

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी', मुंबई ।

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

सर्वश्री आर.सी.शर्मा, लेखा सदस्य एवं श्री पवन सिंह, न्यायिक सदस्य

BEFORE SHRI R.C.SHARMA, AM

&

SHRI PAWAN SINGH, JM

आयकर अपील सं./ITA No.4121/Mum/2015

(निर्धारण वर्ष / Assessment Year :2008-2009)

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| Priya Sandeep Thorat, C/o Jayesh Sanghrajka & Co, Chartered Accountants, Unit No.405, Hind Rajsthan Centre, D.S.Phalke Road, Dadar(E), Mumbai-400014 | Vs. | ACIT-27(1)(Old DCIT-22(1), Vashi Income Tax, Navi Mumbai. |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AHJPM 5246 J | | |
| (अपीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |

निर्धारिती की ओर से /Assessee by : Shri Harshvardhana Datar

राजस्व की ओर से /Revenue by : Shri B.S.Bist

सुनवाई की तारीख / Date of Hearing : **10/08/2015**

घोषणा की तारीख/Date of Pronouncement **28/10/2015**

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of CIT(A), Mumbai, dated 12-6-2015 for the assessment year 2008-09, in the matter of order passed u/s.143(3) r.w.s.147 of the I.T.Act.

2. In this appeal the assessee is aggrieved that the assessment framed u/s.143(3) r.w.s.147 without issue of notice u/s.143(2) is not sustainable in law.

3. We have considered rival contentions and carefully gone through the orders of the authorities below. In para 2.1 & 2.2 of the assessment order, the AO observed as under :-

“2.1. The contention of the assessee against the justification of the present re-assessment proceedings in view of the notice u/s.143(2) having not been issued in due time is not found correct on fact as also under the law. This office has, in fact followed the procedure laid down in section 148 and under section 142(1) of the Act. It is not disputed that the notice u/ s.148 dated 19.03.2012 was duly served on the assessee on 21.03.2012. Thereafter, since the return was received in response to the said notice u/ s. 148, a notice u/ s. 142(1) was issued on 21. 06. 2012 and again on 21.08.2012. There was no response to these notices u/s.142(1) and no information was submitted by the assessee to show that return. of Income. III response to notice u/s. 148 was filed by her. In the above circumstances, this office issued another letter dated 12.10.2012 pointing out that no return was filed by the assessee in response la the notice u/s.148 or in response to the notice u/s.142(1) as stated in the preceding paragraph. It is in response to this letter of 12.10.2012 that the assessee's representative submitted a letter dated 19.10.2012 stating that the return of income has been filed on 30.03.2012 in response to notice u/s.148. It will be appreciated that the system would not accept a return filed out of time like this and for validating such a return the authority lies with the A O by issuing notice u/ s.148. In other words, it is necessary that the assessee files a return in response to notice u/ s.148 and such fact should be informed to the AO. Till then it cannot be said that the assessee has filed a return m response la the said notice u/s.148. It may also be mentioned that it was not mandatory for the assessee to file the return electronically and even if the return had been filed electrically, The AO should have been notified of the same immediately. The AO was not intimated that a return of income has been filed in response to the notice u/s. 148 and there was no response to even notices u/s.142(1) issued on 21.06.2012 & 21.08.2012 and it was only in response to letter dated 12.10.2012 the assessee has intimated that return has been filed on 30.03.2012, i.e. only after the time for issue of notice u/s.143(2) has elapsed. This clearly shows the mala fide intention of the assessee.”

It is clear from the above observation of the AO, which has also been reproduced by the CIT(A) in his order at page 4 that no notice u/s.143(2) was issued to the assessee after filing of the return. We also found from the record that due objection was raised by the assessee during the course of assessment proceedings with regard to non-issue of notice u/s.143(2).

4. In support of her contention that assessment/reassessment framed u/s.143(3)/143 r.w.s.143(3) will be invalid without service of notice u/s.143(2), Id. AR relied upon various decisions of Hon'ble High Court and coordinate benches, copies of which have been produced before us. The list of such case laws are as under :

- 1 The CIT v Mr. Salman Khan [ITA No.508 of 2010 dated 06/06/2011-BOM HC]
- 2 ITO v. The Shirt Company [ITA No.3450/Mum/2009 dated 30/06/2010]
- 3 The CIT v Mr. Salman Khan [ITA No.2362 of 2009 dated 01/12/2009-BOM HC]
- 4 CWT v. HUF of H.H. Late J.M. Scindia 300 ITR 193 (Bom)
- 5 ITO v. R.K. Gupta 308 ITR (AT) 49 (Del)
- 6 CIT v. Rajeev Sharma 336 ITR 678 (All)
- 7 Kuber Tobacco Products Pvt. Ltd. v Dy. CIT 310 ITR 300 (AT) (SB) (Del)
- 8 ITO v. Smt. Kuldip Kaur (2011) 136 TTJ (Chd) (UO) 53
- 9 H. Gouthamchand v. Addl. CIT (2010) 131 TTJ (Bang) 204
- 10 Chandra R. Gandhi v. ITO 120 TTJ 786 (Mum)

5. On the other hand, the learned DR though admitted this fact that no notice u/s.143(2) has been issued in this case, however, he strongly objected that once the assessee has participated in the proceedings before the Assessing Officer and has duly filed its replies, non issuance of notice u/s.143(2) will not invalidate the entire assessment order as it is mere procedural formality. At best the entire order can be set aside and restore back to the file of the Assessing Officer to decide afresh. He strongly relied upon the reasoning's given by the Ld. CIT(A).

6. We have considered rival contentions and carefully gone through the orders of the authorities below and also deliberated on the judicial pronouncements referred by the lower authorities in their orders and also referred by Id. AR and DR during the course of hearing before us. The Hon'ble Allahabad High Court in the case of CIT vs. Rajeev Sharma reported in 336 ITR 678 after considering the series of judgment on this issue including that of the Hon'ble Supreme Court in the case of Hotel Blue Moon, 188 taxman 113, has held that when statutory provides for a particular procedure, the authority has to follow the same and they cannot be permitted to act in contravention of the said procedure. If the statutory time limit has been provided for issuing and service of notice u/s.143(2) after filing of return, the same is to be adhered to and it is incumbent upon the Assessing Officer to do so. In this case, the Hon'ble High Court was dealing with the non issuance of notice u/s.143(2) in case of return filed in response to the notice u/s.148. Thus in view of various decision of the Hon'ble Courts as referred and relied upon the learned counsel and the decision of Hon'ble Supreme Court in ITA Nos : 5089 & 4908/Mum/2005 the case of Hotel Blue Moon (supra), we hold that the assessment order passed u/s. 143(3) r.w.s. 148, dated 25.03.2013 is invalid for the reason that no notice u/s.143(2) was issued after filing of return in response to notice u/s.148 till completion of assessment and is, therefore, quashed.

7. Even the provisions of section 292BB brought in the statute w.e.f 01.04.2008 will also not favour the case of the department as the

assessee had taken objection for non-issue of notice u/s.143(2) during the course of assessment proceedings as per the findings given by AO at para 2.1 & 2.2 of his order. Proviso to Section 292BB provides that nothing contained in Section 292BB shall apply where assessee has raised objection before completion of such assessment or re-assessment.

8. In view of the above, since no notice u/s.143(2)/147 was issued, the assessment framed u/s.143(3) r.w.s.147 is having no legs to stand.

9. **In the result, appeal of the assessee is allowed.**

Order pronounced in the open court on this 28/10/2015.

Sd/-
(पवन सिंह)
(PAWAN SINGH)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(आर.सी.शर्मा)
(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 28/10/2015

प्र.कु.मि/pkm, नि.स/ PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai