

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणेमें।
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES "B" :: PUNE

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No.57/PUN/2022
निर्धारण वर्ष / Assessment Year :2008-09

VLife Sciences Technologies Pvt. Ltd., (Since merged with Novalead Pharma P. Ltd.) 3 rd Floor, Anahat, Plot NO.5, Ram Indu Park, Baner Road, Pune – 411045. PAN: AABCV 5959 N	Vs	The Deputy Commissioner of Income Tax, Circle-(1), Pune.
Assessee/ Appellant		Respondent /Revenue

Assessee by	Shri B.D.Bhide – AR
Revenue by	Shri M.G.Jasnani – DR
Date of hearing	19/04/2023
Date of pronouncement	05/07/2023

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This appeal filed by the Assessee is directed against the order of Id.Commissioner of Income Tax (Appeal)[NFAC], Delhi dated 23.12.2021 emanating from assessment order under section 143(3) r.w.s 147 of the Act, dated 28.02.2014 for A.Y.2008-09. The Assessee has raised the following grounds of appeal:

“Being aggrieved by an order passed by the Id. CIT(A) - National Faceless Appeal Centre (NFAQ hereinafter referred for short as ‘Id. CIT(A), U/Sec.250 of the Income Tax Act dated 23rd December,

2021, your appellant raises following Grounds of Appeal without prejudice to each other for Your Honor's sympathetic consideration.

1. *On the facts and circumstances of the case and in law, the Id. CIT(A) erred in not holding that an order passed U/Sec.147 r.w. Sec. 143(3) dt. 28/02/2014 is bad-in-law since, same is passed by ignoring facts and legal provisions stated below-*
 - i. *Said order is passed without serving a notice U/Sec. 143(2) to the appellant because of which the Id. A.O. couldn't assume jurisdiction while passing said order;*
 - ii. *No new facts came on the records after passing an order U/Sec. 143(3) till the time notice U/Sec. 148 of the Income Tax Act was issued to the appellant;*
 - iii. *Said order was based on revisiting facts submitted by appellant during assessment proceedings based on which order U/Sec. 143(3) was passed hence, order passed U/Sec. 147 is merely on change of opinion which is impermissible while issuing notice U/Sec. 148;*
 - iv. *Said order is passed in view of an audit objection which fact was hidden by the Id. A.O. while supplying copy of reasons for issuing notice U/Sec. 148 to the appellant but, exposed by the Id. A.O. himself as may be seen from said order itself;*
 - v. *Said order was passed without following provisions of Sec.151 of the Income Tax Act and to affirm this fact appellant was denied an opportunity to inspect reassessment records in-spite of repeated requests filed by the appellant which are acknowledged by the lower assessing authorities including the jurisdictional Pr. CIT.*
 - vi. *Said order was passed by ignoring CBDT's instruction/ **LETTER F.NO.DGIT (VIG.)/HQ/SI/APPEALS/2017-18/9959** because of which, there was inordinate delay while passing an order U/Sec.250 beyond 15 days from the date of last hearing of the appeal.*
2. *On the facts and circumstances of the case, the Id. CIT(A) erred in not allowing the appellant' claim to carry-forward*

business losses of earlier assessment years amounting to R: 3,94,80,183/- (though, in the Ground raised before him same was stated as Rs. 4,12yL9,512 as per figure appearing in an order passed U/Sec. 147).Appellant prays for allowing it l carry-forward losses amounting to Rs.3,94,80,183/- as per provisions of Sec.72 of the Income Tax Act as and when occasion arises to claim such set-off.

3. *Appellant prays for awarding it the cost of the present appeal as may be deemed reasonable the Hon'ble Bench as, an order passed U/Sec.250 (which is subject matter of the presi appeal)is without application of mind; ignoring facts of appellant's case; by brushing as:*

written submissions, disregarding ratio of various judgements of jurisdictional high-court/ apex court cited (in the written submissions) by the Ld. CIT(A) which caused hardships for the appellant as, the ld. CIT(A) ignored:

- i. *Appellant's request to admit additional evidence as per rule 46A of the Income Tax Rules while submitting paper-book before him which were included in 'Part-II' of the Paper-book;*
- ii. *Ignoring ratio of judgements of jurisdictional high-court/ apex court cited by the appellant in its written submissions while requesting to admit additional evidence as per provisions of Rule 46 A of the Income Tax Rules;*
- iii. *not taking any decision on admission of additional evidence placed before him/ her (as per 'Part-II' of the Paper-book Index)while passing an order U/Sec.250 of the Income Tax Act;*
- iv. *Disregarding the ratio of various judgements of jurisdictional High-Court and apex court not affirming the action of the ld. A.O. while passing an order U/Sec.147 r.w. Sec,143(3)'*
- v. *Disregarding an order passed by Hon'ble B'bay High Court in appellant's case as per provisions of Sec. 100 to 104 of the Companies Act, 1956 because of which appellant set-off carried forward book losses with 'Securities Premium Reserve' which doesn't prohibit appellant to claim set-off of losses as per provisions of Sec.72 of the Income Tax Act and when this fact was*

- disclosed by the appellant in its audited final accounts in the 'Notes to the Accounts' and;*
- vi. *denial to carry-forward losses reported by the appellant while filing the Return of Income in the past assessment years resulted in charging to tax a capital receipt i.e. 'Securities Premium Account - Reserve' which is beyond the scope, purpose and provisions of Sec.2(24), 4, 5, 6 and Sec.72 of the Income Tax Act.*
 - vii. *In-spite of noting the fact that 'Business Losses' returned by the appellant for earlier assessment years survive in-spite of the book adjustment made by the appellant since, provisions of Sec.72 of the Income Tax Act do not uphold the decision of the ld. CIT(A) to deny carry-forward of losses reported by the appellant for earlier assessment years as no clause of provision of Sec.72 justifies the decision of the ld. CIT(A).*
4. *Appellant prays for restoration of income reported by it while filing the Return of Income for A.Y.2008-09.*
 5. *Appellant craves leave to add, alter, withdraw any of the Grounds of Appeal raised during the appeal proceedings.*

Brief facts of the case :

2. The assessee filed original Return of Income declaring total loss of Rs.1,43,30,855/- on 27.09.2008 electronically. The assessee's case was selected for scrutiny. As per the assessment order, assessee is engaged in the business of providing research enabling software solutions for pharmaceutical, biotech, chemical sectors. The assessment under section 143(3) was passed 20.10.2010 after considering the submission of the assessee. Subsequently, the Assessing Officer(AO), DCIT, Circle-1(2), Pune issued notice under section 148 dated 28.03.2013. The AO passed an order under section 147 r.w.s 143(3) on 28.02.2014, vide which the AO held that losses

for A.Y.2004-05 to 2007-08 totalling to Rs.4,12,19,512/- were not allowed to carry forward. Aggrieved by the assessment order under section 147 r.w.s 143(3), the assessee filed appeal before Id.CIT(A).

3. The Id.CIT(A) upheld the assessment order. Aggrieved by the order of the Id.CIT(A) assessee filed appeal before this Tribunal.

Submission of Id.AR :

4. The Id.AR filed one factual paper book containing 119 pages and another case law paper book. The Id.AR at the outset, submitted that no notice under section 143(2) has been served on the assessee. The Id.AR invited our attention to page no.90 to 98 of the paper book. The Id.AR explained that vide letters dated 11.01.2016, 15.03.2017, 07.09.2017 &22.09.2017 assessee requested Assessing Officer to allow inspection of the assessment record. However, the Id.AR submitted that inspection of the assessment record was not allowed till date. Then, the Id.AR also submitted that assessee also wrote letters to Id.Pr.CIT requesting for inspection of assessment records. The Id.AR vehemently submitted that till date inspection of assessment record has not been granted. The Id.AR also submitted that Department has not filed any document to prove that notice under section 143(2) was served on the assessee during the re-assessment proceedings. The Id.AR took us through the order under

section 143(3) r.w.s 147 to explain that nowhere the Assessing Officer has mentioned about notice under section 143(2). The Id.AR submitted that this goes to the root of the assessment proceedings. Since no notice under section 143(2) was served, the re-assessment order is ab-intio-void. The Id.AR relied on following case laws :

- CIT Vs. Salman Khan (Bom. HC) in IT Appeal (L) No.2362 of 2009.
- DCIT Vs. Terex India Pvt. Ltd., in ITA No.1644/PUN/2015
- Oracle Financial Services Software Ltd., Vs. DCIT 117 taxmann.com 474 (Mum. Trib).
- Amec Foster Wheels Iberia SLU Vs. DCIT 148 taxmann.com 124 (Madras)

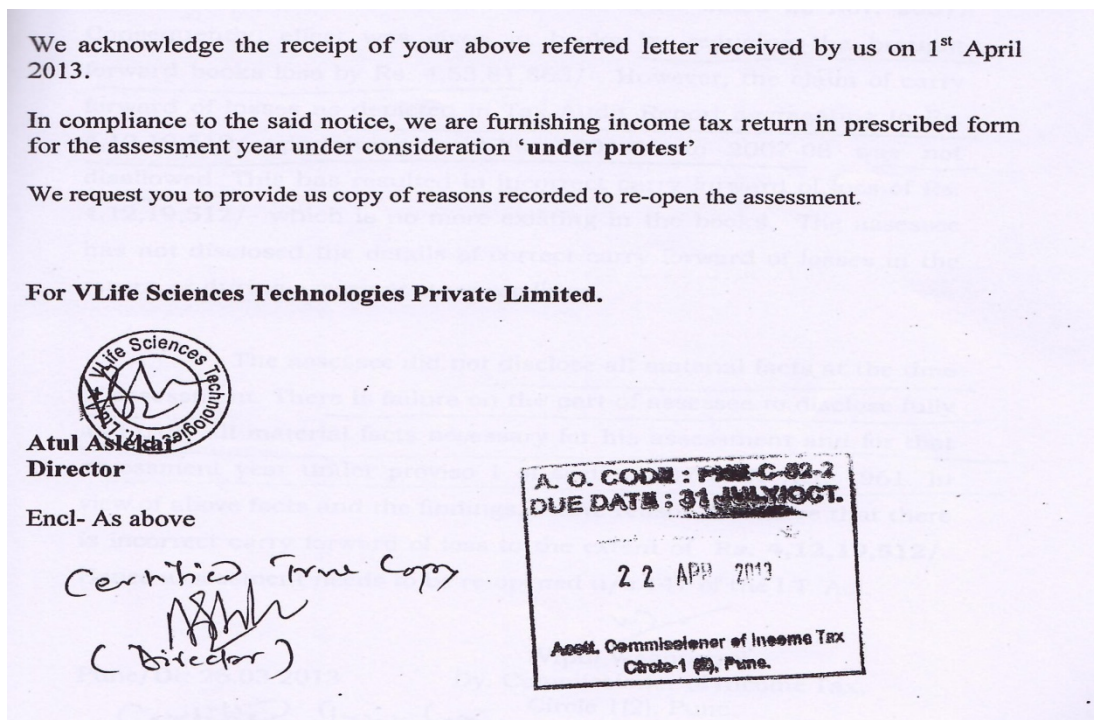
Submission of Id.DR :

5. The Id.DR relied on the orders of the Lower Authorities.

Findings & Analysis :

6. We have heard both the parties and perused the records. We are only considering the Legal Ground first. We have reproduced above the submission of the Id.AR and Id.DR only with reference to Legal Ground of not serving notice under section 143(2).

6.1 In this case, the DCIT, Circle-1(2), Pune(AO) issued notice under section 148 dated 28.03.2013 for A.Y. 2008-09. The assessee vide letter dated 19.04.2013 filed before the AO, submitted as under :



6.2 The said letter dated 19.04.2013 is at page no.60 of the paper book. The said letter duly have acknowledgment stamp of Assistant Commissioner of Income Tax, Circle-1(2), Pune, dated 22.04.2013.

6.3 Thus, it is clear that assessee filed Return in the prescribed form in response to notice under section 148 of the Act. However, nowhere in the assessment order there is any mention of notice under section 143(2) either issued or served on the assessee. The Id.DR could not produce any evidence to prove that notice under section 143(2) was served on the assessee during the re-assessment proceedings. The assessee had taken this plea before Id.CIT(A) as

observed from the assessee's submission dated 06.04.2021 claimed to have been filed before the Id.CIT(A) [Paper Book Page No.3 to 22]. However, Id.CIT(A) has not discussed the issue of service of notice under section 143(2) in the order. As discussed, there is no positive evidence filed by the Revenue to prove that notice under section 143(2) was served on the assessee. Service of notice under section 143(2) goes to the root of the issue of jurisdiction. ITAT Pune in the case of DCIT vs. Terex India Private Ltd., had held that non-issuance of statutory notice under section 143(2) of the Act constitutes an incurable defect and allowed the appeal of the assessee. Similarly, the Hon'ble Bombay High Court in the case of CIT vs. Salman Khan(supra) upheld the order of ITAT cancelling the assessment order by holding that assessment framed under section 143(3) r.w.s 147 cannot be held to be valid assessment in the absence of notice under section 143(2) of the Act. The Hon'ble Madras High Court in the case of Amec Foster Wheels Iberia SLU(supra) has held as under :

“28. In light of the detailed discussion as above as well as the legal position that has been settled in several judgments discussed in the preceding paragraphs, impugned notice under section 148 dated 12-12-2019, order dated 23-7-2021 and reference to TPO on 24-11-2020 stand vitiated by non-issue of notice under section 143(2) of the Act and the same are quashed.”

7. No other contrary judgement of the Hon'ble Supreme Court or the Hon'ble Jurisdictional High Court has been brought to our notice.

8. In these facts and circumstances of the case, respectfully following the Hon'ble Jurisdictional High Court, the Hon'ble Madras High Court and ITAT, as notice under section 143(2) has not been served on the assessee during the re-assessment proceedings initiated by issuing notice under section 148 dated 28.03.2013, the assessment order passed under section 147 r.w.s 143(3) of the Act dated 28.02.2014 is held to be *ab-initio-void*. Accordingly, the Ground No.1(i) of the assessee is allowed.

8.1 Since we have quashed the re-assessment order on the Legal Ground, all other grounds become academic in nature, hence, all other grounds are dismissed unadjudicated.

9. In the result, appeal of the assessee is Partly Allowed.

Order pronounced in the open Court on 5th July, 2023.

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 5th July, 2023/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे/ITAT, Pune.