

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

**BEFORE SHRI PRASHANT MAHARISHI, AM  
AND  
SHRI SUNIL KUMAR SINGH, JM**

**ITA No. 4773/Mum/2023**  
(Assessment Year: 2011-12)

Dhaval Exim Private Limited  
117-A, Panchratna Bldg,  
Mama Parmanand Marg, Opera Vs.  
House, Mumbai-400 004

**(Appellant)**

Asst. Commissioner of Income  
Tax 5(1)(2)  
Aaykar Bhavan,  
Maharshi Karve Road,  
Mumbai-400 020

**(Respondent)**

**PAN No. AADCD0472B**

Assessee by : Shri Rajesh C. Shah, AR  
Revenue by : Shri Rajesh Meshram, DR

Date of hearing: 21.05.2024  
Date of pronouncement : 30.05.2024

**ORDER**

**PER PRASHANT MAHARISHI, AM:**

01. This appeal is filed by the assessee against the appellate order passed by the National Faceless Appeal Centre, Delhi [the learned CIT (A)] for A.Y. 2011-12 dated 28<sup>th</sup> November, 2023, wherein the appeal filed by the assessee against the assessment order dated 20<sup>th</sup> December, 2016 passed under Section 143 read with section 147 of the Income-tax Act, 1961 (the Act) by the Asst. Commissioner of Income Tax, Circle 5(1)(2), Mumbai was dismissed. Therefore, assessee is aggrieved with the same and is in appeal before us.

02. The assessee has raised following grounds of appeal:-

*"1. The learned Assessing Officer was not justified in reopening of the case under Section 147 by issuing notice under Section 148 of the Income-tax Act, 1961 and also the learned CIT (Appeals) has erred in confirming the same.*

*2. The learned Assessing Officer has erred in making addition of ₹3,09,11,602/- (11.83% of ₹26,12,98,413/-) and also the learned CIT (Appeals) has erred in confirming the same."*

03. Now, assessee has raised three additional grounds of appeal as under:-

*"4. The learned income-tax officer has erred in making reassessment without issuing statutory notice u/s 143(2) of the Act, resulting in reassessment is bad in law. The Ld. CIT (A) has further erred in confirming the same.*

*5. The Ld. AO has erred in reopening of the case u/s 147 of the Act by issuing notice u/s 148 of the Act after obtaining prior permission of Ld. CIT-5, Mumbai, whereas the permission as per section 151(2) of the Act (As substituted from 01.06.2015) is of Joint/Additional CIT. The Ld. CIT (A) has further erred in confirming the same.*

*6. The Ld. AO. Has erred and Ld. CIT(A) has erred in confirming the same that the Ld. AO has erred in*

*completing the assessment without disposing of the objections filed by the appellant.”*

04. It is stated in the application itself that the additional ground is in question of law, can be raised any time during the appeal and therefore, the same should be admitted. It was further stated that this ground was also raised before the learned CIT (A) in the written submission filed. He referred to page no.99 of his paper book stating that non-issue of notice under Section 143(2) of the Act is fatal to the assessment and therefore, the assessment order does not survive.
05. The learned Departmental Representative vehemently objected to the same and submitted that this issue was not raised before the lower authorities and therefore, now the same should not be admitted.
06. The learned Authorised Representative submitted that this is a jurisdictional ground which can be raised at any time during the course of opening of the appeal and he further submitted that issue of notice under Section 143(2) of the Act goes to the foundation of the assessment proceedings.
07. As the above ground of appeal is jurisdictional in nature, goes to the root of the matter, therefore, same is admitted.
08. The brief facts of the case show that assessee is a company engaged in trading of diamonds. The return of income was filed on 25<sup>th</sup> September, 2011, declaring total income of ₹57,14,029/-. The assessment under Section 143(3) of the Act has already been made on 29<sup>th</sup> March, 2015, at the same amount. Subsequently, the assessment reopened in view of the fact that information was



received from the investigation wing that assessee has obtained bogus bills through hawala traders. Notice under Section 148 of the Act was issued on 30<sup>th</sup> March, 2016. The reasons recorded were also provided to the assessee wherein it is stated that bogus bills of ₹26.12 crores have been obtained by the assessee. The assessee submitted a letter on 5<sup>th</sup> April, 2016, stating that the original return filed on 25<sup>th</sup> September, 2011, may be treated as return filed in response to the notice under Section 148 of the Act. Subsequently, notice under Section 142(1) of the Act was issued on 1<sup>st</sup> July, 2016, and thereafter, the assessment was made wherein 11.83% of such purchase were added to the total income of the assessee amounting to ₹3,09,11,602/- resulting into a total income of ₹ 3,67,57,630/- by reassessment order dated 20<sup>th</sup> December, 2016, passed under Section 143(3) read with section 147 of the Act.

09. Assessee preferred the appeal before the learned CIT (A), wherein the reopening was challenged and also the addition on merit was also challenged. The learned CIT (A) decided against the assessee on both the counts and confirmed the action of the learned Assessing Officer.
010. Before us, the assessee has submitted that in the reassessment proceedings, the learned Assessing Officer make an assessment only if notice under Section 143(2) of the Act is issued. He submits that in the present case, no notice under Section 143(2) of the Act has been issued. He therefore submitted that the decision of the Hon'ble Supreme Court clearly held that if the notice is not served within the prescribed period the impugned assessment is bad in law. He relied

on the decision of Hon'ble Supreme Court in case of ACIT vs. M/s. Hotel Blue Moon (2010) 321 ITR 362. He also referred to his paper book page no. 103, wherein in ground no.2, identical issue is challenged.

011. The learned Departmental Representative submits that if there is no mentioned in the assessment order about the notice under Section 143(2) of the Act, the same does not mean that no such notices has been issued.
012. We have carefully considered the rival contentions and find that additional ground no.1, the assessee has challenged that the learned Assessing Officer while framing the assessment order under Section 143(3) read with section 147 of the Act has not issued a statutory notice under Section 143(2) of the Act. The re-assessment order is bad in law.
013. We have perused the assessment order and we do not find any mention of the issue of notice under Section 143(2) of the Act. It is also proved that if the fact of issue of notice under Section under Section 143(2) of the Act is not mentioned in the assessment order it cannot be said that no notices has been issued under Section 143(2) of the Act. Therefore, as this was also the argument of the learned Departmental Representative, we granted time for 7 day to submit whether any such notice is issued or not. However till todote no such communication is received. Thus, we do not have any option but to hold that notices u/s 143 (2) of the Act is not issued. Still, later on if it is found that such notices were issued in time, necessary application of recall of this order , may be made in time.



014. Thus, if no notice under Section 143(2) of the Act is issued in reassessment proceedings, the reassessment order cannot be sustained. Such is the view of the Hon'ble Supreme Court in Assistant Commissioner of Income Tax and Ors. vs. Hotel Blue Moon (02.02.2010 - SC) : MANU/SC/0084/2010 ). Neutral Citation: 2010 INSC 75
015. In view of the above facts, the assessment order passed without issue of notice under Section 143(2) of the Act cannot be sustained. Accordingly, the additional ground raised by the assessee is allowed. All other grounds remain unadjudicated.
016. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 30.05. 2024.

Sd/-  
(SUNIL KUMAR SINGH)  
(JUDICIAL MEMBER)

Sd/-  
(PRASHANT MAHARISHI)  
(ACCOUNTANT MEMBER)

Mumbai, Dated: 30.05. 2024

*Sudip Sarkar, Sr.PS*

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar  
Income Tax Appellate Tribunal, Mumbai