

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : D : NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.767/Del/2023
Assessment Year: 2016-17

ITA No.696/Del/2023
Assessment Year : 2017-18

Fixed & Mobile Pte Ltd.,
1 Raffles Place,
#28-01 One Raffles Place, Tower-2,
Singapore, Singapore 9999.

Vs ACIT,
International Taxation,
Circle 1(3)(1),
New Delhi.

PAN: AABCF4910G

(Appellant)

(Respondent)

Assessee by	:	Shri Alok Vasant, FCA & Ms Poonam Ahuja, Advocate
Revenue by	:	Shri Vizay B. Vasanta, CIT-DR
Date of Hearing	:	25.04.2024
Date of Pronouncement	:	09.07.2024

ORDER

PER ANUBHAV SHARMA, JM:

These appeals are preferred by the Assessee against the final assessment orders dated 21.01.2023 passed u/s 147 r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred as 'the Act'), by the ACIT, Circle-1(3)(1), International Taxation, New Delhi (hereinafter referred to as the Ld. AO), for AY 2016-17 and

2017-18. As the issues are common the relevant facts of AY 2016-17 are taken up for convenience.

2. On hearing both the sides it comes up that the Appellant, a foreign company, is in the business of reselling prepaid airtime in the B2B space. It focuses on diaspora communities and hence is mainly in the business of selling cross-border airtime. Its business model is to make small margins from the resale of airtime. Its role is limited to on-selling prepaid talk time obtained from Mobile Operators/distributors and in this process, it earns a small trading margin. F&M on its own does not render any telecom services to subscribers. It only acts as a distributor or sub-distributor of airtime.

2.1 Notice dated March 30, 2021 was issued u/s 148 of the Act by Ld. AO of the Act requiring the Appellant to file its return of income. The notice u/s 148 was purportedly issued on account of the Appellant's alleged failure to file its ITR for the year under consideration. The claim of assessee is that as such there was no statutory obligation to file the ITR since the Appellant's income was not chargeable to tax in India. In compliance of notice, the ITR was filed on February 2, 2022 declaring a Nil income chargeable to tax in India. Further assessee had also responded the notices under section 142(1) dated January 14, 2022, January 27, 2022 and February 20, 2022, vide replies vide written submissions dated February 9, 2022, February 25, 2022 and February 28, 2022 respectively. Further the Appellant filed another reply dated March 4, 2022 in response to the order sheet entry dated February 28, 2022.

2.2 Thereafter, AO passed the Draft Assessment Order u/s 147 r.w.s. 144C(1) of the Act on March 14, 2022 proposing to make variation to the 'Nil' returned income of the Appellant amounting to Rs.1,46,00,560 by alleging that the Appellant rendered technical services to the mobile airtime suppliers in India and held that the discount passed on by such suppliers, on the basis of purchases made by the Appellant, ought to be taxed as fees for the aforesaid alleged services at 10% as per Article 12 of the India Singapore Double Taxation Avoidance Agreement (referred further as 'Relevant DTAA').

2.3 The Appellant filed objections before Dispute Resolution Panel (DRP) on April 12, 2023 against the draft assessment order, wherein, DRP passed its directions on December 2, 2022 and observed that the 'make available' clause in Article 12(4)(b) of the Relevant DTAA stands satisfied triggering India's jurisdiction in the case at hand. Appellant alleges that DRP has failed to appreciate the factual position that no services per se had been rendered by the Assessee and only a discount on mobile airtime purchased for on-selling, had been received.

2.4 The AO accordingly passed the final assessment order on January 21, 2023 in pursuance of the DRP Directions and confirmed the addition of Rs. 1,46,00,560 as fees for technical services. Accordingly, the Appellant has preferred this appeal in hand. Amongst other grounds on merits the Ld. AR has stressed on ground no.2, introduced as additional ground, which reads as under;

“Ground 2: That on the facts and circumstances of the case and in law, the impugned Assessment Order is bad in law and void-ab-initio in absence of issuance and service of mandatory notice as envisaged under the proviso to

section 143(2) of the Act, after the filing of the return of income by the Appellant in response to notice under section 148 of the Act ”

3. Ld. AR has contended that the AO has completed assessment under section 147 of the Act, without issuing the mandatory notice under section 143(2) of the Act once the return of income was filed by the Assessee in response to the notice issued under section 148 of the Act.

3.1 There is no dispute to this fact of non-issuance of the notice u/s 143(2) of the Act. Infact, a report from AO is filed by the Ld. DR, in the form of extracts of proceedings recorded on ITBA portal account of the assessee, showing no notice u/s 143(2) of the Act was issued. Ld. DR has defended it by submitting that the ground is raised for the first time in Tribunal and that as no return was initially filed, notice u/s 143(2) of the Act was not necessary. Reliance was also placed by Ld. DR on provisions of Section 292BB of the Act.

3.2 Ld. AR has submitted that Revenue cannot take recourse to the provisions of Section 292BB of the Act and claim that since the Assessee participated in the assessment proceedings initiated under section 148 of the Act, the Assessee cannot challenge the validity of the notice under section 143(2) of the Act, at this stage. It was submitted that section 292BB of the Act would is only confined to service of notice and does not apply to issuance of notice. Further, it does not cure the defect where a mandatory notice under section 143(2) of the Act is required to be issued for completing any proceedings. Reliance in this regard is placed on the following judicial decisions: -

- CIT vs. Laxman Das Khandelwal [2019] 108 taxmann.com 183 (SC)
- PCIT vs. Silver Line [2016] 383 ITR 455 (Delhi)
- ACIT & ANR. vs. Hotel Blue Moon [(2010) 321 ITR 0362 (SC)]
- PCIT vs. Shri Jai Shiv Shankar Traders (P.) Ltd. [2016] 383 ITR 448 (Delhi)
- PCIT vs. Oberoi Hotels (P.) Ltd. [2018] 96 taxmann.com 104 (Calcutta)
- Alpine Electronics Asia Pte Ltd. vs. DGIT [(2012) 341 ITR 247 (DHC)]
- CIT vs. Rajeev Sharma [(2011) 336 ITR 0678 (ALL.)
- PCIT vs. Paramount Biotech Industries Ltd. [2017] 398 ITR 701 (Delhi)
- Indus Towers Ltd. v. DCIT [2017] 82 taxmann.com 430 (Delhi)
- ADIT (Exemption), Hyderabad v. Vodithala Education Society [2014] 151 ITD 12 (Hyderabad Trib.)
- CIT vs. Panorama Builders (P). Ltd. [(2014) 45 taxmann.com 159 (Gujarat)]

4. At outset we admit that additional ground as the same arises of admitted facts and being pure question of law.

5. Then having considered the law cited by Ld. AR we are of considered view that it is trite law that for section 292BB to apply, section 143(2) notice must have emanated from department and it is only infirmities in manner, process or content of notice, that section seeks to cure. The section does not create an immunity in favour of AO by way of acquiescence of assessee. There cannot be any estoppels against law. The Act mandates issuance of notice u/s 143(2) so mere participation in proceedings pursuant to notice under section 148, would not obviate mandatory

requirement of Assessing Officer to issue assessee a notice under section 143(2) before finalizing order of reassessment.

6. We are of considered view that there is no doubt that Sec. 143(2) is applicable to proceedings under ss. 147/148 of the Act as well and the notice under section 143(2) is mandatory. Section 147 of the Act merely empowers the assumption of jurisdiction for assessment or re-assessment in case of escapement of income, to the knowledge of AO. A return filed in compliance to notice u/s 148 of the Act, happens to one filed u/s 139 of the Act, with consequences to follow further as per section 143 of the Act. The object of notice u/s 143(2) being to let the AO take cognizance of the facts of the return filed in response to notice under section 148 of the Act and then to consider if there is understatement of income or loss is not computed in excessive or that there is under payment of tax. In scheme of assessment under the Act, section 143(2) and Section 143(3) have to be read together. The section 143(3) begins with words “ *On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be..* ” and thus makes it clear that, the Assessment to be concluded under section 143(3) of the Act, gives jurisdiction to the AO, to proceed, and hear the evidences u/s 143(3) of the Act, only by requiring assessee, to be called upon by notice u/s 143(2) of the Act, to appear on particular day. Thus, the non-issuance of notice under section 143(2) of the Act after filing of return by assessee vitiates the assessment concluded u/s 143(3), as the foundation of first taking cognizance of the return filed by assessee

is absent. Thus there is no force in the argument of Ld. DR that as initially no return was filed, notice u/s 143(2) is not necessary.

7. We are inclined to sustain the ground no. 2 and consequently the appeals are allowed. The impugned additions are quashed.

Order pronounced in the open court on 09.07.2024.

Sd/-

(G.S. PANNU)
VICE PRESIDENT

Dated: 09th July, 2024.

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Copy forwarded to:

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

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Asstt. Registrar, ITAT, New Delhi