

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 358/Ind/2020
Assessment Year: 2015-16

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| DCIT (Central)-I, Bhopal | <u>बनाम/</u> Vs. | M/s. Vatika Builders & Developers, Vatika Parisar, Near Petrol Pump, Lalghati, Bhopal |
| (Revenue / Appellant) | | (Assessee / Respondent) |

C.O.No. 20/Ind/2022
(Arising out of ITA No. 358/Ind/2020)
Assessment Year: 2015-16

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| M/s. Vatika Builders & Developers, Vatika Parisar, Near Petrol Pump, Lalghati, Bhopal | <u>बनाम/</u> Vs. | DCIT (Central)-I, Bhopal |
| (Assessee/Cross-Objector) | | (Revenue / Respondent) |
| PAN: AAIFV6693A | | |
| Revenue by | Shri P.K. Mishra, CIT DR | |
| Assessee by | Shri Ashish Goyal, CA and Shri N. D. Patwa, Adv. | |
| Date of Hearing | 23.08.2023 | |
| Date of Pronouncement | 25.09.2023 | |

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by appeal-order dated 14.10.2020 passed by learned Commissioner of Income-Tax (Appeals)-3, Bhopal ["Ld. CIT(A)"], which in turn arises out of assessment-order dated 21.12.2016 passed by learned

DCIT, Central-I, Bhopal ["Ld. AO"] u/s 143(3) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2015-16, the revenue has filed captioned appeal and assessee has filed captioned cross-objection.

2. The grounds taken by parties are as under:

Revenue's Appeal:

"On the facts and in the circumstances of the case, the Ld. CIT(A)-3 has erred in :-

- 1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 1,20,32,000/- made by the AO on account of unaccounted receipts.*
- 2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 1,39,55,297/- made by the AO on account of unaccounted payments.*
- 3. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 12,00,000/- made by the AO on account of unaccounted receipts.*
- 4. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 38,45,000/- made by the AO on account of unaccounted receipts.*
- 5. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 11,81,352/- made by the AO on account of unaccounted addition in capital."*

Assessee's Cross-Objection:

- 1. That the Ld. CIT(A) was not justified in confirming the assessment order, which is bad-in-law, void ab initio, barred by limitation, illegal, contrary to the facts and circumstances of the case, liable to be annulled.*
- 2. The assessment order is bad-in-law, void ab initio, barred by limitation, illegal, contrary to the facts and circumstances of the case, liable to be annulled.*
- 3. That the Ld. CIT(A) erred in confirming the assessment whereas the notice u/s 143(2), which granted jurisdiction, was barred by limitation. Hence, the assessment itself was liable to be annulled.*
- 4. The notice u/s 143(2), which granted jurisdiction, was barred by limitation. Hence the assessment itself was liable to be annulled.*

3. Heard the learned Representatives of both sides at length and case-records perused.

4. The assessee has raised legality grounds in Cross-Objection whereas the Revenue's appeal challenge merit. Since the legality grounds question the validity of assessment itself, we first propose to adjudicate Assessee's Cross-Objection and thereafter Revenue's appeal.

Assessee's Cross-Objection:

5. Precisely, the assessee claims that the AO has passed assessment-order u/s 143(3) on the basis of notice u/s 143(2) dated 11.11.2016 but the said notice was time-barred having been issued beyond the statutory time-limit of 6 months prescribed in proviso to section 143(2). Therefore, the entire assessment-proceeding is invalid and deserves to be quashed.

6. Apropos to the issue, the relevant facts are such that the present case involves AY 2015-16 for which the assessee filed original return u/s 139 on 23.02.2016 and immediately on next day filed a revised-return on 24.02.2016. The AO issued statutory notice u/s 143(2) on 11.11.2016 to acquire jurisdiction of scrutiny. These dates, namely the date of filing (revised) return on 24.02.2016 and the date of issuance of notice on 11.11.2016 are clearly mentioned by AO in Para No. 2.0 and 3.0 of assessment-order and also verified by us from assessment-record produced by Ld. DR. Further, the notice u/s 143(2) bearing date 11.11.2016 is also scanned and re-produced below for a ready reference:



भारत सरकार

Government of India

वित्त मंत्रालय (राजस्व विभाग)

Ministry of Finance (Department of Revenue)

कार्यालय उपायुक्त आयकर (केन्द्रीय)-I, भोपाल

OFFICE OF THE DEPUTY COMMISSIONER OF INCOME TAX-CENTRAL -I, BHOPAL

कक्ष क.-301, अरेरा हिल्स, आयकर भवन, होशंगाबाद रोड, भोपाल - 462011

Room No. - 301, Erera Hills, Aayakar Bhawan, Hoshangabad Road, Bhopal - 462011

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NOTICE UNDER SECTION 143(2) OF THE INCOME-TAX ACT, 1961

Dated: - 11.11.2016

To,

M/s Vatika Builders & Developers,
20, Railway Housing Society,
E-8, Arera Colony,
Bhopal
PAN: AAIFV6693A

There are certain points in connection with the return of income submitted by you for the assessment year 2015-16 on which I would like some further information.

You are hereby required to attend my office on 18/11/2016 at 11:30 AM either in person or by a representative duly authorized in writing in this behalf or produce cause there to be produced at the said time any documents, accounts and any other evidence on which you may rely in support of the return filed by you.



Yours faithfully

(Swati Agarwal)

Dy. Commissioner of Income Tax (Central)-I
Bhopal

7. Having noted above dates, we come to the contention raised by Ld. AR that the section 143(2) contains following proviso prescribing time-limit:

“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.”

8. Ld. AR submitted that in the present case, the return was filed on 24.02.2016, therefore the time-limit of six months prescribed in the proviso expired on 30.09.2016. Hence, the notice issued by AO on 11.11.2016 is a time-barred notice and void-ab-initio. Therefore, the assessment-proceeding conducted by AO and finally order u/s 143(3) passed by him on the strength of such void notice is invalid and liable to be quashed. To support his stand, Ld. AR relied upon catena of decisions, the most relevant decisions are cited below:

(a) *CIT Vs. Laxman Das Khandelwal (2019) 108 taxmann.com 183 (SC):*

In this case, the AO made assessment u/s 143(3) without issuing notice u/s 143(2). The Hon'ble Supreme Court held that the notice u/s 143(2) is mandatory for making assessment u/s 143(3). Further held that section 292BB cannot cure complete absence of notice.

(b) *Harman Singh Dhingra Vs. ACIT, New Delhi (2021) 132 taxmann.com 40 (Delhi – ITAT), order dated 24.09.2021:*

Held:

“5.....The Ld. AR further submitted that the reassessment u/s 147 will be invalid, if no notice u/s 143(2) was issued and will not be save even by section 292BB, even if the assessee participates in the proceedings. The Revenue can avail section 292BB only if notice u/s 143(2) was issued and not when admitted position is that no notice was issued as in the instant case. The Ld. AR relied upon the decision in case of Travencor Diagnostics (P.) Ltd. v. Asstt. CIT [2016] 74 taxmann.com 239 (Ker.). The Ld. AR further submitted that effect of non-issue of notice u/s 143(2) within the specified time and invalid service, where no evidence of notice u/s 143(2) was given to the postal authority then the assessment has to be set aside. The Ld. AR relied upon the decision of the Hon'ble Gujarat High Court in case of Pr. CIT v. Nexus Software Ltd. [2017] 81 taxmann.com 153/248 Taxman 243.

6. The Ld. DR relied upon the assessment order and the order of the CIT(A). In respect of additional ground, the Ld. DR submitted that from the records it appears that notice u/s 143(2) was not within the specified time.

7. We have heard both the parties and perused the material available on record. Since the additional grounds are legal grounds we are firstly deciding the same by admitting the additional grounds. **It is pertinent to note that the notice u/s 143(2) should have been issued till the date 30-9-2014 but the same was issued after the statutory limit. This fact was not denied by the Ld. DR after going through the assessment records. Hence, the additional ground raised by the assessee are allowed. Thus, the assessment order itself becomes null and void ab initio as the notice issued was not issued within the specified time.** Since, the assessment itself becomes nullity; there is no need to discuss the merits of the case. The appeal of the assessee is allowed."

[Emphasis supplied]

(c) Pai Vinod Vs. DCIT (2013) 35 taxmann.com 164 (Karnataka):

"3. In the facts and circumstances of the case, the issuance of notice under section 143(2) of the Income-tax Act, 1961, within the prescribed time limited for the purpose of making assessment under section 143(3) of the Income-tax Act, 1961, is mandatory.

4. The said question was answered by the apex court in the following manner (page 369) :

"We may now revert back to section 158BC(b) which is the material provision which requires our consideration. Section 158BC(b) provides for enquiry and assessment. The said provision reads 'that the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142, sub-sections (2) and (3) of section 143, section 144 and section 145 shall, so far as may be, apply.' Analysis of this sub-section indicates that, after the return is filed, this clause enables the Assessing Officer to complete the assessment by following the procedure like issue of notice under section 143(2)/142 and complete the assessment under section 143(3). This section does not provide for accepting the return as provided under section 143(1)(a). The Assessing Officer has to complete the assessment under section 143(3) only. In case of default in not filing the return or not complying with the notice under section 143(2)/142, the Assessing Officer is authorized to complete the assessment ex parte under section 144. Clause (b) of section 158BC by referring to section 143(2) and (3) would appear to imply that the provisions of section 143(1) are excluded. But section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under section 143(2). However, if an assessment is to be completed under section 143(3) read with section 158BC, notice under section 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under section 143(2) cannot be a procedural irregularity and

the same is not curable and, therefore, the requirement of notice under section 143(2) cannot be dispensed with. The other important feature that requires to be noticed is that section 158BC(b) specifically refers to some of the provisions of the Act which require to be followed by the Assessing Officer while completing the block assessments under Chapter XIV-B of the Act. This legislation is by incorporation. This section even speaks of sub-sections which are to be followed by the Assessing Officer. Had the intention of the Legislature been to exclude the provisions of Chapter XIV of the Act, the Legislature would have or could have indicated that also. A reading of the provision would clearly indicate, in our opinion, if the Assessing Officer, if for any reason, repudiates the return filed by the assessee in response to notice under section 158BC(a), the Assessing Officer must necessarily issue notice under section 143(2) of the Act within the time prescribed in the proviso to section 143(2) of the Act. Where the Legislature intended to exclude certain provisions from the ambit of section 158BC(b) it has done so specifically. Thus, when section 158BC(b) specifically refers to applicability of the proviso thereto it cannot be excluded. We may also notice here itself that the clarification given by the Central Board of Direct Taxes in its Circular No. 717, dated August 14, 1995, has a binding effect on the Department, but not on the court. This circular clarifies the requirement of law in respect of service of notice under sub-section (2) of section 143 of the Act. Accordingly, we conclude that even for the purpose of Chapter XIV-B of the Act, for the determination of undisclosed income for a block period under the provisions of section 158BC, the provisions of section 142 and sub-sections (2) and (3) of section 143 are applicable and no assessment could be made without issuing notice under section 143(2) of the Act. However, it is contended by Sri Shekhar, learned counsel for the Department that in view of the expression 'so far as may be' in section 158BC(b), the issue of notice is not mandatory but optional and are to be applied to the extent practicable. In support of that contention, the learned counsel has relied on the observation made by this court in Dr. Partap Singh's case [1985] 155 ITR 166 (SC). In this case, the court has observed that section 37(2) provides that 'the provisions of the Code relating to searches, shall so far as may be, apply to searches directed under section 37(2). Reading the two sections together it merely means that the methodology prescribed for carrying out the search provided in section 165 has to be generally followed. The expression "so far as may be" has always been construed to mean that those provisions may be generally followed to the extent possible'. The learned counsel for the respondent has brought to our notice the observations made by this court in the case of Maganlal v. Jaiswal Industries [1989] 4 SCC 344 wherein this court while dealing with the scope and import of the expression "as far as practicable" has stated 'without anything more the expression "as far as possible" will mean that the manner provided in the Code for attachment or sale of property in execution of a decree shall be applicable in its entirety except such provision therein which may not be practicable to be applied'.

The case of the Revenue is that the expression 'so far as may be apply' indicates that it is not expected to follow the provisions of section 142, sub-sections (2) and (3) of section 143 strictly for the purpose of block assessments. We do not agree with the submissions of the learned counsel for the Revenue, since we do not see any reason to restrict the scope and meaning of the expression 'so far as may be apply'. In our view, where the Assessing Officer in repudiation of the return filed under section

158BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of section 142, sub-sections(2) and (3) of section 143.

Section 158BH provides for application of the other provisions of the Act. It reads:

'Save as otherwise provided in this Chapter, all the other provisions of this Act shall apply to assessment made under this Chapter'. This is an enabling provision, which makes all the provisions of the Act, save as otherwise provided, applicable for proceedings for block assessment. The provisions which are specifically included are those which are available in Chapter XIV-B of the Act, which includes section 142 and sub-sections (2) and (3) of section 143."

5. Therefore, it is a clear omission on the part of the assessing authority to issue notice under section 143(2) is not a procedural irregularity. The same is not curable. Therefore, the requirement of notice under section 143(2) of the Act cannot be dispensed with. When the same is issued in respect of the block return filed, the Assessing Officer must necessarily issue notice under section 143(1) of the Act within the time prescribed in the proviso to section 143(2) of the Act. Even for the purpose of Chapter XIV-B of the Act, for determination of the undisclosed income for the block assessment under the provisions of section 158BC, the provisions of section 142 and sub-sections (1) and (3) of section 143 are applicable. No assessments could be made without issuance of notice under section 143(2) of the Act where the Assessing Officer in repudiation of the return filed under section 158BC, proceeds to make an enquiry he has to necessarily follow the provisions of section 142, sub-sections (2) and (3) of section 143. If there is violation of the mandatory provision then the assessment order passed is illegal and liable to be set aside. In the light of the law declared by the apex court the appeal filed by the assessee in I. T.A. No. 818 of 2006 has to succeed and consequently the appeals preferred by the Revenue are liable to be dismissed. The substantial questions of law in so far as limitation is concerned is answered in favour of the assessee and against the Revenue."

9. Ld. DR dutifully supported the assessment-order but, however, could not controvert the submissions of Ld. AR.

10. We have considered rival submissions of both sides and perused the case-record. Admittedly, the present case involves AY 2015-16 for which the assessee filed return on 24.02.2016 and the AO issued statutory notice u/s 143(2) on 11.11.2016. The time-limit prescribed in proviso to section 143(2), however, exhausted on 30.09.2016 and the AO issued notice after exhaustion of time-limit. Notably, this is not a case where the AO has issued

notice within statutory time-limit of 6 months but served subsequently so that the revenue may avail safeguard of section 292BB. Under section 292BB, the assessee is precluded from taking objection only in three situations, namely (i) the notice is not served upon him, or (ii) the notice is not served upon him in time, or (iii) the notice is served upon him in an improper manner. In the present case, the assessee's objection is altogether different in as much as the assessee is claiming that the notice was not issued by AO in time. Therefore, the assessee's case can be constructed in the matrix of the situation decided by Hon'ble Supreme Court in **Laxman Das Khandelwal (supra)** where no notice u/s 143(2) was issued to assessee. Further, the assessee's case is also governed by direct decisions in **Harman Singh Dhingra (supra) and Pai Vinod (supra)** where it has been clearly held that if the notice u/s 143(2) is not issued in the prescribed time-limit of six months, the entire assessment-proceeding becomes invalid. Respectfully applying the ratio of Hon'ble Supreme Court and the view taken in other decisions cited above, we are of the considered view that in the present case of assessee, the AO has invalidly made assessment u/s 143(3) on the strength of a time-barred, illegal notice u/s 143(2). Therefore, we quash the assessment-proceeding itself. The assessee succeeds in Cross-Objection.

Revenue's Appeal:

11. Since we have allowed cross-objection of assessee and thereby quashed assessment-proceeding itself, the revenue's appeal raising issues on merits becomes infructuous. Hence, revenue's appeal is dismissed.

12. Resultantly, the revenue's appeal is dismissed and assessee's cross-objection is allowed.

Order pronounced in the open court on 25.09.2023.

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 25.6. 2023

CPU/Sr. PS

*Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File*

By order

*Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore*