

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'E' NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER**

ITA No.269/Del/2018
Assessment Year: 2014-15

M/s. Mideast Integrated Steels Ltd., H-1, Zamrudpur Community Centre, Kailash Colony, New Delhi	Vs.	ACIT, Central Circle-2, New Delhi
PAN :AAACM0846P		
(Appellant)		(Respondent)

With

ITA No.991/Del/2018
Assessment Year: 2014-15

ACIT, Central Circle-2, New Delhi	Vs.	M/s. Mideast Integrated Steels Ltd., H-1, Zamrudpur Community Centre, Kailash Colony, New Delhi
PAN :AAACM0846P		
(Appellant)		(Respondent)

Assessee by	Sh. Salil Aggarwal, Sr. Advocate Sr. Shailesh Gupta, Advocate Sh. Mahir Aggarwal, Advocate Sh. Uma Shankar, Advocate
Department by	Sh. Subhra Jyoti Chakraborty, CIT(DR)

Date of hearing	18.04.2024
Date of pronouncement	25.04.2024

ORDER

PER SAKTIJIT DEY, VICE-PRESIDENT

Captioned cross appeals arise out of order dated 09.11.2017 passed by learned Commissioner of Income Tax (Appeals)-28, New Delhi, pertaining to assessment year 2014-15.

2. At the very outset, learned counsel appearing for the assessee drew our attention to ground nos. 3 & 3.1 and submitted that the issue raised therein, being a purely legal and jurisdictional issue going to the root of the matter, should be taken up for adjudication at the first instance.

3. Learned Departmental Representative agreed with the aforesaid submission of the assessee. It is observed, in ground nos. 3 & 3.1 the assessee has challenged the validity of the assessment order dated 30.12.2016 passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

4. Before we proceed to decide this issue, it is necessary to narrate the relevant facts. The assessee is a resident corporate entity stated to be engaged in the business of manufacturing of pig iron and mining of iron ore. As observed by the Assessing Officer, for the assessment year under dispute, the assessee filed

its return of income electronically on 26.12.2016 declaring total income of Rs.52,60,76,020/- under the normal provisions. Whereas, the assessee declared book profit of Rs.184,99,20,449/- under section 115JB of the Act and paid tax on the book profit. Assessee's case was picked up for scrutiny assessment. In course of assessment proceedings, the Assessing Officer called upon the assessee to furnish various details from time to time. In response, the assessee furnished the details called for. Ultimately, the Assessing Officer completed the assessment under section 143(3) of the Act vide order dated 30.12.2016, making couple of additions, as under:

(i) *Unexplained expenditure of Rs.78,68,52,192/-*

(ii) *Unexplained purchases of Rs.66,04,678/-*

5. Contesting the aforesaid additions, the assessee filed an appeal before learned first appellate authority. In course of proceedings before learned first appellate authority, the assessee canvassed an additional ground challenging the validity of the assessment order due to invalid notice issued under section 143(2) of the Act. While deciding the appeal, learned first appellate authority granted substantial relief to the assessee on

merits by restricting the total addition to Rs.1,25,30,213/-. However, he did not decide the additional ground raised by the assessee challenging the validity of the assessment order.

6. Before us, learned counsel appearing for the assessee submitted that the notice issued under section 143(2) of the Act is invalid, as, it was issued prior to filing of return of income by the assessee. He submitted, a valid notice under section 143(2) of the Act being a *sine qua non* for a valid assessment order under section 143(2) of the Act, any lapse in issuing a valid notice under section 143(2) of the Act will render the assessment order invalid. He submitted, assumption of jurisdiction to make assessment under section 143(3) of the Act is entirely based on the notice issued under section 143(2) of the Act and any invalidity in the notice under section 143(2) of the Act would affect the assumption of jurisdiction to make an assessment. Therefore, such defect cannot be cured under section 292BB of the Act, with the participation of the assessee in the assessment proceedings. In support of such contention, learned counsel relied upon the following decisions:

- i. *Pr. CIT Vs. Marck Biosciences Ltd., 106 taxmann.com 399 (Guj.)*

ii. *CIT Vs. Laxman Das Khandelwal, 417 ITR 325 (SC)*

7. Per contra, learned Departmental Representative submitted, though, notice under section 143(2) of the Act was issued and served on the assessee prior to filing of return, however, it is a fact on record that the assessee has fully participated in the assessment proceedings. Therefore, infirmity, if any, in the notice issued under section 143(2) of the Act, would get cured in terms of section 292BB of the Act. In support of such contention, he relied upon the following decisions:

i. *Sumitra Menon Vs. ACIT, [2009] 315 ITR 111 (Madras)*

ii. *Josh Builders & Developers (P.) Ltd. Vs. PCIT, [2016] 389 ITR 314 (P&H)*

8. Proceeding further, he submitted, though, the assessee had not filed the return of income prior to issuance of notice under section 143(2) of the Act, however, drawing our attention to letter dated 27.12.2021 of the Assessing Officer, he submitted, notice under section 143(2) of the Act was issued based on Form 29B, Form 3CA and Form 3CEB furnished by the assessee.

9. We have considered rival submissions in the light of judicial precedents relied upon and perused the materials on record. So

far as the primary facts are concerned, there is no dispute that for the impugned assessment year, the assessee had filed its return of income on 26.12.2016. Whereas, as per the observations of the Assessing Officer in the body of the assessment order, notice under section 143(2) of the Act was issued to the assessee on 23.09.2015. Thus, it is established on record that notice under section 143(2) of the Act was issued and served on the assessee prior to the filing of the return of income by the assessee.

9. At this stage, it will be necessary to look into the provisions of section 143 of the Act. On a careful reading of the aforesaid provision, it becomes clear that where a return of income has been filed under section 139, or in response to a notice issued under section 142(1) of the Act in terms of sub-section (1) of section 142 of the Act, such return is to be processed in the manner provided in the said sub-sections. However, upon furnishing of a return under section 139(1) of the Act or in response to notice issued under section 142(2) of the Act, if the Assessing Officer deems it appropriate to ensure that the assessee has not understated the income or has not computed excessive loss or has not underpaid the tax in any manner, he shall serve a

notice under section 143(2) of the Act requiring him to produce any evidence, which the assessee may rely in support of the return on a date to be specified by the Assessing Officer. Once the assessee complies to the notice issued under section 143(2) of the Act, the Assessing Officer proceeds to complete the assessment under section 143(3) of the Act.

10. Thus, the provisions of section 143 read as a whole, makes it clear that assumption of jurisdiction to make an assessment under section 143(3) of the Act is based on notice issued under section 143(2) of the Act, which gets triggered only upon filing of return of income either under section 139(1) of the Act or in response to notice issued under section 142(1) of the Act.

11. In the facts of the present appeal, undisputedly, on the date of issuance of notice under section 143(2) of the Act on 23.09.2015, there was no return of income filed by the assessee either under section 139, or in response to notice issued under section 142(1) of the Act. Therefore, there was no occasion for the Assessing Officer to issue notice under section 143(2) of the Act in absence of a return of income. More so, when assessee's case was selected under manual scrutiny, which presupposes that the

Assessing Officer must have examined all the facts and materials available on record. Therefore, the very initiation of assessment proceedings under section 143(3) of the Act, suffers from serious jurisdictional error and infirmity.

12. Before us, learned Departmental Representative has made an attempt to make out a case in favour of the Department by submitting that notice under section 143(2) of the Act was issued based on Form 29B, Form 3CA and form 3CEB. However, we are not impressed with such submission.

13. The provision contained under section 143(2) of the Act makes it clear that only upon filing of return of income proceedings could have been initiated. Certainly Form 29B, Form 3CA and Form 3CEB cannot be considered as return of income in terms of section 139 of the Act. Though, in the assessment order, the Assessing Officer has referred to only a single notice dated 23.09.2015 issued under section 143(2) of the Act, however, in letter dated 27.12.2021, the Assessing Officer has referred to two more notices under section 143(2) of the Act issued on 26.05.2016 and 25.07.2016. Even assuming that such notices

were actually issued, however, they were issued prior to the filing of return of income on 26.12.2016.

14. It is fairly well settled that an assessment order under section 143(3) of the Act can only be passed based on a valid notice issued under section 143(2) of the Act. In this context, we may refer to a decision of the Hon'ble Gujarat High Court in case of PCIT Vs. Marck Biosciences Ltd. (supra).

15. Insofar as the decision relied upon by learned Departmental Representative in case of Sumitra Menon Vs. ACIT (supra), notice under section 143(2) of the Act was validly issued, but as claimed by the assessee, it was never served on him. However, the Tribunal after verifying the facts recorded a factual finding that the notice was validly served on the assessee. Therefore, the Hon'ble High Court upheld the decision of the Tribunal. In case of Josh Builders & Developers (P.) Ltd. Vs. PCIT (supra), the facts are quite similar as the Tribunal recorded a finding of fact that notice under section 143(2) of the Act was validly served on the assessee and the assessee without any objection participated in the assessment proceedings. Therefore, any defect in the notice was cured under section 292BB of the Act.

16. However, facts are completely different in the present case, as, the notice issued under section 143(2) of the Act was prior to filing of return of income by the assessee, at which point of time, the provisions of section 143(2) of the Act could not have got triggered. Therefore, the very assumption of jurisdiction by the Assessing Officer was invalid. That being the case, section 292BB of the Act cannot come to the rescue of the Department.

17. A reading of section 292BB makes it clear that if any notice, which is served upon the assessee in time and in accordance with the provisions of the Act, then such assessee can be precluded from taking any objection qua proceeding or inquiry under this Act on the ground of invalidity of the notice. Thus, the provisions postulate that firstly, the notice has to be served in time, and secondly, it has to be in accordance with the provisions of the Act. In the present case, notice under section 143(2) of the Act was not in accordance with the provisions of the Act, as, it was not based on any return of income filed by the assessee. Rather, at the time of issuance of notice under section 143(2) of the Act, there was no return of income for the impugned assessment year available before the Assessing Officer. Therefore, he could not have

assumed jurisdiction under section 143(2) of the Act. Therefore, it is clearly a jurisdictional error, which cannot be cured under section 292BB of the Act. In this context, we may refer to the decision of Hon'ble Supreme Court in case of CIT Vs. Laxman Das Khandelwal (supra).

18. Thus, considering the overall facts and circumstances of the case in the light of ratio laid down in the decisions cited before us, we have no hesitation in holding that the notice issued under section 143(2) of the Act is invalid. Consequently, the impugned assessment order is also invalid. Therefore, we quash the assessment order. Impugned order of learned first appellate authority is hereby set aside.

19. In view of our decision in ground no. 3 & 3.1 of assessee's appeal, ground nos. 1 and 2 in assessee's appeal as well grounds raised in Revenue's appeal have become infructuous.

20. In the result, assessee's appeal is partly allowed, whereas, Revenue's appeal is dismissed.

Order pronounced in the open court on 25th April, 2024

Sd/-
(NAVEEN CHANDRA)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
VICE-PRESIDENT

Dated: 25th April, 2024.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi