

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No. 970/Ahd/2023

(निर्धारण वर्ष / Assessment Year : 2011-12)

Prakash Amarlal Doulatani 16/318, Satyagrah Chhavni, Near Bhavnirjar, Satellite Road, Ahmedabad - 380015	बनाम/ Vs.	The Income Tax Officer Ward -3(3)(4), Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AASPD3727B		
(Appellant)	..	(Respondent)

Assessee by :	Shri Vihar Soni, A.R.
Revenue by :	Shri Urjit Shah, Sr. DR

सुनवाई की तारीख / Date of Hearing	30/01/2024
घोषणा की तारीख /Date of Pronouncement	31/01/2024

ORDER

PER Ms. MADHUMITA ROY - JM:

The instant appeal filed at the instance of the assessee is directed against the order dated 05.10.2023 passed by National Faceless Appeal Centre (NFAC), Delhi arising out of the order dated 22.11.2018 passed by the ITO, Ward-3(3)(4), Ahmedabad under Section 143(3) r.w.s. 147 of the Income Tax Act, 1961, (hereinafter referred to as ‘the Act’) for Assessment Year 2011-12, whereby and wherunder the addition made by the Ld. AO on account of ‘on money’ has been confirmed.

2. The short fact leading to the case is this that the appellant filed his return of income for A.Y. 2011-12 on 20.07.2011 declaring total income of Rs.10,38,500/-. On the basis of information of a search under Section 132 of the Act conducted on 25.02.2016 in the premises of J. P. Iscon Group and documents seized thereon in respect of 'on money' received from various customers including the assessee of the projects developed by J. P. Iscon Pvt. Ltd. and its group concerns, the case of the assessee was reopened under Section 147 of the Act. As per Revenue, the search conducted on the third party reveals information that the appellant paid 'on money' of Rs.22,71,000/- for the purchase of Unit No. K-204, Iscon Platinum Project, the date of booking whereof was 14.02.2011 and the total investment was Rs.71,46,000/- including 'on money'. The assessee did not disclose fully and truly income and the complete details of income by filing return of income and therefore the Ld. AO has reason to believe that income chargeable to tax has escaped assessment. Consequently, notice under Section 148 of the Act was issued on 30.03.2018 upon obtaining approval from the PCIT-3, Ahmedabad. Further that, the notice under Section 142(1) of the Act was issued on 10.08.2018 directing the appellant to submit certain details and/or information. In response to the same, the appellant filed online reply and submitted the copy of income tax return and computation of income. A further notice under Section 142(1) of the Act dated 25.10.2018 was issued asking for explanation for source of investment in property whereupon the assessee by filing letter dated 06.11.2018 explained the issue raised. The Excel sheet found and seized from the search premises was, in fact, claimed to have been the main basis of alleging 'on money' payment by the assessee though as per the Ld. AR the same was never served upon the assessee to controvert the same. The assessment proceeding was finalized by making addition of Rs.22,71,000/- as

unexplained investment as 'on money', which was further confirmed by the First Appellate Authority. Hence, the instant appeal before us.

3. At the very outset of the proceeding, the Ld. Counsel appearing for the assessee submitted before us that no notice under Section 143(2) of the Act was issued by the Ld. AO during the said proceeding under Section 143(2) r.w.s. 147 of the Act and therefore the valid jurisdiction to pass orders under Section 143(3) r.w.s. 147 of the Act was never assumed by the Ld. AO. This particular ground on the maintainability of the appeal was also taken before the Ld. CIT(A).

4. As it appears from the above that the judgment passed in the case of CIT vs. Madhya Bharat Energy Corpn. Ltd., reported in 337 ITR 389 passed by the Hon'ble Delhi High Court has though been relied upon by the Ld. CIT(A), the said judgment has been overruled by the Hon'ble Delhi High Court in its subsequent decision pronounced in the case of PCIT vs. Shri Jai Shiv Shankar Traders (P.) Ltd., reported in [2015] 64 taxmann.com 220 (Delhi), where it was categorically held that failure of Assessing Officer issuing notice under Section 143(2) of the Act is fatal to order of re-assessment which makes such order invalid.

5. While rebutting, the Ld. DR submitted that the assessee has not filed its return pursuant to the notice under Section 148 of the Act dated 30.03.2018 and therefore, the Ld. AO did not find any requirement to issue notice under Section 143(2) of the Act. In fact, at that juncture, the Ld. AR again drew our attention to the 5th paragraph of the order passed by the Ld. AO where it states that notice under Section 142(1) of the Act was issued on 10.08.2018 and

certain details/information were called for and served upon the assessee through ITBA as well as Speed Post. In response whereof, the assessee filed reply and submitted copy of income tax return and computation of income which implies that the assessee was relying upon the return already filed under Section 139(1) of the Act which was supposed to be treated as return in response to the notice issued under Section 148 of the Act. We find force in such submission made by the Ld. AR. We also find that though the return was not filed within 30 days from the date of issuance of notice under Section 148 of the Act, the assessee was served further notice under Section 143(2) of the Act by Revenue directing him to file the return. It was specifically mentioned therein that the assessee has not complied with the initial notice and requested to comply immediately. Such notice has been annexed by the assessee in its paper book filed before us appearing at Page 28 therein. The contents whereof is as follows:

“Please refer to notice u/s. 148 of the I.T. Act issued on 30/03/2018 in your case. You were required to file return of income against this notice, but you have not complied the same till date. You are requested to comply immediately

In connection with the assessment for the A.Y.2011-12, you are also required to furnish or cause to be furnished the accounts and documents specified here as under:

- 1. Please furnish complete details of nature of business activity?*
- 2. Please furnish Brief note on earning activity,*
- 3. Details of bank accounts, either held solely or jointly, in the following format and also provide copy of the bank statement for the period:*

<i>Sr. No.</i>	<i>Name of the Account holder</i>	<i>Bank name</i>	<i>Branch address</i>	<i>Account No.</i>	<i>Account type</i>
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>6</i>

- 4. Copy of ITR/Statement of Income for A.Y. 2011-12*
- 5. Audit Report/Copy of Trading Account, Profit & loss account, balance sheet and capital account.*

6. As per the information available with this office, you have made following transactions:

a) During the year under consideration, it is noticed, that you have made advanced/paid cash for booking purchase of Unit K-204, Iscon Platinum

You are requested to explain the above mentioned transaction(s) with supporting documents, evidences and corresponding bank statements.

Please note that failure to comply this notice will attract penalty u/s 271(1)(b) of the I.T. Act and completion of assessment proceeding ex-parte u/s 144 of the Income-tax Act, 1961 on the basis of material available on record with this office.

This Notice may be treated as notice issued u/s. 142(1) r.w.s. 129 of the Income-tax Act. You are requested to comply to this notice online through e-filing portal.”

6. Immediately, thereafter the assessee filed the return which was already filed by him under Section 139(1) of the Act alongwith the computation of income of the assessee and the details of payment made by the assessee to the Iscon Group. The same is appearing at Page Nos. 30 to 34 of the paper book filed before us. Since, further notice has been issued to the assessee under Section 142(1) of the Act by the Ld. AO requesting submission and particularly when the assessee submitted the copy of the return of income filed under Section 139(1) of the Act in response to the said subsequent notice under Section 142(1) of the Act appearing at Page Nos. 28 & 29 of the Paper Book, there is no scope of doubt that the assessee relied upon the return already filed under Section 139(1) of the Act and the same was requested to be treated as return in response to the notice issued under Section 148 of the Act. Therefore, issuance of notice, under this particular facts and circumstances of the case, under Section 143(2) of the Act was very much necessary in terms of the statutory provision but admittedly not been complied with by the AO which goes to the root of the matter. Non-issuance of such notice under Section 143(2) of the Act makes entire proceeding vitiated and thus liable to be quashed, which is also a settled principle of law. One of such decision

passed by the Hon'ble Apex Court in the case of CIT vs. Hotel Blue Moon in Civil Appeal No. 1198 of 2010 was also relied upon by the Ld. AR in the written notes of submission filed before us.

7. Now, we proceed to deal with the order passed by the Ld. CIT(A) in rejecting this particular ground of appeal of non-issuance of notice under Section 143(2) of the Act relying upon the judgment passed in the case of CIT vs. Madhya Bharat Energy Corpn. Ltd. (supra). On this count, the Ld. AR has drawn our attention to paragraph 5.3.1 of Page 16 of Ld. CIT(A)'s order, which reads as follows:

“5.3.1 As per IT Act, it does not specifically provide that assessment made u/s 147 should be after issue of notice u/s 143(2) - AO has the basic jurisdiction to assess the income u/s 147 & 148. In this regard, reliance is placed on the judgement of Hon'ble Delhi High Court in the case of CIT VS Madhya Bharat Energy Corpn. Ltd. in 337 ITR 389, in which It is held that:

“12. It is noted that the impugned assessment is in response to notice under Section 148 of the Act and the Act does not specifically provide that the assessment made under Section 147 of the Act will be after issue of the notice under Section 143(2) of the Act. In fact, AO has the basic jurisdiction to assess the income in terms of Section 147 and Section 148 of the Act where he has reason to believe that the income has escaped assessment. On the submissions of non issuance of notice under Section 143(2) of the Act, we are of the view that the findings of the Tribunal in this regard are not as per the scheme of the provisions of Section 147 and 148 of the Act.

5.3.2 Though no specific notice was required u/s 143(2) of the IT Act, as noted above, the questionnaire dated 08.11.2018 provided the appellant specific opportunity to explain the details of transactions showing in J.P.Group by seeking documentary evidence and details.”

8. In this regard, we have considered the judgment passed by the subsequent judgment of the Hon'ble Delhi High Court in case PCIT vs. Shri Jai Shiv Shankar Traders (P.) Ltd. (supra) whereby and whereunder the former judgment passed in the case of CIT vs. Madhya Bharat Energy Corpn. Ltd. (supra) was overruled with the following observations:

“.....8. When this appeal was first listed before this Court on 29th July, 2015 reliance was placed by Ms Suruchi Aggarwal, learned Senior Standing counsel for the Revenue on the decision of this Court in 'Commissioner of Income Tax v. Madhya Bharat Energy Corporation Ltd. (2011) 337 ITR 389) Del which purported to hold that non-issue of notice under Section 143(2) of the Act on an Assessee prior to completion of the reassessment would not be fatal to the reassessment. She also sought to distinguish the decision in ACIT v. Hotel Blue Moon (supra) on the ground that it pertained to a block assessment.

9. Dr Rakesh Gupta, learned counsel appearing for the Assessee, at the outset drew the attention of this Court to an order passed by this Court on 17th August, 2011 in Review Petition No.441/2011 in ITA No.950/2008 (CIT v. Madhya Bharat Energy Corporation) whereby this Court reviewed its main judgment in the matter rendered on 11th July 2011 on the ground that the said appeal had not been admitted on the question concerning the mandatory compliance with the requirement of issuance of notice under Section 143(2) of the Act. In its review order, this Court noted that at the time of admission of the appeal on 17th February, 2011 after noticing that in the said case that no notice under Section 143(2) had ever been issued, the Court held that no question of law arose on that aspect. The upshot of the above discussion is that the decision of this Court in CIT v. Madhya Bharat Energy Corporation (supra) is not of any assistance to the Revenue as far as the issue in the present case is concerned.

10. Ms Aggarwal nevertheless urged that notwithstanding the above position, the decision of this Court in CIT v. Vision Inc. (2012) 73 DTR 201 (Del) would apply. The said judgment held that since on the facts of that case the Assessee had been properly served with the notice under Section 143(2) of the Act within the statutory time limit prescribed under the proviso thereto, the ITAT should not have set aside the re-assessment in toto. Ms Aggarwal placed reliance on Section 292BB of the Act and urged that the Assessee having not raised any objection about non service of the notice under Section 143(2) of the Act either at any time before the AO or prior to, or during the reassessment proceedings, the Assessee was precluded from raising such an objection in the subsequent stages of the proceedings.

11. Dr Rakesh Gupta for the Assessee on the other hand placed reliance on a large number of decisions of the High Courts apart from the decision of the Supreme Court in ACIT v. Hotel Blue Moon (supra). He submitted that the failure to issue a notice under Section 143(2) of the Act subsequent to the Assessee having informed the AO that the return originally filed should be treated as the return filed pursuant to the notice under Section 148 of the Act, was fatal to the order of re-assessment.

12. The narration of facts as noted above by the Court makes it clear that no notice under Section 143(2) of the Act was issued to the Assessee after 16th December 2010, the date on which the Assessee informed the AO that the return originally filed should be treated as the return filed pursuant to the notice under Section 148 of the Act.

.....

19. The resultant position is that as far as the present case is 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, is fatal to the order of re-assessment.

20. Consequently, there is no legal infirmity in the impugned order of the ITAT. No substantial question of law arises. The appeal is dismissed.....”

9. As it appears that the ratio of the judgment pronounced by the Hon'ble Delhi High Court in the case of CIT vs. Madhya Bharat Energy Corpn. Ltd. (supra) has been overruled with the observation that the non-issuance of notice under Section 143(2) of the Act is fatal to the re-assessment and accordingly re-assessment order was quashed, thus, as we have already discussed the facts of the case hereinbefore that though the assessee submitted the copy of the return under Section 139(1) of the Act in response to the subsequent notice under Section 142(1) of the Act, no notice under Section 143(2) of the Act since issued by the Ld. AO as per law, the entire proceeding is found to be bad in law, void ab initio and thus liable to be quashed. We are also enlightened with the observation made by the Hon'ble Delhi High Court in the case of PCIT vs. Shri Jai Shiv Shankar Traders (P.) Ltd. (supra) as stated above the ratio whereof was also not been able to be controverted by the Ld. DR by citing any other judgment against the same. Respectfully relying upon the same, we quash the entire proceeding initiated under Section 148 of the Act. Thus, the assessee's appeal is allowed.

10. In the result, appeal preferred by the assessee is allowed.

This Order pronounced on 31/01/2024

Sd/-

(WASEEM AHMED)

ACCOUNTANT MEMBER

Ahmedabad; Dated 31/01/2024

S. K. SINHA

True Copy

आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad

Sd/-

(MADHUMITA ROY)

JUDICIAL MEMBER

6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad