

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'एसएमसी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य के समक्ष
Before Shri Sanjay Garg, Judicial Member

I.T.A. No.1280/Kol/2023
Assessment Year: 2010-11

Manju Devi Shah.....Appellant
P-281 Scheme VIM CIT Road,
Kankurgachi, Kolkata-700054.
[PAN: AMKPS3650G]

vs.

ITO, Ward-50(4), Kolkata..... Respondent

Appearances by:

Shri A. K. Tibrewal, FCA, appeared on behalf of the appellant.

Shri Bibekananda Madhu, JCIT-Sr. DR, appeared on behalf of the Respondent.

Date of concluding the hearing : January 29, 2024

Date of pronouncing the order : April 22, 2024

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 12.10.2023 of the National Faceless Appeal Centre [hereinafter referred to as 'CIT(A)'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The assessee in this appeal has apart from challenging the additions on merits made/confirmed by the lower authorities of Rs.42,12,703/- u/s 68 of the Act by treating the long-term capital gains earned by the assessee as bogus, has also challenged the very validity of the reopening of the assessment.

3. Since, the legal grounds relating to the validity of the reopening of the assessment hit at the very jurisdiction of the Assessing Officer to

frame the assessment, therefore, these legal grounds are taken first for adjudication.

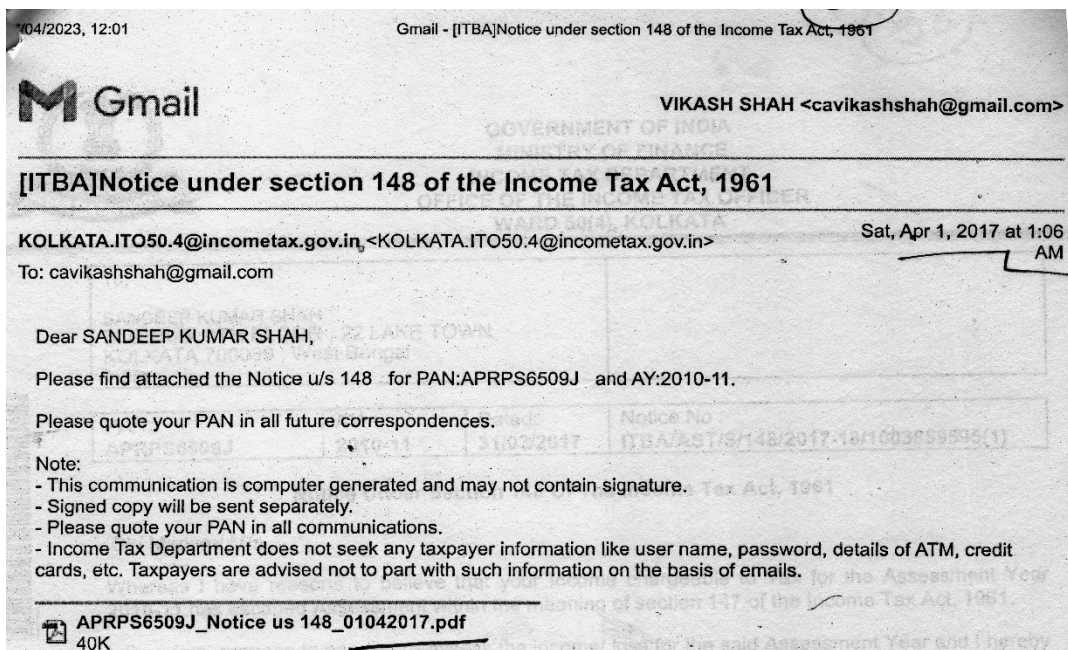
4. At the outset, the ld. counsel for the assessee has invited our attention to the paper-book page 1 and 2 to submit that the assessee received an email dated 31.03.2017 enclosing notice issued u/s 148 of the Act delivered to the assessee at 9.46 pm, wherein, it has been mentioned that the said notice has been issued to the assessee after obtaining necessary satisfaction of the Additional Commissioner/Commissioner of Income Tax/Chief Commissioner of Income Tax. The ld. counsel for the assessee has further invited our attention to another email dated 01.04.2017 delivered at 1.06 am enclosing another notice issued u/s 148 of the Act. A perusal of the said notice reveals that it has been mentioned therein that the said notice has been issued after obtaining necessary satisfaction of the PCIT-17, Kolkata. Admittedly, since four years have expired from the end of the relevant assessment year, therefore, approval from the competent authority was required in this case u/s 151 of the Act before issuing notice u/s 148 of the Act. The ld. counsel has further invited our attention to the impugned assessment order, wherein, at page 2 of the assessment order, it has been specifically mentioned that the notice u/s 148 of the Act was issued after obtaining approval from the ld. PCIT-17, Kolkata for initiation of proceedings u/s 147 of the Act after recording reasons to believe. The ld. counsel pointing out to the aforesaid documents has submitted that the first notice sent to the assessee on the last date of limitation i.e. 31.03.2017 sent through email at 9.46 pm, contained a vague reference of obtaining satisfaction from Additional Commissioner/Commissioner of Income Tax/Chief Commissioner of Income Tax without specifying as to from which


authority, in fact, the satisfaction/sanction was received. However, the second notice which specifically mentions that the notice has been issued after obtaining necessary satisfaction of the PCIT-17, Kolkata was sent to the assessee on 01.04.2017 at 1.06 am, which was time-barred and therefore, the assessment framed by the Assessing Officer was void being barred by limitation. It has to be noted that even in the assessment order, the Assessing Officer has mentioned that the assessment was reopened after getting approval from PCIT-17, Kolkata. The record shows that the notice u/s 148 of the Act was sent/served upon the assessee after the last date of prescribed limitation period. The issue is squarely covered by the decision of the Coordinate Bench of the Tribunal in the case of Sandeep Kumar Shah vs. ITO in ITA No.07/Kol/2023 order dated 30.11.2023, wherein, in the identical facts and circumstances, the Coordinate Bench of the Tribunal has held that in such circumstances, the notice issued was time barred, observing as under:

“4. At the outset, the ld. Counsel for the assessee referring to the additional Ground No. 1 raised in the light of the judgment of the Hon’ble Apex Court in the case of National Thermal Power Co. Ltd. vs. Commissioner of Income Tax [1998] 229 ITR 383 (SC), stated that the notice u/s 148 of the Act has been served upon the assessee on 01/04/2017 and that the time limit to serve the notice u/s 148 of the Act expired on 31/03/2017 and since the notice u/s 148 of the Act is time barred, the assessment proceedings carried out are without jurisdiction, illegal and bad in law and liable to be quashed. The ld. Counsel for the assessee referring to various judgments relied heavily on the judgment of the Hon’ble Calcutta High Court in the case of Marudhar Vintrade Private Limited vs. UOI & Ors. in WPA No. 4382 of 2022, judgment dt. 12/04/2022 which has been followed by this Tribunal in the case of M/s. Osian Stock Broking Pvt. Ltd. vs. ITO in ITA No. 375/Kol/2022; Assessment Year 2009-10, order dt. 12/05/2023.

4.1. On the other hand, the ld. D/R submitted that after obtaining proper approval notice to the assessee was issued on 31/03/2017 and, therefore, the assessment proceedings are valid and the additions made by the Assessing Officer deserves to be confirmed.

5. We have heard rival contentions and perused the record placed and carefully gone through the decision relied upon by the assessee. The legal issue raised by the assessee in the additional ground is that notice u/s 148 of the Act is time barred and, therefore, the reassessment proceedings carried out are without jurisdiction and liable to be quashed. We notice that the assessee, who is an individual, filed his return of income for Assessment Year 2010-11 on 29/07/2010 declaring income of Rs.6,24,228/-. The return was processed u/s 143(1) of the Act and thereafter the ld. Assessing Officer received certain information from DDIT (Inv.) and proceeded to reopen the assessment proceedings by way of issuance of notice u/s 148 of the Act. The time limit for issuing notice for Assessment Year 2010-11 was expiring on 31/03/2017. After obtaining the necessary approval of ld. Pr. CIT - 17, Kolkata, notice dt. 31/03/2017 was issued but it was served on 01/04/2017 at 01:06 A.M.. Copy of the notice dt. 31/03/2017 and the email addressed to the assessee for serving notice are reproduced below:-




GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE INCOME TAX OFFICER
WARD 50(4), KOLKATA

To, SANDEEP KUMAR SHAH BLOCK-B, 4TH FLOOR , 22 LAKE TOWN KOLKATA 700089 , West Bengal India			
PAN: APRPS6509J	AY: 2010-11	Dated: 31/03/2017	Notice No : ITBA/AST/S/148/2017-18/1003859595(1)

Notice Under Section 148 Of The Income Tax Act, 1961

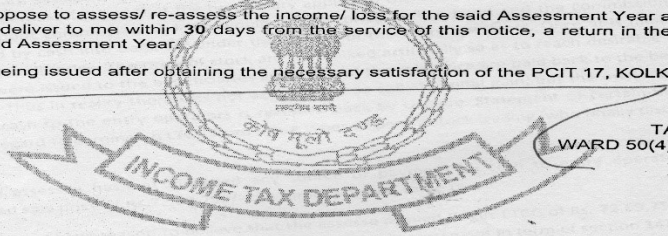
Sir/ Madam/ M/s,

Whereas I have reasons to believe that your Income chargeable to Tax for the Assessment Year 2010-11 has escaped Assessment within the meaning of section 147 of the Income Tax Act, 1961.

I, therefore, propose to assess/ re-assess the income/ loss for the said Assessment Year and I hereby require you to deliver to me within 30 days from the service of this notice, a return in the prescribed form for the said Assessment Year.

This notice is being issued after obtaining the necessary satisfaction of the PCIT 17, KOLKATA

TAPAS SAHA
WARD 50(4), KOLKATA



6. Now, the ld. Counsel for the assessee has pleaded that the notice was served on 01/04/2017 and, therefore, it is time barred which renders the assessment proceedings without jurisdiction. Reliance was placed on the judgment of the Hon'ble Jurisdictional High Court in the case of M/s. Marudhar Vintrade Pvt. Ltd. (supra), wherein the Hon'ble Court while examining the issue of issuance of notice u/s 148 of the Act observed that the last date for issuing and serving the notice was 31/03/2021 but though the notice was dt. 31/03/2021 but it was actually uploaded for communication on 01/04/2021 at 03:00 A.M.. The Hon'ble Court held that since the provisions w.e.f. 01/04/2021 has been amended issuing of notice u/s 148A of the Act was mandatory before issuing notice u/s 148 of the Act, and in absence thereof all subsequent proceedings are not sustainable in law and same are quashed. We further notice that this Tribunal in the case of Osian Stock Broking Pvt. Ltd. (supra) considering similar type of issue pertaining to the issue of notice u/s 143(2) of the Act being time barred has held as follows:-

“3. The assessee has contested the impugned addition on various ground, inter alia, that the Assessing Officer had no reason to believe that the income of the assessee has escaped assessment; that the concerned Assessing Officer did not have territorial jurisdiction to frame the assessment and further that the notice issued u/s 143(2) of the Act was time barred and, therefore, the assessment framed was void ab initio.

4. At the outset, the ld. counsel for the assessee has submitted that since the question relating to the issue of notice

u/s 143(2) of the Act hits at the very validity of the assessment order, therefore, the said issue may be adjudicated first. The ld. counsel has further submitted that the last date for issue of notice u/s 143(2) was on 30.09.2015. He has further submitted that though the notice has been shown to be signed on 30.09.2015 itself however, the same was sent at the email address of the assessee 03.11.2015. He, therefore, has submitted that by mere signing of the notice by the concerned Assessing Officer, it would not mean that the same was issued on the said date. That the date of issue of the said notice would be the date on which the email was sent on 03.11.2015. He, in this respect, has relied upon the decision of the Hon'ble Jurisdictional High Court in the case of 'Marudhar Vintrade Pvt. Ltd. vs. Union of India & Ors.' in WPA No.4382 of 2022 order dated 12.04.2022.

5. *The ld. DR, on the other hand, has submitted in this case the notice for reopening of the assessment u/s 148 of the Act was issued within the time. That once the notice u/s 148 of the Act was issued, there was no relevance of delayed issuance of notice u/s 143(2) of the Act. He has further submitted even otherwise the identity of issuance of notice will be the date on which the Assessing Officer signed the said notice which was on 30.09.2015 and hence it cannot be said that the notice u/s 143(2) of the Act was time barred.*

6. *We have heard the rival contentions and gone through the records. The notice in this case has been shown to be signed on 30.09.2015, however, the same was emailed to the assessee on 03.11.2015. The Hon'ble Jurisdictional Calcutta High Court in the case of Marudhar Vintrade Pvt. Ltd. vs. Union of India & Ors.' (supra) considering the facts that the notice u/s 148 of the Act was signed on March 31 2021, however, it was actually uploaded for communication on April 1 2021 at 3 a.m. thereby treating the 1st April 2021 as issuance of impugned notice u/s 148 of the Act, quashed the reassessment proceedings holding that the provisions of Finance Act 2021 would be applicable from 01.04.2021 and therefore, before issuance any notice u/s 148 of the Act, the Assessing Officer was required to observe the statutory formalities u/s 148A of the Act. In the case in hand also, the notice was set in motion only on 03.11.2015, in our humble view, signing of the notice would not constitute as issuance of notice. The date of issuance of notice would be when it is set in motion for delivery to the assessee. So far as the contention of the ld. counsel that the issue of notice u/s 143(2) of the Act within the prescribed period in relation to the reassessment proceedings u/s 147/148 was not mandatory, we find that the issue has been settled by the various High Courts*

holding that even in the case of reassessment proceedings u/s 147/148 of the Act, the issuance of notice within the specified period u/s 143(2) of the Act is mandatory and that the Assessing Officer cannot assume jurisdiction u/s 143(3) of the Act without issuance of notice u/s 143(2) of the Act and this defect cannot be cured by taking recourse to the deeming fiction provided u/s 292BB of the Act. Reliance in this respect can be placed on the decision of the Delhi High Court in the case of PCIT vs. Shree Jai Shiv Shankar Traders Pvt. Ltd. IT Appeal No.1068 of 2013 dated 18.02.2015; Hon'ble Madras High Court in the case of Saphagiri Finance & Investment vs. ITO reported in (2013) 90 DTR (Mad) 289; Hon'ble Delhi High Court in the case of DIT vs. Society for Worldwide Interbank Financial Telecommunications reported in (2010) 323 ITR 249 (Del); Hon'ble Allahabad High Court in the case of CIT vs. Solarpur Cold Storage P Ltd (2014) 50 Taxmann.com 105 (All); Hon'ble Allahabad High Court in the case of [CIT vs. Rajeev Sharma](#) reported in [2011] 336 ITR 678 (All.). Since the Assessing Officer did not issue notice u/s 143(2) of the Act within the specified time period, therefore, the Assessing Officer could not have assumed jurisdiction to frame the assessment u/s 143(3) of the Act and, therefore, the impugned assessment order is bad in law and the same is accordingly held to be non-est.

Since we have allowed the appeal of the assessee on the aforesaid legal ground, therefore, at this stage, the other grounds raised by the assessee have been rendered academic in nature.

7. In the result, the appeal of the assessee stands allowed.”

7. From perusal of the above judgments and decisions it remains a legally settled position that the notice should not only be issued but also be served before the expiry of time limit provided under the Act. In other words, if the last date for issuing notice u/s 148 of the Act is 31/03/2017, then the notice should be served on or before 31/03/2017. In the instant case, the ld. Assessing Officer was required to serve notice on the assessee on or before 30/03/2017 but it was finally served on 01/04/2017 and, therefore, since the notice u/s 148 of the Act was not issued within the specified time period, the Assessing Officer could not have assumed jurisdiction to frame the reassessment order u/s 147/143(3) of the Act. Therefore, the impugned assessment order dt. 22/12/2017 is bad in law and non-est. Additional ground raised by the assessee is allowed. Since we have allowed the additional ground and quashed the assessment order, the remaining legal grounds as well as the grounds raised on merits are rendered academic in nature.

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

5. Moreover, as pointed out by the ld. counsel for the assessee, even the reasons recorded for reopening of the assessment are general in nature, there is no application of mind by the Assessing Officer. Simply, it has been mentioned that as per the information in possession of the Assessing Officer, the assessee during the Financial Year 2009-10 has indulged in malpractice in connivance with entry operators, brokers, directors, controller, manager of the company in order to show long-term capital gains as exempt. There is no specific mention in the reasons recorded as to with whom the assessee was indulged in malpractice and in what manner. The reasons recorded are general in nature and there is no cross verification of the information received by the Assessing Officer with the facts of the case of the assessee. Therefore, the reasons recorded by the Assessing Officer cannot be said to be sufficient reasons for forming the belief that the income of the assessee has escaped assessment. It has been held time and again that the reasons to believe regarding the escapement of the income should be based on certain tangible material and it should not be mere pretence of the Assessing Officer. The reasons to believe does not mean reason to suspect. Reopening of the assessment is not permitted for making fishing and roving enquiries. The Assessing Officer, after receipt of alleged information received from the Investigation Wing was supposed to correlate the same with the records and other facts of the case and thereafter, should have satisfied himself of escapement of income. Reopening is not permissible on the basis of borrowed satisfaction of the Assessing Officer. In view of the above observation, not only the reopening of the assessment in this case is held to be bad in law but also the assessment order framed being barred by limitation and the same is accordingly quashed.

6. In the result, the appeal of the assessee stands allowed.

Kolkata, the 22nd April, 2024.

Sd/-
[संजय गर्ग /Sanjay Garg]
न्यायिक सदस्य/Judicial Member

Dated: 22.04.2024.

RS

Copy of the order forwarded to:

1. Manju Devi Shah
2. ITO, Ward-50(4), Kolkata
3. CIT (A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches