request to the AO, the assessee could not get copies of the notices issued by the AO u/s. 143(2) and 142(1) of the Act. Therefore the assessee filed an application under Right to Information Act, on 20.11.2020 which was replied by the ITO on 14.12.2020 providing copies of the notice u/s. 143(2) and 142(1) of the Act dated 11.07.2016 for AY 2009-10 which are beyond prescribed time limit. The learned counsel also drew our attention towards order sheet of the AO for AY 2009-10 wherein the date of issuance said notices has been mentioned as 11.07.2016. The learned counsel placing reliance on the judgment of Hon'ble Supreme Court in the case of CIT vs. Laxman Das Khandelwal dated 13.08.2019 in SLP (C) 7708 of 2019 submitted that when no notice u/s. 143(2) of the Act has been issued and served on the assessee within prescribed time limit then the assessment order is vitiated and this defect is not curable u/s. 292BB of the Act.

5. Replying to the above the Id. CIT(DR) strongly supported the action of the AO and submitted that if there is any minor defect in the notice then it is curable u/s. 292BB of the Act, hence additional legal ground of assessee may kindly be dismissed. On being asked by the bench the Id. CIT(DR) shown his inability to submit relevant

assessment record and submitted that despite several efforts the departmental is unable to trace and place relevant assessment records. However, he did not controvert the copies of notice u/s. 143(2) and 142(1) dated 11.07.2016 and order sheet of Assessing Officer for AY 2009-10 starting from 11.07.2016.

6. First of all, we note that impugned assessment order was passed on 29.12.2011 and in the first paragraph of order the Assessing Officer mentions that notice u/s. 143(2) of the Act dated 15.09.2010 was duly served upon the assessee on 16.09.2010 but in reply to application of assessee under RTI Act, dated 20.11.2020 the Assessing Officer vide letter dated 14.12.2020 provided copies of the notices u/s. 143(2) and 142(1) both dated 11.07.2016 along with copy of order sheet from date 11.07.2016. Which reveals that the Assessing Officer in fact issued said notices on 11.07.2016 much after passing assessment order on 29.12.2011. therefore we safely presume that the Assessing Officer has not issued any notice u/s. 143(2) of the Act on 15.09.2010 as noted in the first paragraph of assessment order.

7. In the case of ITO vs. Laxman Das Khandelwal (supra) Hon'ble Supreme Court by referring to its own judgment in the case of ACIT vs. Hotel Blue Moon 321 ITR 362 (SC), held that the service of the notice of the assessee u/s. 143(2) of the Act, within prescribed period of time is a prerequisite for framing valid assessment orders. However their Lordships made distinction between the cases where the assessee participated in the proceedings and notice was not served upon him, or not served upon him on time or served upon him in improper manner then the provision of section 292BB of the Act would come into play in favour of the revenue. Their Lordship further explained that but in a case where there is no notice u/s. 143(2) of the Act was ever issued by the department then the result would be different and it has to be held that the impugned assessment order is null & void being passed without assuming valid jurisdiction by the Assessing Officer.

8. Since in the present case the ld. CIT(DR) neither produced assessment records nor produce copy of notice u/s. 143(2) of the Act, dated 15.09.2010 as noted by the

Assessing Officer in the assessment order therefore respectfully following the judgment of Hon'ble Supreme Court in the case of Laxman Das Khandelwal (supra) we hold that the impugned assessment order dated 29.12.2011 passed u/s. 154/143(3) of the Act is not valid and sustainable being passed by the AO without assuming valid jurisdiction by issuing notice u/s. 143(2) of the Act within prescribe time limit. Thus, impugned assessment order and all consequent proceedings and orders are quashed. Accordingly additional ground of assessee is allowed.

9. Since in the earlier part of this order we have quashed assessment order and all other consequent orders therefore grounds of assessee on merits are not being adjudicated and left open.

10. In the result, the appeal of the assessee is partly allowed.

Order pronounced in Open court on 18.05.2023.

Sd/-

(BHAGIRATH MAL BIYANI)  
ACCOUNTANT MEMBER

Sd/-

(CHANDRA MOHAN GARG)  
JUDICIAL MEMBER

Dated: 18<sup>th</sup> May, 2023.

NV/-

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

// By Order //

Asstt. Registrar, ITAT, Indore

		Date
1.	Draft dictated online on	18.05.2023
2.	Draft placed before the author	18.01.2023
3.	Draft placed before the other Member	.01.2023
4.	Approved Draft comes to the Sr.PS/PS	.01.2023
5.	Order uploaded on	.01.2023
6.	File sent to the Bench Clerk	.01.2023
7.	Date on which file goes to the Head Clerk.	
8.	Date on which file goes to the AR	
9.	Date of dispatch of Order.	