

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No.2564/Mum/2014(Assessment Year 2006-07)
ITA No.2565/Mum/2014(Assessment Year 2007-08)

Shri Karanraj M. Jain,
Prop. of M/s. R.K.Construction,
At Post- Poynad, Tal.Alibag,
Dist. Raigad - 402108
PAN:ABCPJ 9941J

..... Appellant

Vs.

The Income Tax Officer,
Ward -3, Panvel.

.... Respondent

Appellant by : Shri Piyush Chhajed
Respondent by : Shri Durga Dutt

Date of hearing : 28 /11/2016
Date of pronouncement : 30/11/2016

ORDER

PER G.S.PANNU,A.M:

Both the appeals relate to the same assessee and involve a common legal issue relating to the validity of the assessment orders passed under section 143(3) r.w.s. 147 of the Act pertaining to assessment year 2006-07 and 2007-08.

2. In both the years, the pertinent plea raised by the assessee is that after reopening the assessment by issue of notice under sections 147/148 of the

Act, ensuing assessments have been completed without issuance of the mandatory notice under section 143(2) of the Act.

3. At the time of hearing, Ld. Representative for the assessee also pointed out that similar issue had come up before the Tribunal in assessee's own case for assessment year 2005-06 and vide ITA No.2563/Mum/2014 dated 24/06/2015, wherein it has been decided in favour of the assessee. A copy of the said decision has also been placed on record.

4. In order to appreciate the facts, we may refer to the appeal of the assessee for assessment year 2006-07, which is directed against an orders passed by CIT(A)- 1, Thane dated 23/12/2013, which in turn, arises out of an orders passed by the Assessing Officer under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short 'the Act') dated 29/12/2010.

5. The contention of the assessee is that the mandatory notice has not been issued under section 143(2) of the Act and in this regard our attention has been invited to pages 1 & 2 of the assessment order wherein is tabulated a list of notices issued by the Assessing Officer to the assessee in the course of assessment proceedings. It was submitted that the Assessing Officer has failed to issue a mandatory notice under section 143(2) of the Act, which is evident from the tabulation contained in the assessment order.

6. The aforesaid factual matrix is clearly emerging from the assessment order and in this context we find that similar issue has been dealt with by the Tribunal in the case of the assessee for assessment year 2005-06(supra) and the following discussion is relevant:-

"In support of his contention, Id Counsel for the assessee relied on the binding judgment of the Hon'ble jurisdictional High Court in the case of

ACIT vs. GENC Pharmaceuticals Ltd [2013] 84 CCH 0117, which is relevant for the following proposition.

“Conclusion:

Notice u/s 143(2) is mandatory and in the absence of such service, the AO cannot proceed to make an inquiry on the return of income in compliance with the notice issued u/s 148.”

3. *He also relied on the Special Bench decision of the ITAT, Delhi in the case of Raj Kumar Chawla & Ors vs. Income Tax Officer[2005] 94 ITD 1 (Del.) (SB), which is relevant for the following conclusion.*

“Conclusion:

In view of the legal fiction created by section 148 that a return filed under that section is to be treated as one under section 139 and no assessment can be made if the notice under section 143(2) is not served within the time prescribed by the proviso under section 143(2).”

4. *Further, Ld Counsel also relied on another judgment of the Hon’ble jurisdictional High Court in the case of CIT vs. Mr. Salman Khan in Income Tax Appeal (L) No. 2362 of 2009, dated 1.12.2009, wherein, under the Wealth Tax provisions, the High Court held that the issue of mandatory notice u/s 143(2) is essential and for the proposition, the High Court relied on its own judgment in the case of CIT vs. HUF of H.H. Late J.M. Scindia (2008) 300 ITR 193 (Bom.). Further also, Ld Counsel relied on another judgment in the case of CIT vs. Mr. Salman Khan in Income Tax Appeal No. 508 of 2010, dated 6.6.2011, wherein the Hon’ble High Court has relied on its own judgment in the case of Mr. Salman Khan in IT Appeal (L) No.2363 of 2009 (supra) and held that the failure of the Assessing Officer in issuing such statutory notice u/s 143(2) is not curable u/s 292BB of the Act.*

5. *On the other hand, Ld DR for the Revenue submitted that the liberty may be given to the Department for moving a Miscellaneous Application, if notice u/s 143(2) is found issued to the assessee.*

6. *On hearing both parties and on perusal of the orders of the Revenue Authorities, I find the orders of the AO as well as the CIT (A) are clear in mentioning that the statutory notice u/s 143(2) of the Act was never issued before making re-assessment. It is not the case of the Revenue that such notice was issued and the relevant provisions are complied with. In such circumstances, after considering the above cited binding judgments of the jurisdiction High Court, I am of the opinion, the re-assessment is not legally sustainable. Accordingly, the legal issue raised by the assessee is admitted and adjudicated in favour of the assessee. Considering the adjudication of the legal issue in favour of the assessee, I find the adjudication of other grounds relating to the merits of the addition becomes an academic exercise. Accordingly, the other grounds raised by the assessee are dismissed as academic.*

7. *In the result, appeal of the assessee is allowed."*

7. Notably, the Tribunal took note of the judgment of the Hon'ble Bombay High Court in the case of ACIT vs. GENC Pharmaceuticals Ltd., 84 CCH 0117 , wherein it has been laid down that issue of notice under section 143(2) is mandatory, where the Assessing Officer intends to make enquiries on the return of income filed in response to notice issued under section 148 of the Act. Thereafter, the Tribunal has also referred to the other legal decisions namely in the cases of CIT vs. Mr. Salman Khan in Income Tax Appeal (L) No.2362 of 2009 dated 01/12/2009 and CIT vs. HUF of H.H. Late J.M.Scindia, 300 ITR 193(Bom) to hold that the failure of the Assessing Officer in issuing the statutory notice under section. 143(2) of the Act is also not curable under section 292BB of the Act. For the above reasons, the Tribunal held the reassessment order as legally untenable. In the instant year also, similar fact-situation prevails and following the reasoning adopted by the Tribunal in assessment year 2005-06(supra), in the instant year also the reassessment is held to be legally unsustainable and is hereby set-aside. Since the legal issue raised by the assessee has been decided in favour of the assessee, the other grounds relating to merits of the issue become academic and are not being decided accordingly. In the result, the appeal for assessment year 2006-07 is allowed as above.

8. At the time of hearing, it was a common point between the parties that so far as appeal for the assessment year 2007-08 is concerned, the issues raised are similar to the Grounds of appeal dealt with by us in the appeal for assessment year 2006-07. As a consequence, our decision in appeal for assessment year 2006-07 shall apply *mutatis mutandis* in the appeal for assessment year 2007-08 also.

9. In the result, appeals filed by the assessee are allowed as above.

Order pronounced in the open court on 30/11/2016

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOCUNTANT MEMBER

Mumbai, Dated 30/11/2016

Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)

ITAT, Mumbai