

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

HEARING THROUGH: PHYSICAL MODE

श्री आकाश दीप जैन, उपाध्यक्ष एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. AAKASH DEEP JAIN, VP & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं. / ITA NO.709/Chd/2023
निर्धारण वर्ष / Assessment Year : 2010-11

Anand Sawroop S/o Sh. Ravinder Sawroop Sainwala Majra, Paonta Sahib, Sirmour- 173025, Himachal Pradesh	बनाम	The ITO Nahan (H.P.)
स्थायी लेखा सं. / PAN NO: AUDPS3233L		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारिती की ओर से/ Assessee by : Shri Abhimanyu Jhamba, Advocate
Shri M.L. Jhamba, Advocate and
Shri Abhishek Jhamba, Advocate
राजस्व की ओर से/ Revenue by : Shri Vivek Vardhan, JCIT, Sr. DR

सुनवाई की तारीख/ Date of Hearing : 07/10/2024
उदघोषणा की तारीख/ Date of Pronouncement : 30/10/2024

आदेश/Order

PER VIKRAM SINGH YADAV, A.M. :

This is an appeal filed by the Assessee against the order of the Ld. CIT(A)/NFAC, Delhi dt. 11/10/2023 pertaining to Assessment Year 2010-11.

2. In the present appeal, the assessee has raised the following grounds of appeal:

1. That on the facts and circumstances of the case and in law, the Ld. Commissioner of Income tax (Appeals) [hereinafter referred to as 'Ld. CIT (A)] has grossly erred in sustaining the addition of Rs 1,25,81,068 made by the Ld, Assessing Officer.

2. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has grossly erred in not appreciating that the classification of land either as Banjar Kadeem or Nakabil Jhund would not make the land non-agricultural and it would still retain its nature and character of agricultural land.

3. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has grossly erred in holding that carrying out agricultural operation is a sinequa non for characterising the land as agricultural land.

4. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has grossly erred in not appreciating the revenue records which clearly exhibits the nature and character of the land to be agricultural land.

5. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has failed to appreciate that the assessment framed u/s 147 is bad in law since the notice u/s 148 was not served upon the Appellant.

6. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has failed to appreciate that the notice u/s 148 is bad in law for want of proper sanction in terms of section 151 of the Act.

7. That on the facts and circumstances of the case and in law, the Ld. CIT (A) and the Assessing Officer have wrongly construed and applied section 50C in the present case.

8. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has failed to appreciate that it was incumbent upon the Ld. AO to refer the valuation to Valuation Officer in terms of section 50 C(2) of the Act.

9. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in not appreciating that section 50C would have no applicability particularly when the agricultural land is sold to a Govt. entity viz. Himachal Pradesh Power Corporation Limited and the consideration thereof is discharged through banking channel / cheque.

10. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in not appreciating that the assessment framed by the Ld. Assessing Officer is bad in law since it could not have been framed without issuing the mandatory notice u/s 143(2) of the Act.

11. That on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in not appreciating that the assessment framed u/s 144 of the Act is bad in law.

12. That on the facts and circumstances of the case and in law, the Ld. CIT (A) has grossly erred in passing a non-speaking order.

3. Briefly the facts of the case are that basis information that the assessee has sold certain immovable property during the F.Y. 2009-10 relevant to impugned assessment year 2010-11, the AO recorded reasons to the effect that income to the tune of Rs. 30,00,000/- has escaped assessment and it is a fit case to issue notice under section 148 of the Act. Notice under section 148 dt.

31/03/2017 was subsequently issued to the assessee requiring him to file return of income. As per the AO, the assessee has failed to file his return of income till the date of passing of the assessment order and has also not complied to the various notices and therefore, he proceeded and pass the assessment order under section 144 r.w.s 147 of the Act, wherein short term capital gains of Rs. 1,25,81,068/- was determined by the AO on sale of land by the assessee to M/s Himachal Pradesh Power Cooperation Ltd. (HPPCL) under Section 50C of the Act, which, on appeal, has been confirmed by the Ld. CIT(A).

4. Against the said findings and the order of the Ld. CIT(A), the assessee is in appeal before us.

5. During the course of hearing, the Ld. AR submitted that the assessee is an agriculturist and has sold a piece of agriculture land to HPPCL vide registered sale deed dt. 11/02/2010 and the sale consideration was discharged by the HPPCL for an amount of Rs. 91,28,374/- which is duly reflected in the bank statement of the assessee. It was submitted that being a sale of agriculture land, the same was exempt from tax, hence the assessee did not file his return of income coupled with the fact that he had no other taxable income exceeding the exemption limit. It was submitted that the assessment proceeding were initiated by issuance of notice under section 148 at the fag end of expiry of sixth year from the end of the impugned assessment year 2010-11 on 28/03/2017. Thereafter, the AO issued notice under section 142(1) which were duly complied with by the assessee. In the course of such compliance, the assessee also filed his return of income declaring NIL income on 07/12/2017 and placed on record the relevant documents including purchase deed and sale deed of the agriculture land in question. It was submitted that without issue of mandatory notice under section 143(2) of the Act, the AO has proceeded to frame best judgment assessment under section 144 of the Act which is in clear violation of the provisions of the Act and therefore deserves to be set aside.

5.1 In this regard, it was submitted that notice issued under section 148 gave the assessee an option to furnish the return form manually and even Rule 12 of the Income Tax Rules, 1962 as relevant to A.Y. 2010-11 allows the assessee to file return manually and given that the assessee was facing difficulty in filing the return electronically, the return of income was furnished manually before the AO as evident from page 2 of the assessment order wherein the AO has stated as under:

S.No	Notice	Fixed For	Remarks
7		07-12-2017	The assessee was called telephonically. He was apprised about his case and was told to file ITR in response to (notice) u/s 148. He has submitted a print out of ITR, he stated trying to file electronically and on his request the case was adjourned for 11-12-2017

5.2 It was submitted that once the return of income was filed even though manually, it was obligatory upon the AO to issue notice under section 143(2) before framing the assessment under section 147 of the Act. It was submitted that the assessee had infact appeared before the AO and there is no reason for the AO not to issue notice under section 143(2) and proceeded to frame the assessment under section 144 of the Act.

5.3 It was submitted that the law is well settled that issuing of notice under section 143(2) is mandatory and Section 292BB does not come to the aid of the AO and in this regard, reliance was placed on the decision of Hon'ble Supreme Court in case of CIT Vs. Laxman Das Khandelwal reported in (2019) 310 CTR 8 wherein it was held as under:

"7. A closer look at Section 292BB shows that if the assessee has participated in the proceedings it shall be deemed that any notice which is required to be served upon was duly served and the assessee would be precluded from taking any objections that the notice was (a) not served upon him; or (b) not served upon him in time; or (c) served upon him in an improper manner. According to Mr.

Mahabir Singh, learned Senior Advocate, since the Respondent had participated in the proceedings, the provisions of Section 292BB would be a complete answer.

On the other hand, Mr. Ankit Vijaywargia, learned Advocate, appearing for the Respondent submitted that the notice under Section 143(2) of the Act was never issued which was evident from the orders passed on record as well as the stand taken by the Appellant in the memo of appeal. It was further submitted that issuance of notice under Section 143(2) of the Act being prerequisite, in the absence of such notice, the entire proceedings would be invalid.

8. The law on the point as regards applicability of the requirement of notice under Section 143(2) of the Act is quite clear from the decision in Hotel Blue Moon's case (supra). The issue that however needs to be considered is the impact of Section 292BB of the Act.

9. According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.

10. Since the facts on record are clear that no notice under Section 143(2) of the Act was ever issued by the Department, the findings rendered, by the High Court and the Tribunal and the conclusion arrived at were correct. We, therefore, see no reason to take a different view in the matter.

11. These Appeals are, therefore, dismissed. No costs.

On this ground also, the entire proceedings would stand vitiated and the assessment so framed by the Ld. Assessing Officer may be quashed by your honour.

5.4 It was accordingly submitted that in absence of notice under section 143(2), the entire assessment proceedings u/s 147 stands vitiated and the assessment so framed by the AO deserves to be quashed.

5.5 It was submitted that similar contentions were raised before the Ld. CIT(A) however the Ld. CIT(A) has failed to record any findings in this regard. It was submitted that the said issue goes to the root of the matter and it was submitted that the same may be decided by the Bench instead of remanding the matter

back to the file of the Ld. CIT(A) as all the relevant facts are on record and no new facts are required to verify or examine the same.

6. Per contra, the Ld. DR has relied on the order passed by the AO and submitted that in the assessment order, the AO in para 2 and thereafter, in para 3 and 3.1 has clearly stated that the assessee has not filed his return of income till the date of passing of this order. In this regard, during the course of hearing our reference was drawn to para 3 of the assessment order and contents thereof read as under:

"3. Before framing assessment in the case, it is important to discuss conduct of assessee during assessment proceedings. The detail of notices compliances made by the assessee and status of notices issued to him are as under:

S.No.	Notice	Fixed for	Remarks
1.	u/s148 dated 28-03-2017	The assessee was required to furnish income tax return within 30 days.	Till date no return has been filed.
2.	Notice u/s 142(1) dated 15-05-2017	24-05-2017	A letter was received in this office on 23-05-2017 under the signatures of assessee. The assessee had stated, "As per notice issued by your good office u/s148. As I need time to produce document please give me next date".
3.	Notice u/s 142(1) dated 29-05-2017	12-06-2017	Sh. Anand Swaroop, the assessee attended the proceedings. He has submitted document regarding sale and purchase of land. He stated that the land is agricultural land which has been acquired by Himachal Pradesh Power Cooperation Limited. He also stated that he will represent his case on its own. The case was adjourned for 27-06-2017.
4.		27-06-2017.	None attended.
5.	Notice u/s 142(1) dated 17-08-2017	05-09-2017	Received back undelivered.
6.	Notice u/s 142(1) dated 04-10-2017	16-10-2017	None attended.
7.		07-12-2017	The assessee was called telephonically. He was apprised about his case and was told to file ITR in response to u/s 148. He has submitted a printout of ITR, he stated trying to file electronically and on his request the case was adjourned for 11-12-2017.
8.		11-12-2017	None attended.

7. It was submitted that at S.No. 7, the AO has stated that the assessee was called telephonically. He was apprised about his case and was told to file ITR in response to notice under section 148. Thereafter, the AO has further stated that the assessee has submitted the printout of ITR and he has stated that the assessee was trying to file return electronically and which could not be filed and thereafter the case was adjourned to 11/12/2017. Further reference was drawn to para 3 of the assessment order wherein the AO has stated that despite issuance of first notice dated 28/03/2017, the assessee has not filed the return of income till the date of the assessment order. The AO has further stated that the assessee had personally attended the hearing twice and had been apprised about the proceedings and procedure but he didn't comply with it. The AO has further stated that in every notice issued u/s 142(1), the assessee was specifically required to file his return of income which has not been done. The Id DR accordingly submitted that no return of income has been filed by the assessee in response to notice u/s 148 and in absence thereof, there was no requirement to issue notice u/s 143(2) and the assessment proceedings have rightly been conducted and concluded by the AO by passing of the assessment order u/s 144 r/w 147 of the Act and the contentions so advanced by the Id AR deserve to be dismissed.

8. We have heard the rival contentions and perused the material available on record. The proceedings under consideration were initiated by the AO by issuance of notice u/s 148 of the Act dated 28/03/2017 requiring the assessee to file return of income within 30 days from the service of notice, in a prescribed form for the impugned assessment year 2010-11. Thereafter, notices issued u/s 142(1) were issued from time to time wherein the assessee was specifically required to file his return of income. On 07/12/2017, the assessee was called telephonically by the AO and he was apprised about his case and was told to file ITR in response to notice u/s 148 and in response, the assessee appeared

before the AO and submitted that he was trying to file his return electronically which apparently couldn't be filed and a printout of his ITR was submitted to the AO and our reference was drawn to the return of income so prepared and verified by the assessee in prescribed ITR Form 2 on 07/12/2017 and filed manually before the AO which is available as part of APB pages 91-97. We therefore find that a manual return of income has been filed by the assessee in response to notice u/s 148 and a copy thereof personally handed over to the AO during the course of assessment proceedings. It is also a fact that the assessee couldn't file the return of income electronically and as pointed by the Id AR, Rule 12 of the Income tax Rules as applicable for the impugned assessment year 2010-11 allows the assessee to file the return in paper form and therefore, there is compliance with the said Rules. However, the fact remains that the assessee has filed his return of income in prescribed form and duly verified in response to notice u/s 148 of the Act. Once the return of income has been filed in response to notice u/s 148 of the Act, the AO has to consider and examine the same and for the purposes, he has to necessarily issue notice u/s 143(2) of the Act which has admittedly not happened in the instant case. It is a settled position that issuance of notice u/s 143(2) is mandatory required in proceedings u/s 147 of the Act and the law in this regard is well settled.

9. As observed by the Hon'ble Supreme Court in the case of **ACIT & Anr. Vs. Hotel Blue Moon** (2010) 321 ITR 362 (SC), the omission on the part of the assessing authority to issue notice under Sec. 143(2) cannot be held to be a procedural irregularity, and the same is not curable. It was held by the Hon'ble Supreme Court that for the purpose of framing of a valid assessment, issuance of a notice under Section 143(2) cannot be dispensed with. In this regard, useful reference can also be drawn to decisions of Hon'ble Allahabad High Court in case of CIT vs Rajeev Sharma (2010) 192 Taxman 197 (All), Hon'ble Bombay High Court in case of ACIT vs Geo Pharmaceuticals Ltd (2013) 32 taxmann.com 162 (Bom),

Hon'ble Madras High Court in case of Sapthagiri Finance & Investments vs ITO (2013) 90 DTR (Mad) 289, Hon'ble Delhi High Court in case of PCIT vs Silver line (2016) 383 ITR 445 (Del) and in case of PCIT vs Jai Shiv Shankar traders (P) Ltd (2016) 383 ITR 448(Del), Hon'ble Calcutta High Court in case of PCIT vs Oberoi Hotels (P) Ltd (2018) 96 taxmann.com 104 (Cal) wherein it has been consistently held by the Hon'ble High Courts that reassessment order u/s 147 cannot be passed without compliance with the mandatory requirement of notice u/s 143(2) of the Act. No contrary authority including that of the jurisdictional Himachal Pradesh High Court has been brought to our notice.

10. Further, we agree with the contention of the Id AR that the provisions of section 292BB doesn't come to the aid of the AO as the said provisions talks about the situation where the notice has actually been issued and there are situations in terms of infirmities in respect of service of notice, etc and in the instant case, where notice itself has not been issued, the question of invocation of provisions of section 292BB doesn't arise for consideration and our view is fortified by the decision of the Hon'ble Supreme Court in case of CIT Vs. Laxman Das Khandelwal (*Supra*) wherein the Lordships have held that "The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself."

11. In light of aforesaid discussions, we find that where the return of income has been filed in response to notice u/s 148 and no notices has been issued by the AO u/s 143(2), the subsequent assessment proceedings u/s 147 stand vitiated and the order so passed by the AO u/s 144 r/w 147 deserve to be set-

aside and is hereby set-aside. The ground of appeal no. 10 so taken by the assessee is thus allowed.

12. In light of the aforesaid, where we have set-aside the reassessment proceedings for want of issuance of notice u/s 143(2), the other grounds of appeals have become academic in nature and the same are thus left open.

13. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 30/10/2024.

Sd/-
आकाश दीप जैन
(AAKASH DEEP JAIN)
उपाध्यक्ष / VICE PRESIDENT

Sd/-
विक्रम सिंह यादव
(VIKRAM SINGH YADAV)
लेखा सदस्य/ ACCOUNTANT MEMBER

AG

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar