

**IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI**

**BEFORE SHRI OM PRAKASH KANT, AM AND  
MS. KAVITHA RAJAGOPAL, JM**

ITA No. 794/Mum/2023  
(Assessment Year: 2013-14)

Income Tax Officer 3(1)(1) Room No. 666, 6 <sup>th</sup> Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020	Vs.	Aaress Realty Private Limited 810, 8 <sup>th</sup> Floor, Raheja Centre, Free Journal Marg, Nariman Point, Mumbai-400 021
PAN/GIR No. AAICA 8388 C		
<b>(Revenue)</b>	:	<b>(Assessee)</b>

CO No. 47/Mum/2023  
(Arising out of ITA No. 794/Mum/2023)  
(Assessment Year: 2013-14)

Aaress Realty Private Limited 810, 8 <sup>th</sup> Floor, Raheja Centre, Free Journal Marg, Nariman Point, Mumbai-400 021	Vs.	Income Tax Officer 3(1)(1) Room No. 666, 6 <sup>th</sup> Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
PAN/GIR No. AAICA 8388 C		
<b>(Assessee)</b>	:	<b>(Revenue)</b>

<b>Assessee by</b>	:	Shri A. K. Sharma
<b>Respondent by</b>	:	Shri Eknath Shirke

<b>Date of Hearing</b>	:	10.11.2023
<b>Date of Pronouncement</b>	:	13.12.2023

**ORDER**

**Per Kavitha Rajagopal, JM:**

This appeal has been filed by the Revenue and the cross objection by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) ('Id.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2013-14.

2. The Revenue has challenged the deletion of addition made by the Id. CIT(A) amounting to Rs.1,86,00,000/- made u/s. 80C by the Id. Assessing Officer ('A.O.' for short) and the disallowance of expenses amounting to Rs.10,81,830/-. The assessee, on the other hand, in its cross objection has challenged the validity of the assessment order on the ground that the notice u/s. 143(2) was not issued and served upon the assessee.

3. The brief facts are that the assessee company was engaged in the business of construction and development of real estate and had registered under the provisions of the Companies Act. The assessee filed its return of income dated 26.09.2013, declaring total loss of Rs.10,92,590/- and the same was processed u/s. 143(1) of the Act. The assessee's case was reopened u/s. 147 of the Act vide notice u/s. 148 of the Act dated 09.03.2016 for the reason that the information from Pr. DIT (Investigation)-1, Mumbai that the assessee was one of the beneficiary of accommodation entries provided by Shri Gautam Jain and others (Surat Diamond Concerns) group in the form of non genuine purchase bills and unsecured loans, etc, pursuant to the search action carried out in the case of Shri Gautam Jain and group concerns dated 03.10.2013. It is also observed that the statement u/s. 132(4)/131 of the Act from Shri Gautam Jain revealed that the assessee has availed unsecured loans from the following concerns which were controlled and operated by Shri Gautam Jain group and others for providing accommodation entries in the form of unsecured loans:

<b>Sr. No.</b>	<b>Name of the bogus concern</b>	<b>A.Y.</b>	<b>Amount of transaction</b>
1	M/s. Karishma Diamond Pvt. Ltd.	2013-14	50,00,000
2	M/s. Parshwanath Gems Pvt. Ltd.	2013-14	49,00,000
3	M/s. Marine Gems Pvt. Ltd.	2013-14	87,00,000
	<b>Total</b>		<b>1,86,00,000</b>

4. The Id. A.O. then passed the assessment order u/s. 143(3) r.w.s. 147 of the Act determining the total income at Rs.1,96,81,830/- after making an addition u/s. 68 of the Act amounting to Rs.1,86,00,000/- as unexplained cash credit and Rs.10,81,830/- towards expenses claimed by the assessee as being incurred for the purpose of business on the ground that the assessee has failed to prove the genuineness of the said transaction.

5. In an appeal preferred by the assessee, the first appellate authority had deleted the impugned addition on the ground that the Id. A.O. has merely relied upon the statement of Shri Gautam Jain and had not carried out any enquiry on the said transaction where the assessee has discharged the initial onus casted upon it as to the identity of the creditor, the genuineness of the transaction and the creditworthiness of the creditors. The Id. CIT(A) also deleted the addition made towards the disallowance of expenses claimed by the assessee, on the ground that the Id. A.O. has made an adhoc addition without specifying the defects in the bills and vouchers furnished by the assessee.

6. The Revenue is in appeal before us challenging the impugned order of the Id. CIT(A). The assessee has filed the cross objection challenging the validity of the assessment order on the ground that the Id. A.O. has not issued notice u/s. 143(2) of the Act during the assessment proceeding making the assessment order null and void in the eyes of the law. As this ground goes to the root of the case, we deem it fit to decide the issue on the legal ground raised by the assessee before getting into the merits of the case.

7. The learned Authorised Representative ('Id. AR' for short) for the assessee vehemently contended that the Id. A.O. has not issued the notice u/s. 143(2) of the Act though it is mentioned that notice u/s. 143(2) and 142(1) of the Act were issued on

05.07.2016 and served upon the assessee. The ld. AR further contended that the assessee has raised this issue before the first appellate authority which has not been dealt with by the ld. CIT(A) in his order dated 17.01.2023. The ld. AR further submitted that the issuance of the notice u/s. 143(2) of the Act was a mandatory compliance to be made by the ld. A.O. and not a directory procedure. The ld. AR contended that the assessment order is null and void for failure on the part of the ld. A.O. to follow the mandatory procedure. The ld. AR relied on the decision in the case of *CIT vs. Rajeev Shah* [2011] 336 ITR 678 (All) and *CIT vs. Alstom T & D India Limited* [2014] 226 Taxman 103 (Mag)(Mad).

8. The learned Departmental Representative ('ld.DR' for short), on the other hand, controverted the said fact and stated that the ld. A.O. has specifically mentioned in the assessment order that notice u/s. 143(2) was issued on 05.07.2016 and served upon the assessee. The ld. DR further sought for time to produce the records to show that the notice u/s. 143(2) of the Act was issued and served upon the assessee. The ld. DR relied on the orders of the lower authorities.

9. We have heard the rival submissions and perused the materials available on record. It is observed that the assessee's case was reopened vide notice u/s. 148 of the Act dated 09.03.2016 on the basis of the information received that the assessee was one of the beneficiary of availing accommodation entries from Shri Gautam Jain and others by way of bogus unsecured loan. The assessee vide letter dated 21.07.2016 filed copy of original return dated 26.09.2013 in response to notice u/s. 148 of the Act. Subsequently, the reasons recorded were provided to the assessee. The ld. A.O. records that notice u/s.

143(2) and 142(1) were issued on 05.07.2016. The assessee's contention is that notice u/s. 143(2) was not issued to the assessee. This issue was also raised before the Id. CIT(A) who has not given a specific finding on this issue. It is observed that during the appellate proceeding before us, several opportunities were given to the Id. DR to produce the assessment record for substantiating the fact that notice u/s. 143(2) of the Act was issued by the Id. A.O. This appeal was adjourned on 19.06.2023, 23.06.2023, 21.07.2023, 28.07.2023, 04.08.2023, 22.09.2023, 28.09.2023, 06.10.2023, 20.10.2023 giving adequate opportunity to the Id. DR for furnishing the assessment records. In spite of several opportunities, the Revenue has failed to substantiate the fact that the notice u/s. 143(2) was issued and served upon the assessee.

10. In the above factual matrix, we are bound to go by the conclusion that the assessee's allegation that notice u/s. 143(2) was never issued stand substantiated by taking an adverse inference that the Revenue has no records to controvert otherwise. It is evident that when the assessee has stated that the original return of income be treated as return of income filed in response to notice u/s. 148 of the Act then the Id. A.O. is bound to mandatorily issue notice u/s. 143(2) of the Act for assuming jurisdiction for assessing the income of the assessee. The assessee has also contended that mere recording in the assessment proceeding that notice was served without corroborating it with supporting documentary evidence will not validate the assessment proceeding. The Id. AR has relied on a catena of decisions to reiterate the proposition that the Id.A.O. assumes jurisdiction only after service of a legal and valid notice in accordance with the law. We would also like to rely on the decision of the Hon'ble Apex Court in the case of *Hotel Blue Moon* [2010] 321 ITR 362 (SC), wherein it has been held that non issuance of notice which is

mandatory is not a curable defect. The non issuance of notice u/s. 143(2) of the Act which was a mandatory procedure would amount to procedural irregularity making the entire reassessment proceeding to be vitiated and would not be a curable defect u/s. 292BB of the Act. This proposition has also been reiterated by the decision of the Hon'ble Jurisdictional High Court in the case of *CIT vs. Sodder Builder and Developer Pvt. Ltd.* [2020] 156 taxmann.com 251 (Bom).

11. From the above observation, we deem it fit to hold that the assessment order passed without issuing the notice u/s. 143(2) of the Act stands vitiated. As we have held the assessment order to be null and void, the grounds raised by the Revenue becomes infructuous.

12. In the result, the appeal filed by the Revenue is dismissed and the cross objection filed by the assessee is allowed.

*Order pronounced in the open court on 13.12.2023.*

Sd/-

(Om Prakash Kant)  
Accountant Member

Mumbai; Dated : 13.12.2023

Roshani, Sr. PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

Sd/-

(Kavitha Rajagopal)  
Judicial Member

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai