IN THE INCOME TAX APPELLATE TRIBUNAL

Mumbai "J (SMC)" Bench, Mumbai.

Before Smt. Beena Pillai, Judicial Member,
&
Shri Ratnesh Nandan Sahay, Accountant Member

I.T.A. No. 2653/Mum/2024
(A.Y. 2010-11)

Mrs. Nayana D. Atekar H-308, Sharad Industrial Estate, Lake Road, Bhandup (West) Mumbai PAN : AFQPA0192J	Vs.	Joint Commissioner of Income Tax (A) – 8 Mumbai
(Appellant)		(Respondent)

Assessee by	Shri Vallabhdas Parmar
Department by	Ms. Deepika Arora (Sr.DR)
Date of Hearing	12.09.2024
Date of Pronouncement	12.09.2024

O R D E R

PER SMT. BEENA PILLAI, JM :

The present appeal arises out of the order dated 12th March, 2024 passed by NFAC Delhi for A.Y. 2010-11 on following grounds of appeal.

> *"1. On facts and circumstances of the case and in law Ld. CIT(A) erred in confirming all additions made by Ld AO without considering assessee's submission and not providing adequate opportunity of being heard.*

2. On facts and circumstances of the case and in law Ld. CIT(A) erred in holding that assessment order passed us 143(3) read with section 147 is valid in spite of the fact that no notice us 143(2) was issued and served on assessee.

3 (i) On facts and circumstances of the case and in law Ld. CIT(A) erred in holding that reopening the case us 147 of the IT Act 1961 is valid.

(ii) On facts and circumstances of the case and in law Ld. CIT(A) erred in holding that reopening the case us 147 is valid without appreciating the fact that there is no application of mind as much date of filing of return us 139 and income returned were kept blank in reasons recorded by AO.

(iii) On facts and circumstances of the case and in law Ld. CIT(A) erred in holding that reopening the case u/s. 147 of the IT Act 1961 is valid, without appreciating the fact the case is reopened based on general, vague, non specific, unverified information of alleged bogus purchases of Rs. 23,96,024/-

4(i) On facts and circumstances of the case and in law Ld. CIT(A) erred in confirming the addition of Rs.23,96,024 made by AO on account of alleged bogus purchases (entire purchases were considered as hawala purchases) without appreciating the fact that such addition is made without giving opportunity of cross examinations of Havala operators. Even statements of parties who have alleged to have provided Hawala entries are not provided. Thus there is complete violation of principles of natural justice. Hence addition needs to be deleted. Reliance is placed on following decisions Andaman Timber Industries vs CIT(C.E.) Civil Appeal no 4228 of 2006 dated 2-09-2015 (S.C.)

5. On facts and circumstances of the case and in law Ld. CIT(A) erred in confirming the addition us 69C of Rs 23,96,024/- on account of hawala purchases (entire purchases were considered as hawala purchases) without appreciating the fact that there is complete quantitative tally, and GP rate of current year is comparable to earlier years, the payments are by account payee cheques duly reflected in bank statements, delivery of goods are supported by bills, delivery challans etc and there is no evidence brought on record by AO to prove that such purchases are bogus.AO has not doubted sales.

6. On facts and circumstances of the case and in law Ld. CIT(A) erred in confirming addition of Rs 9,55,598/-on account of expenses debited to P & L account on adhoc basis for want of verification or for personal use.

7. The appellant craves leave to consider each of the above ground of appeal as independent and without prejudice to each other and craves leave to add, alter, modify or delete any or all grounds of appeal."

2. At the outset, the Ld. AR submitted that Ground No.2 is a legal issue alleged by the assessee that goes to the root cause of the case. He submitted that the Ld. AO did not issue notice under section 143(2) of the Act and therefore, the entire assessment becomes bad in law. He placed reliance on the decision of *Hon'ble Supreme Court* in the case of *CIT versus Hotel Blue Moon* reported in *(2010) 321 ITR 362 (SC)* and the decision of *Hon'ble Bombay High Court* in the case of *ACIT versus Geno Pharmaceuticals Ltd.* reported in *(2013) 2014 Taxman 83 (Bom).* The Ld. AR submitted that, in the preceding assessment year identically, the Ld. AO passed assessment order which is identical to the year under consideration and therefore there is non-application of mind by the Ld. AO.

Brief facts leading to the legal issue alleged by the assessee is as under:

2.1 The assessee filed its original return of income on 23.09.2010 declaring total income of ₹5,97,170/- that was processed under section 143(1) of the Act. Subsequently, the case was selected for scrutiny by reopening the assessment under section 148 of the Act and notice of reopening was issued on 30.03.2014. Subsequently notice under section 142(1) was issued on 06.05.2014 and the reason for reopening was provided to the assessee.

2.2 The Ld. AO completed the assessment u/s.143(3) r.w. Section 147 of the Act on 16.09.2014 by making addition of Rs.23,96,024/- u/s. 69C of the Act. The Ld. AO also made various other disallowances to the extent of Rs.9,55,598/-.

Aggrieved by the order of the Ld. AO, the assessee preferred appeal before the Ld. CIT(A).

2.3 The assessee alleged the legal issue, challenging the validity of the assessment order in the absence of notice u/s.143(2) of the Act before the Ld. CIT(A).

2.4 The Ld. CIT(A) observed as under:

> *"1. In ground nos. 1& 2 the assessee objects to reopening of the case u/s 148 and issuing notice u/s 143(2) without stating any particular reason. On verification it was found that the assessee was engaged in hawala transactions with various parties. The information was received from DG (Inv). As the assessee has not submitted copies of receipts of VAT paid, sales tax paid, transport receipts. Octroi receipts, godown receipts,. Consumption of materials purchased details, toll receipts of loading and unloading charges of purchases of Rs.2396024. The AO thus rightly added bogus billing to the extent of Rs. 2396024 as unexplained expenditure u/s 69C of the IT Act. This is a clear case of concealment and notice u/s 148 & 143(2) were issued on the basis of documentary evidences pointing towards suppression of income."*

Aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before this Tribunal.

3. The Ld. AR informed that on earlier date this *Tribunal* called for the assessment records to verify issuance of notice under Section 143(2) to the assessee. In response to the same, the Ld. DR filed letter dated 04.09.2024 by the Ld. AO, wherein it is submitted that, neither notice under section 143(2) of the Act was found on record nor there is any mention of such notice having issued to the assessee in the order sheets placed in the assessment records. The Ld. AR thus vehemently argued that, the ratio laid down by *Hon'ble*

Supreme Court in case of *Hotel Blue Moon (supra)* is squarely applicable to the present facts of the case and the assessment order so passed without issuance of such notice u/s. 143(2) becomes bad in law and deserves to be quashed.

3.1 On the contrary, the Ld. DR submitted that, the assessee participated in the assessment proceedings, and therefore, benefit under section 292BB of the Act should be given to the Ld. AO as he completed the assessment after considering the submissions filed by the assessee.

We have perused the submissions advanced by both the sides.

4.1 On perusal of the letter filed by the Ld. AO dated 04.09.2014, following paragraph is worth to be taken note of which is as under.

> *"Notice u/s. 143(2) of the Act was not found on record, however, it is seen that the A/R of the assessee vide his letter dated 18/07/2014 has requested to treat the return filed on 23.09.2010 as return filed in response to notice u/s 148 of the Act. From this, it is evident that the assessee actually has not filed a return in response to notice u/s 148 of the IT Act. He merely requested the AO to treat his earlier return as the return filed in response to notice u/s 148 of the Act. This action of the assessee results in non fulfillment of the requirement of the notice issued u/s. 148 of the Act. The said notice clearly requires a compliance on the part of the assessee to actually upload electronically a return of income duly verified by him. Since, the statutory requirements can never be fulfilled by filing a mere letter, it is to be concluded that the assessee failed to file a return of income in response to notice u/s 148 of the Act. Consequently question of issue of notice u/s 143(2) of the Act by the AO simply does not arise. Hence, Plea taken by the assessee regarding non issue of notice u/s 143(2) of the Act, may kindly be dismissed and the appeal be decided on the merits of the case."*

4.2 From the above, it is clear that the Ld. AO has not issued notice under Section 143(2) in order to pass the assessment order

under Section 143(3) r.w. Section 147 of the Act. Further, failure on the part of the Ld. AO to issue such notice under Section 143(2), debars the Ld. AO from assuming jurisdiction to complete assessment under Section 143(3) of the Act. *Hon'ble Bombay High Court* in the case of *Geno Pharmaceuticals Ltd. (supra)* held that, notice under Section 143(2) is mandatory and in absence of issuance of notice u/s.143(2), the Ld. AO cannot proceed to make enquiry on the return filed in compliance with the notice under Section 148 of the Act. The order of the *Tribunal* quashing the re-assessment proceedings held to be valid.

4.3 The Ld. AO in his letter dated 04.09.2024 alleged that the assessee did not file any return of income in lieu of notice u/s.148 of the Act, instead filed a letter intimating to treat the original return of income in response to notice u/s.148 of the Act. This in our view cannot be treated as non compliance of notice as observed by the Ld. AO. In present facts admittedly the assessee responded by informing to treat the original return to be in response to notice u/s.148 which was a valid return. We therefore reject this objection of the Ld. AO at the threshold.

4.4 Before us, the Ld. DR relied on the provisions of Section 292BB of the Act, since the assessee participated in the re-assessment proceedings with the department and filed details from time to time, even though no notice under Section 143(2) was issued and served upon assessee. In our view, the provisions of Section 292BB will come to rescue of the department, only when

the notice under Section 143(2) of the Act is issued to assessee and but not properly served within the specified time. On a repeated query raised by the Bench to the Ld. DR, as to whether the notice under Section 143(2) having issued, the answer was in negative. This means there is an admitted failure on the part of the Ld. AO to issue the mandatory notice under Section 143(2) of the Act leading to a jurisdictional error. Therefore, the question of any protection under Section 292BB of the Act does not arise. We therefore do not find any force in the submissions of the ld. DR and the same is rejected.

4.5 Reliance was placed on the decision of *Co-ordinate Bench* of this *Tribunal* in *assessee's own case* for *A.Y.2009-10* in *ITA No.3537/MUM/2018* vide order dated *7th February, 2019* wherein on identical issue, this *Tribunal* quashed the assessment order by observing as under:

> *"Notice u/s 143(2) of the Act was not found on record, however, it is seen that the A/R of the assessee vide his letter dated 18/07/2014 has requested to treat the return filed on 23.09.2010 as return filed in response to notice u/s 148 of the Act. From this, it is evident that the assessee actually has not filed a return in response to notice u/s 148 of the IT Act. He merely requested the AO to treat his earlier return as the return filed in response to notice u/s 148 of the Act. This action of the assessee results in non fulfillment of the requirement of the notice issued u/s 148 of the Act. The said notice clearly requires a compliance on the part of the assessee to actually upload electronically a return of income duly verified by him. Since, the statutory requirements can never be fulfilled by filing a mere letter, it is to be concluded that the assessee failed to file a return of income in response to notice u/s 148 of the Act. Consequently question of issue of notice u/s 143(2) of the Act by the AO simply does not arise. Hence, Plea taken by the assessee regarding non issue of notice us 143(2) of the Act, may kindly be dismissed and the appeal be decided on the merits of the case."*

4.6 We also rely on the ratio laid down by *Hon'ble Bombay High Court* in case of *CWT vs. HUF of Late Shri J.M. Scindia* reported in *(2008) 300 ITR 193 (Bom)*. Based on the discussion and the legal principles laid down by *Hon'ble Supreme Court* in the case of *Hotel Blue Moon (supra)* and *Hon'ble Bombay High Court* in the case of *ACIT vs. Geno (supra)* and decision relied hereinabove, we are of the opinion that the re-assessment order passed for the year under consideration is bad in law and void for non issuance of mandatory notice under Section 143(2) of the Act deserves to be quashed.

Accordingly Ground No.2 raised by the assessee on the legal issue stands allowed.

9. As we have already quashed the assessment order, there is no reason to go into merits of the addition as the same do not survive at this stage.

In the result, the appeal filed by the assessee stands allowed.

Order pronounced in the open court on 20.09.2024

Sd/-	Sd/-
[RATNESH NANDAN SAHAY]	[BEENA PILLAI]
ACCOUNTANT MEMBER	JUDICIAL MEMBER

MUMBAI, DATED: 20/09/2024
Prabhat