

**IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR**

**BEFORE: DR. S. SEETHALAKSHMI, JM
&
SHRI RATHOD KAMLESH JAYANTBHAI, AM**

**ITA Nos. 153/Jodh/2019
(ASSESSMENT YEAR- 2010-11)**

Sh. Murlidhar Kriplani 142-E-Class, Pratapnagar, Udaipur.	Vs	ITO, Ward-2(3), Udaipur.
(Appellant)		(Respondent)
PAN NO. AVXPK 9653 R		

(Virtual hearing)

Assessee By	Shri Sarvesh Baldi-C.A.
Revenue By	Shri S.M. Joshi, JCIT-DR
Date of hearing	05/07/2023
Date of Pronouncement	03/10/2023

ORDER

PER: Dr. S. Seethalakshmi, JM

The assessee has filed an appeal against the order of the Learned Commissioner of Income Tax (Appeals)-1, Udiapur [herein after “Ld.CIT(A)”] dated 22.02.2019 for the assessment year 2010-11.

2. The assessee has raised the following grounds of appeal:-

“1. That on the facts and circumstances of the case as well as in law, the Ld. AO Ward-2(3), Udiapur vide order dt. 09.12.2015 grossly erred an order made u/s 148/143(3) of Income Tax Act, 1961 without issuing serving notice u/s 143(2) before completing the assessment of income which is mandatory in

nature. The Commissioner of Income tax (Appeals) also confirmed that where return of income filed beyond time as contemplated under section 139, it is not necessary on part of AO to issue notice u/s 143(2) which is bad in law and unjustified and not tenable as per the Hon'ble Rajasthan High Court Jaipur Bench in case of ITO vs Kamla Devi Sharma in DB ITA no. 179/2018 dated 10/07/2018.

2. Without Prejudice to above-

That on the facts & circumstances of the case as well as in the law the proceeding initiated under section 147 read with section 148 is bad in law having regard to the facts of the case, written submission and position of law.

3. That the Ld. CIT(A) legally erred in confirming the addition of Rs.3,50,000/- by disallowing the deduction claimed u/s 54F by the assessee as there was no addition on the ground as recorded in reasons to believe u/s 148. The Ld. CIT(A) order is against the binding judicial precedents of Rajasthan High Court in case of CIT vs Sh. Ram Singh (306 ITR 343) & CIT v/s Dr. Devendra Gupta (336 ITR 59)

4. That on the fact and circumstances of the case as well as in the law the Ld. Commissioner of Income Tax (Appeal) erred in confirming that assessee appellant is not entitled for the benefit claimed under section 54F of the Income Tax Act on technical ground which is bad in law.

5. That on the fact and circumstances of the case as well as in the law the Ld. AO by the impugned order of assessment erred in taxing a sum of Rs. 18,000/- being income under the head House Property which too confirmed by the Commissioner of Income Tax (Appeal) after providing part relief in respect of statutory deduction@ 30% which is bad in law.

6. That the appellant craves its right to add, alter, amend, modify or substitute any of the grounds of appeal on or before the time of hearing of appeal.”

3. Brief facts of the case are that the assessee is a small retail trader engaged in business of sale of tobacco goods at retail counters. The assessee filed his return of income on 31.03.2012 declaring total income at Rs. 6,04,660/- including income from business & profession of Rs. 1,77,438/- and long term capital gain of Rs. 4,27,217/-. Notice u/s 148 was issued on 25.03.2015 and thereafter notice u/s 142(1) of the Act was issued on 07.05.2015. After hearing the assessee, the AO completed the assessment u/s 143(3)/147 of the Act determining the total income at Rs. 9,72,660/- by making additions/disallowances of Rs. 3,68,000/-.

4. Aggrieved, from the said order of assessment the assessee has filed an appeal before the Id. CIT(A). The Id. CIT(A) after hearing the contention of the assessee dismissed the appeal of the assessee by giving following findings on the issue:-

“Paragraph 15But 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 158 BC, notice under Section 143(2) should be issued within one year from the date of filing of the 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."

Thus, it is evident that ratio laid down by the Supreme Court in the aforesaid decision is that a notice under Section 143(2) is mandatory, if the return as filed is not accepted and an assessment order is to be made at variance with the return filed by the assessee. The aforesaid decision would not apply to a case where no return is filed by the assessee as would be axiomatic from plain reading of Section 143(2) of the Act also. It is also pertinent to mention here that in *Madhya Bharat Energy Corpn. Ltd. and Vision Inc.* (supra) the assessee had filed the original return in response to the notice under Section 148 of the Act. Therefore, the aforesaid decisions have no application to the obtaining factual matrix of the case where assessee admittedly did not file the return."

The facts of the appellant case are similar to the case of *Broadway Shoe Co.* (Supra) and the ratio laid down by the Hon'ble Jammu & Kashmir High Court is squarely applicable to the case of the appellant. Keeping in view the authoritative judicial precedents as discussed above and the fact that the AO has followed the due procedure of law while re-opening the assessment, I find no merits in various claims made by the appellant. This ground of appeal regarding validity of re-assessment proceedings is dismissed."

5. As the assessee did not receive any favor from the appeal filed before Id. CIT(A). The present appeal filed against the said order of the Id. CIT(A) dated 22.02.2019 before this tribunal on the grounds as reiterated in para 2 above. To support the grounds so raised the Id. AR appearing on behalf of the assessee has placed their written submission which is extracted in below:-

"That the assessee is small retail trader engaged in business of sale of tobacco goods at retail counters.

That the original return of income was filed on 21/03/2012 vide acknowledgement No. 6344 declaring total income of Rs. 6,04,660/- comprising of Rs. 1,77,438/- as income under business and Rs. 4,27,217/- under the head capital gains.

Subsequently, the assessee was served with notice under section 148 read with section 147 of the Income Tax Act dated 25/03/2015 the assessment was completed under section 148/143(3) vide order dated 09/12/2015.

LEGAL POINTS CHALLENGED BY THE ASSESSEE

GROUND NO. 1 & 2 -VALIDITY OF REASSESSMENT PROCEEDINGS

That the assessment was completed under section 143(3) of the IT Act. Notice under section 148 was issued on 25/03/2015 requiring the assessee to file the return in response to the notice. Further, notice u/s 142(1) of the IT Act was issued along with questionnaire and served on 07/05/2015. In response to which assessee filed a letter dated 25/05/2015 requesting to treat the original return filed on 31/03/2012 as return filed in compliance to notice u/s 148 / 142(1) of the Act. The chronology of events is given in tabular form below:

S. No.	Date	Particulars
1.	25/03/2015	Notice u/s 148 was issued and served upon the assessee
2.	07/05/2015	Notice u/s 142(1) was issued fixing date of hearing on 20/05/2015
3.	25/05/2015	Letter submitted to the Assessing Officer with a request to treat the original return filed on 31/03/2012 as return filed in compliance to notice u/s 148/142(1)
4.	Various dates as per order sheet entries	Proceedings were attended by the AR of the assessee from time to time
5.	09/12/2015	Assessment order was passed by the Ld. AO vide Order dated 09/12/2015

Sir, as evident from Section 148 of the Act which specifically provides that all the provisions of the Act shall be applicable in respect of return of income u/s 148 as if the same was return furnished u/s 139. Going further, first and second provisos to section 148 provides the time limit for issuance of notice u/s 143(2) on the basis of date of filing of return of income.

In this particular case, assessee filed the return in response to notice u/s 148 on 25/05/2015 which has not been in dispute and this fact also confirmed by the CIT(A)-1 vide order dated 22/02/2019, vide Para No. 4, Page No. 2.

That the assessment was completed u/s 143(3)/148 without issuance of notice u/s 143(2) of the IT Act and thus the reassessment proceedings is without any valid jurisdiction and order passed is void ab-initio

That the Ld. CIT(A)-1, confirmed the legal validity of reassessment proceedings even without non-issuance of notice u/s 143(2) which is bad in law and illegal. The Ld. CIT(A)-1 heavily relied upon to the case of the Principal Commissioner of Income Tax Vs. Broadway Shoe Company, (2018) 99 Taxmann.com 83 (JK High Court), wherein the Court held that where no return was filed in pursuance of notice issued u/s 148, issue of notice u/s 143(2) was not required for making assessment.

The CIT(A) in its order at Page No. 14 had reproduced the finding given by the Jammu & Kashmir High Court and for the sake of convenience and ready reference the same is reproduced:

"Thus, it is evident that ratio laid down by the Supreme Court in the aforesaid decision is that a notice under section 143(2) is mandatory, if the return as filed is not accepted and an assessment order is to be made at variance with the return filed by the assessee. The aforesaid decision would not apply to a case where no return is filed by the assessee as would be axiomatic from plain reading of Section 143(2) of the Act also. It is also pertinent to mention here that in Madhya Bharat Energy Corpn. Ltd. and Vision Inc. (supra) the assessee had filed the original return in response to the notice under Section 148 of the Act. Therefore the aforesaid decisions have no application to the obtaining factual matrix in the case where assessee admittedly did not file the return."

Further the CIT(A) summarily rejected the appellant's contention by simply stating that the facts of the appellant's case is similar to the case of Broadway Shoe Company (supra) and this judgment is applicable to appellant's case. However, it is in complete disguise that how come when a return has been filed in response to notice u/s 148 and the same is affirmed by the Ld. CIT(A) in its order at Para No. 4, Page No. 2 and this fact duly been admitted and confirmed by the CIT(A) as sated in the preceding para.

The Ld. CIT(A) grossly erred in upholding the legal validity of reassessment proceedings in spite of the fact that the return has been filed by the assessee in response to notice u/s 148. The Ld. CIT(A) failed to interpret the essential provisions of the Act which compels the Ld. AO to issue notice u/s 143(2) of the Act, once the return of income is filed by the assessee. The issue of notice u/s 143(2) is mandatory in nature once the return is filed by the assessee and the assessment is subsequently concluded u/s 143(3) of the Act

The Ld. CIT(A) ignored the judicial pronouncements submitted by the assessee which hold that omission to issue notice u/s 143(2) is not a procedural irregularity and the same is not curable. The present case of the appellant in regard to non-issuance of notice u/s 143(2) is directly covered in its favour by the case of PCIT, Jaipur, Vs. Kamla Devi Sharma, (2018) ITI 4027 (Rajasthan High Court) in DB IT Appeal No. 197/2018, Order dated 10/07/2018 wherein even an assessee files a belated return in response to notice u/s 148, the AO is bound to issue and serve the notice u/s 143(2) before the completion of assessment u/s 143(3) of the Act. The non-issuance of notice u/s 143(2) is fatal to the order of reassessment. For your ready reference one copy of this judgment is enclosed herewith.

Hence the point in issue regarding the mandatory issuing of notice u/s 143(2) directly been covered from the decision of Hon'ble High Court of Rajasthan which is one of the lengthy decisions, even provision of section 292BB is not applicable as the failure to issue of notice cannot said to be procedural irregularity and provision of section 292BB is not applicable.

Therefore, assessee appellant pray that the impugned order passed u/s 148 read with section 143(3) is void, ab-initio illegal, bad in law, unjustified, unwarranted and not tenable in the eye of law. Hence order so passed deserves to be quashed.

The assessee also relied upon the case of -

1. ACIT VS. Hotel Blue Moon (SC) 321 ITR 362
2. PCIT Vs Jai Shiv Shankar Traders Pvt. Ltd., 383 ITR 448 (Delhi HC)

GROUND NO. 3-ADDITION OF RS. 3.50.000/-

That the assessee also challenges the addition of Rs. 3,50,000/- on the legal ground that where no addition has been made on the basis of reason recorded, addition on different issue which was not the subject matter of reopening is illegal.

Sir, your attention is invited to the judgment of hon'ble Rajasthan High Court:

1. CIT Vs. Shrim Ram Singh, 306 ITR 343, wherein it has been held that once the Assessing Officer comes to conclusion that income with respect to which he had entertained "reason to believe" to have escaped assessment was found to have been explained, his jurisdiction comes to a stop at that and he does not continue to possess jurisdiction to put to tax any other income which subsequently came to his notice in course of proceedings, which was found by him to have escaped assessment.
2. CIT Vs. Dr. Devendra Gupta, 336 ITR 59, where Court held that in case where despite existence of material on record, to arrive at conclusion about escapement of certain income from assessment, in the reassessment proceedings where such income is not found to have escaped assessment, it is not open for the Assessing Officer to complete the reassessment proceedings, by finding some other income, to be liable to be subjected to tax which is found by the Assessing Officer in the reassessment proceedings to have been required to be taxed in the original assessment.

Further reliance is placed on the following cases:

1. ACIT VS. M.K. Exim (India) Ltd., ITAT, Jaipur, 82 Taxmann.com 61.
2. Ranbaxy Laboratories Ltd. Vs. CIT (Delhi HC) 336 ITR 136
3. CIT Vs. Jet Airways (1) Ltd. (Bombay HC) 331 ITR 236
4. Travancore Cements Ltd. Vs. ACIT (Kerala HC) 305 ITR 170

Thus, the appellant prays to quash the assessment order so passed by the Assessing Officer and confirmed by the Commissioner of Income Tax (Appeals)-1, Udaipur, as the same is bad in law, unjustified, and not tenable as per the facts of the case and the judicial pronouncements relied upon.”

6. Per contra, the ld. DR relied upon the orders of the ld. CIT(A).

7. We have heard both parties, perused the materials available on record and also gone through the judicial decision cited by both the parties to drive home to their contentions. The bench noted that the assessee in ground no. 1 challenged the action of the Assessing Officer not issuing notice u/s 143(2) of the Act before completing the assessment in the case of the assessee which is mandatory in nature. The Bench also noted from the order of the Id. CIT(A) wherein the fact that there is no notice issued u/s 143(2) of the Act and for that the Id. CIT(A) taken a view that since the assessee did not file any written in response to the notice u/s 148 of the Act and therefore, in the light of that factual matrix he has not consider the said legal ground taken by the assessee. On this issue we note that the Id. AR of the assessee placed reliance on decision of the Hon'ble Rajasthan High Court in the case of **Pr. Commissioner of Income Tax, Jaipur-III vs. Kamla Devi Sharma in D.B. Income Tax Appeal No. 197/2018 dated 10.07.2018** wherein the case is held as under:-

"The resultant position was that as far as the present case was concerned the failure by the AO to issue a notice to the Assessee under Section 143(2) of the Act subsequent to 16th December 2010 when the Assessee made a statement before the AO to the effect that the original return filed should be treated as a return pursuant to a notice under Section 148 of the Act, was fatal to the order of reassessment. (Para 19) Consequently, there was no legal infirmity in the impugned order of the ITAT. No substantial question of law arises. The appeal was dismissed." (Para 20).

Thus, the facts of the assessee's case are similar to the facts of the case involved in the decision of the Hon'ble Delhi High Court wherein it has been categorically held that the issue of notice U/s 143(2) in reassessment proceedings, prior to finalizing re-assessment order, cannot be condoned by referring to Section 292BB and is fatal to the order of reassessment. Respectfully following the same, we hereby set aside the order of the authorities below and allow the grounds No. 1 to 4 of the assessee's appeal.”

Since, the fact of the case on hand and the fact of the case of Pr. Commissioner of Income Tax, Jaipur-III vs. Kamla Devi Sharma (supra) relied by the assessee being similar. We considered the ground No. 1 and quashed the assessment order in ground No. 1 raised by the assessee. Since, we have considered ground No. 1 on legal ground and therefore, ground No. 2, 3, 4 & 5 becomes educative in nature. Ground No. 6 being general in nature and does not require any adjudication.

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

Order pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963 by placing the details on the notice board.

Sd/-

(RATHOD KAMLESH JAYANTBHAI)
ACCOUNTANT MEMBER

Sd/-

(DR. S. SEETHALAKSHMI)
JUDICIAL MEMBER

Dated : 03/10/2023

**Santosh*
Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR
6. Guard File

Assistant Registrar
Jodhpur Bench