(2018) 07 RAJ CK 0151

In the Rajasthan High Court

Case No : Income Tax Appeal No. 197 of 2018

Pr Commissioner Of Income Tax @APPELLANT@Hash Kamla Devi Sharma

Date of Decision : 10-07-2018

Acts Referred:

Citation : (2018) 07 RAJ CK 0151

Hon'ble Judges : Kalpesh Satyendra Jhaveri, J;Vijay Kumar Vyas, J

Bench : Division Bench

Advocate : Daksh Pareek, Sameer Jain

Final Decision : Dismissed

Judgement

1. By way of this appeal, the appellant has assailed the judgment and order of the tribunal whereby tribunal has allowed the appeal of the assessee.

2. Counsel for the appellant has framed following substantial questions of law:-

(i) Whether on the facts and circumstances ofthe case the ITAT was right in quashing the reassessment proceeding u/s 147/144 {mistakenly

mentioned 143(3)} for the reason of non issuance of notice u/s 143(2) before finalizing reassessment whereas the assessee did not file her return of

income within the period of 30 days stipulated by notice issued u/s 148?

(ii) Whether on the facts and in circumstancesof the case the ITAT was right in quashing the reassessment proceeding u/s 147/144 {mistakenly

mentioned 143(3)} for the reason of non issuance of notice u/s 143(2) wherein the assessee filed her return of income on 22.4.2014 which is 10

months 17 days beyond 5.7.2013 i.e. after expiry of 30 daysâ??Â time from service of notice on 6.6.2013 stipulated in the notice issued u/s 148?

(iii) Whether on the facts and incircumstances of the case the AO was under statutory obligation to issue notice u/s 143(2) before completing the

assessment u/s 144 wherein the assessee filed her return of Income 10 months

17 days beyond the 30 daysâ?? time allowed by notice issued u/s 148

which expired on 5.7.2013 as the notice was served upon on 6.6.2013?

(iv) Whether on the facts and circumstancesof the case the ITAT was right in quashing the reassessment proceeding u/s 147/144 {mistakenly

mentioned 143(3)} relying upon the decision of Delhi High Court in the case of PCIT vs. Jai Shiv Shankar Traders Pvt. Ltd. 383 ITR 448 whereas the

facts of the case are distinguishable that the return of income in the present case was not filled within the time allowed in the notice u/s 148 and the

case was completed u/s 144?

(v) Whether on the facts and circumstancesof the case mentioning of completion of order â??u/s 147/143(3) instead of â??144â?? in the order is not

a mistake curable u/s 292BB when the case was completed u/s 144?

3. The facts of the case are that the assessee is an individual. The assessee had purchased the land on 30.4.2008 for a consideration of

Rs.1,01,20,000/- and paid in cash. Notice u/s 148 of the Income Tax Act, 1961 (in short the Act) was issued on 31.5.2013. Notice was served on

6.6.2013 through notice server. Return of income was filed on 22.4.2014. Notice u/s 142(1) of the Act was issued alongwith questionnaire on

30.4.2014. The assessment was made on 5.3.2015 at Rs.1,01,20,000/-, that is the amount paid for purchase of the agricultural land, treated as

unexplained investment. The ld. CIT(A) has confirmed the action of the Assessing Officer.

4. While considering the matter, the tribunal has observed as under:-

5. A written submission was also made by theld AR of the assessee on the issue of nonissue of notice U/s 143(2) of the Act prior to finalization of the

assessment U/s 143(3) of the Act. The submissions of the ld AR on this issue is reproduced hereunder:

In these grounds of appeal, assessee has challenged the action of Ld. C1T(A) in confirming the action of ld. AO in completing assessment without

issuing notice u/s 143(2), which is sine qua non once assessee furnished return of income. Since all these grounds of appeal are inter related, thus have

been dealt with together for the sake of convenience. Brief facts as stated above are that the case of assessee was reopened by issue of the notice

u/s 148 of the Act and thereafter the assessment was completed without issue of notice u/s 143(2) though the assessee had filed the return of income in response to such notice u/s 148. The chronology of the events are as under: - on 31.05.2013 notice u/s 148 was issued and served upon assessee on

06.06.2013; -on 03.04.2014, notice u/s 142(1) was issued fixing date of hearing on 16.04.2014; - on 22.04.2014, Return of Income was filed by

assessee;

- on 30.04.2014, further Query letter u/s142(1) as well as show cause notice u/s 271(1)(b) was issued;

- notices u/s 142(1) were issued on17.11.2014 and 06.02.2015 and the proceedings were attended by the A/R of the assessee from time to time

- Assessment order was passed u/s 143(3)/147 of the Act by Ld. AO vide order dated 05.03.2015.

From the perusal of the summary of chronological events it is clearly evident that notice u/s 143(2) was never issued by ld.AO before completion of

the assessment and this fact has categorically been admitted by ld.AO in remand report submitted before the ld. CIT(A) (APB 15-18).

With this background of chronological events, kind attention of Honâ??ble bench is invited to the provisions of section 148 of the Act, which reads as

under:

148. [(1)] Before making the assessment, reassessment or recomputation under section 147. the Assessing Officer shall serve on the assessee a

notice requiring him to furnish within such period, [* * *] as may be specified in the notice, a return of his income or the income of any other person in

respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and

verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be,

apply accordingly as if such return were a return required to be furnished under section 139 :] Provided further that in a caseâ?

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September,

2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of section 143 after the expiry of twelve months specified in the proviso

to clause (ii) of subsection (2) of section 143, but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in subsection (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.] On perusal of above, it is

evident that section 148 specifically provides that all the provisions of Act shall be applicable in respect of return of income u/s 148 as if the same was

return furnished u/s 139. Going further, first and second provisos to section 148, provides the time limit for issuance of notice u/s 143(2) on the basis of

date of filing return of income. Thus, it is not discretionary rather mandatory for an assessing officer to issue notice u/s 143(2) once the return of

income is filed by assessee. The only relaxation in the case of re assessment is that notice u/s 143(2) can be issued at any time before the expiry of

time limit for completing assessment/ re assessment and the same would be deemed as valid notice. However, as stated above, no notice u/s 143(2)

was ever issued in the case of the assessee even though the return of income was filed by the assessee. Thus the completion of the reassessment

proceedings and completion of the assessment is without any valid jurisdiction and therefore the order passed is void ab initio. This contention was also

raised before ld.CIT(A) who sought remand report from ld. AO in this regard. The ld. AO in remand report dated 12/02/2016 at page 2 in last para

observed that: (APB -17)

â??During the assessment proceedings in this case for the assessment year under consideration, the assessee or her authorized representative did not

oppose that the notice u/s 143(2) of the income Tax Act, 1961 was not issued after filing return of income in response to the notice u/s 148 of the

Income Tax Act, 1961. Therefore, under the provisions of Income Tax Act, 1961, the notice u/s 148 canâ??t be issuedâ?¦â?¦â?¦ Ld. CIT(A)

confirmed the validity of assessment order so passed without issue of notice u/s 143(2) by observing that assessee had attended the hearing on several

occasions and no objection was raised during the proceedings before the ld. AO, thus non issuance of notice u/s 143(2) of the Act would not make

assessment order invalid. Ld. CIT(A) further held that such mistake of ld. AO of non issue of notice u/s 143(2) is curable u/s 292BB of the Act.

At this juncture, provisions of section 292BB of the Act are reproduced herewith for the sake of convenience:

292BB. Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance

with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the

notice wasâ?

(a) not served upon him; or

(b) not served upon him in time; or

(c) served upon him in an improper manner: Provided that nothing contained in this section shall apply where the assessee has raised such objection

before the completion of such assessment or reassessment.] In this regard, it is submitted that section 292BB provides that a notice shall be deemed to

be served in a situation that assessee has cooperated/ attended / participated in assessment/ re assessment proceedings and no objection regarding non

receipt of notice was filed during assessment stage. It is worth noticing here that section nowhere provides that â??a notice required to be issued,

shall be deemed to be issuedâ?. Thus, it is evident that deeming provisions of section 292BB are with respect to notices issued but not served/ not

served in time / not served in proper manner. It does not cure the defect so far as notice has not been issued at all.

In this regard, it is further submitted that there are catena of judicial pronouncements, which hold that Omission to issue notice u/s 143(2), is not a

procedural irregularity and the same is not curable. Further, ld. AO in the remand report dated 12/02/2016 (APB 15-18) has stated that return of

income has been filed belatedly thus he not required to issue such notice mandatorily. Your honours would appreciate that it has nowhere been

provided in the Act that AO shall be absolved with the requirement of issuing notice u/s 143(2) in the event of late filing of return. In fact, proviso to

section 148 provides that notice u/s 143(2) can be issued at any time before completion of assessment. Thus, so far as return of income has been filed,

AO ought to have issued notice u/s 143(2), which has not been done in the instant case.

In this regard, reliance is placed on:

Assistant Commissioner of Income Tax v. Hotel Blue Moon 321 ITR 362 (SC) (Case laws Paper book pages 93-99) Search and Seizure â?

Undisclosed Income Detected - Block Assessment â?" Issue of Notice u/s 143(2) within prescribed time Mandatory - Income Tax Act, 1961, ss. 132,

143(2), 158BA, 158BC, 158BH - CBDT

Circular No. 717 Dated 14.08.1995. Though in the above case, assessment was completed by ld.AO u/s 153A, without issuing notice u/s 143(2), the

same is applicable to assessments completed under Act, irrespective of the fact under which section assessment is to be completed as legislature has

provided for issuance of such notice before completion of assessment under whatever section it may be. CIT v. Salarpur Cold Storage (P.) Ltd.

[2014] 50 taxmann.com 105 (All)

10. Section 292BB of the Act was inserted by the Finance Act, 2008 with effect from April 1, 2008. Section 292BB of the Act provides a deeming

fiction. The deeming fiction is to the effect that once the assessee has appeared in any proceeding or cooperated in any enquiry relating to an

assessment or reassessment, it shall be deemed that any notice under the provisions of the Act, which is required to be served on the assessee, has

been duly served upon him in time in accordance with the provisions of the Act. The assessee is precluded from taking any objection in any

proceeding or enquiry that the notice was (i) not served upon him; or (ii) not served upon him in time ; or (iii) served upon him in an improper manner.

In other words, once the deeming fiction comes into operation, the assessee is precluded from raising a challenge about the service of a notice, service

within time or service in an improper manner. The proviso to section 292BB of the Act, however, carves out an exception to the effect that the

section shall not apply where the assessee has raised an objection before the completion of the assessment or reassessment. Section 292BB of the

Act cannot obviate the requirement of complying with a jurisdictional condition. For the Assessing Officer to make an order of assessment under

section 143(3) of the Act, it is necessary to issue a notice under section 143(2) of the Act and in the absence of a notice under section 143(2) of the

Act, the assumption of jurisdiction itself would be invalid.

In the same decision in CIT v. Salarpur Cold Storage (P.) Ltd. (supra), the Allahabad High Court noticed that the decision of the Supreme Court in

Asst. CIT v. Hotel Blue Moon (supra) where in relation to block assessment, the Supreme Court held that the requirement to issue notice under

section 143(2) was mandatory. It was not ""a procedural irregularity and the same is not curable and, therefore, the requirement of notice under section

143(2) cannot be dispensed with"". [2017] 390 ITR 167 (Ker) Travancore Diagnostics (P) Ltd. Vs. ACIT (Case laws Paper book pages 58-61)

Â Reassessment-Â Â Notice-Â Â Validity- Reassessment can be made within time for regular assessment- Reassessment under section 147 read

with section 143(3)Condition precedent- Notice u/s 143(2) Omission to issue notice under section 143(2)- Deject not curable - Section 292BB not

applicable- Reassessment not validIncome Tax Act, 1961, ss. 143,147,292BB 336 ITR 678 - CIT V/s Rajeev Sharma (Allahabad) (Case laws Paper

book pages 6268)

Reassessment - Procedure - Return in response to Notice u/s 148 - Assessing Officer must apply his mind and issue Notice u/s 143(2) - Procedure

must be followed strictly â?" Income Tax Act, 1961, ss. 143, 148. It is further submitted that even if the return of income was filed after the issue of

notice u/s 142(1), the Honâ??ble Delhi court in the case of PCIT-08 vs. Shri Jai Shiv Shankar traders Pvt. Ltd. reported in 383 ITR 448 (Delhi)

(Case laws Paper book pages 29-31) has held that the issue of notice u/s 143(2) is not a procedural requirement and is mandatory and completion of

assessment without issue of notice u/s 143(2) is fatal to the assessment.

In this case, notice u/s 148 was issued on 30.03.2010, in response to which no return of income was filed. On 01.10.2010, Ld.AO issued notice u/s

143(2), which was duly served. Subsequently notices u/s 142(1) were also issued on certain occasions. Authorized representative of assessee, on

16.12.2010 presented and stated that return of income filed u/s 139 may be treated as furnished in response to notice u/s 148. Assessment was

completed vide order dated 31.12.2010, in that situation also, the Honâ??ble Court held that AO ought to have issued notice after 16.12.2010, in

absence of which assessment was held invalid. In our case also, the return was filed after the issue of notice u/s 142(1), thus is squarely covered by

the decision of Honâ??ble Delhi high court, as stated above.

Further reliance is placed on the following:

323 ITR 249 - DIT V/s Society for Worldwide Inter Bank Financial Telecommunications (Delhi) (Case laws Paper book pages 49-50) Â Assessment

- Enquiry - Notice - Only upon Examination of Return - Notice u/s 143(2) served upon assessee before filing of Return Not valid - Assessment completed on basis of Notice invalid - Income Tax Act, 1961, s. 143(2) Â 90 DTR 289 - Saptha Giri Finance & Investments V/s ITO (Madras)

Reassessment â?" Validity - Absence of notice u/s 143(2) - In completing the assessment u/s 148, compliance of the procedure laid down under ss.

142 and 143(2) is mandatory - Once the admitted fact that beyond notice u/s 142(1), there was no notice issued u/s 143(2) and that admittedly the

assessee had requested the officer to accept the original return as a return filed in response to s. 148, there was total failure on the part of the

Revenue from complying with the procedure laid down u/s 143(2) which is mandatory â?" In the absence of notice u/s 143(2), reassessment could not

be held to be validly made.

The facts of that case were that a notice under section 148 of the Act was issued to the assessee seeking to reopen the assessment for the

assessment year 2000-01. However, the assessee did not file a return and therefore a notice was issued to it under section 142(1) of the Act.

Pursuant thereto, the assessee appeared before the Assessing Officer and stated that the original return filed should be treated as a return filed in

response to the notice under section 148 of the Act. The High Court observed that if thereafter, the Assessing Officer found that there were problems

with the return which required explanation by the assessee then the Assessing Officer ought to have followed up with a notice under section 143(2) of

the Act. It was observed that:

Merely because the matter was discussed with the assessee and the signature is affixed, it does not mean the rest of the procedure of notice under

section 143(3) of the Act was complied with or that on placing the objection the assessee had waived the notice for further processing of the

reassessment proceedings. The fact that on the notice issued under section 143(2) of the Act, the assessee had placed its objection and reiterated its

earlier return filed as one filed in response to the notice issued under section 148 of the Act and the Officer had also noted that the same would be

considered for completing of assessment, would show that the Assessing Officer has the duty of issuing the notice under section 143(3) to lead on to

the passing of the assessment. In the circumstances, with no notice issued under section 143(3) and there being no waiver, there is no justifiable

ground to accept the view of the Tribunal that there was a waiver of right of notice to be issued under section 143(2) of the Act.

Recently Jaipur bench of ITAT in the case of Cameron (Singapore) Pte Ltd Vs. ADIT in ITA No. 2/JP/14 vide orders dt. 27/7/2017 held that where

notice u/s 143(2) is not served upon the assessee within the stipulated time period, the consequent order passed cannot be sustained. In that case

though the notice u/s 143(2) was issued but the same was not served upon the assessee within the stipulated time period however, in our case the

notice u/s 143(2) was never served upon the assessee.

The Honâ??ble ITAT Delhi bench in the case of DR. S.B. KALIDHAR Vs. ITO in ITA No. 1082/Del/2016 dated 27.11.2017 has given a finding in

favour of the assessee, by placing reliance on the decision of the Honâ??ble ITAT, SMC-2, Delhi Bench dated 16.10.2015 passed in ITA Nos. 4171-

4175/Del/2015 ((AY 200304) in the case of Ms. Meenakshi Aggarwal vs. ITO & Ors(Case laws paper book pages 7-9) in which reliance was placed

on the decision of the Honâ??ble ITAT, â??Câ?? Bench, Bangalore dated 10.10.2014 in the case of Shri GN Mohan Raju vs. ITO passed in ITA

No. 242 & 243(Bang)2013, wherein it was held as under:

â??7. This brings us to the crux of the issue i.e. whether notices under section 143(2) is mandatory in a reopened procedure and whether notices

issued prior to the reopening would satisfy the requirement specified U/s 143(2) of the Act. That issue of a notice u/s 143(2) of the Act, is mandatory

even in a reassessment proceeding initiated u/s 148 of the Act has been clearly laid down by the Hon'ble Delhi High Court in the case of M/s Alpine

Electronics Asia PTE Ltd., (supra). Hon'ble Delhi High Court had reached this conclusion after considering the decision of the Hon'ble Apex Court in

the case of Hotel Blue Moon (supra). At para-24 of the judgment their Lordship has held that Section 143(2) was applicable to a proceedings u/s

147/148 also, since proviso to section 148 of the Act, granted certain specific liberties to the revenue, with regard to extension of time for serving such

notices. No doubt, Hon'ble Madras High Court in the case of Areva T and D India Ltd., (supra) had held that issue of notice u/s 143(2) was

procedural in nature. However, Co-ordinate Bench in the case of M/s Amit Software Technologies Pvt. Ltd., (supra) after considering the decision of

the Hon'ble Madras High Court as well as Delhi High Court had held that Section 143(2)of the Act, was a mandatory requirement and not a procedural one.

Once notice u/s 148 of the Act, issued to the assessee required it to file a return within 30 days from the date of service of such notice. There is no

provision in the Act, which would allow an AO to treat the return which was already subject to a processing u/s 143(1) of the IT Act, as a return filed

pursuant to a notice subsequently issued u/s 148 of the Act. However, once an assessee itself declare before the AO that his earlier return could be

treated as filed pursuant to notice u/s 148 of the IT Act, three results can follow. Assessing Officer can either say no, this will not be accepted, you

have to file a fresh return or he can say that 30 days time period being over I will not take cognizance of your request or he has to accept the request

of the assessee and treat the earlier returns as one filed pursuant to the notice u/ s 148 of the IT Act. In the former two scenarios, AO has to follow

the procedure set out for a best of judgment assessment and cannot make an assessment under section 143(3). On the other hand, if the AO chose to

accept assessee's request, he can indeed make an assessment under section 143(3). In the case before us, assessments were completed under section

143(3) read with section 147. Or in other words AO accepted the request of the assessee. This in turn makes it obligatory to issue notice u/s 143(2)

after the request by the assessee to treat his earlier return as filed in pursuance to notices u/s 148 of the IT Act was received. This request, in the

given case, has been made only on 05- 10-2010. Any issue of notice prior to that date cannot be treated as a notice on a return jiled by the assessee

pursuant to a notice u/s 148 of the Act. Or in other words, there was no valid issue of notice u/s 143(2) of the IT Act, and the assessments were done

without following the mandatory requirement u/s 143(2) of the IT Act. This in our opinion, render the subsequent proceedings all invalidâ??

In view of above judicial pronouncements, it is submitted that so far as assessee furnished return of income u/s 148, Ld.AO was duty bound to issue

notice u/s 143(2) of the Act. And the non-issuance of notice u/s 143(2) was not a procedural error which could have been corrected in the wake of

deeming provisions of sec 292BB of the Act. Thus, in the case of assessee, since no notice was issued u/s 143(2), it is prayed that assessment

completed u/s 143(3)/ 147 deserves to be Quashed.

6. On the other hand, the ld DR has relied onthe orders of the authorities below

and pleaded that the order of the ld. CIT(A) may be sustained.

7. The Bench have heard both the sides onthis issue and perused the material available on the record. The Honâ??ble Delhi High Court in the case

of Pr.CIT Vs Jai Shiv Shankar Traders Pvt. Ltd. 383 ITR 0448 (Delhi), in the similar circumstances, has held as under: â??No notice under Section

143(2) of the Act was issued to the Assessee after 16th December 2010, the date on which the Assessee informed the AO that the return originally

filed should be treated as the return filed pursuant to the notice under Section 148 of the Act. (Para 12)

The Madras High Court held likewise in Sapthagiri Finance & Investments v. ITO (2013) 90 DTR 289 (Mad). The facts of that case were that a

notice under Section 148 of the Act was issued to the Assessee seeking to reopen the assessment for AY 2000-01. However, the Assessee did not

file a return and therefore a notice was issued to it under Section 142 (1) of the Act. Pursuant thereto, the Assessee appeared before the AO and

stated that the original return filed should be treated as a return filed in response to the notice under Section 148 of the Act. The High Court observed

that if thereafter, the AO found that there were problems with the return which required explanation by the Assessee then the AO ought to have

followed up with a notice under Section 143(2) of the Act. (Para 17)

As already further noticed, the legal position regarding Section 292BB has already been made explicit in the aforementioned decisions of the

Allahabad High Court. That provision would apply insofar as failure of ""service"" of notice was concerned and not with regard to failure to ""issue

notice. In other words, the failure of the AO, in re-assessment proceedings, to issue notice under Section 143(2) of the Act, prior to finalising the

reassessment order, cannot be condoned by referring to Section 292BB of the Act. (Para 18)

Â The resultant position was that as far as the present case was concerned the failure by the AO to issue a notice to the Assessee under Section

143(2) of the Act subsequent to 16th December 2010 when the Assessee made a statement before the AO to the effect that the original return filed

should be treated as a return pursuant to a notice under Section 148 of the Act, was fatal to the order of reassessment. (Para 19) Consequently, there

was no legal infirmity in the impugned order of the ITAT. No substantial question of law arises. The appeal was dismissed.â? (Para 20) Thus, the

facts of the assesseeâ??s case are similar to the facts of the case involved in the decision of the Honâ??ble Delhi High Court wherein it has been

categorically held that the issue of notice U/s 143(2) in reassessment proceedings, prior to finalizing re-assessment order, cannot be condoned by

referring to Section 292BB and is fatal to the order of reassessment. Respectfully following the same, we hereby set aside the order of the authorities

below and allow the grounds No. 1 to 4 of the assesseeâ??s appeal.

8. Since we have quashed the reassessmentproceedings, therefore, there is no need to adjudicate the issues raised in grounds No. 5 to 9 of the appeal.

5. In our considered opinion, the tribunal is bound by the decision of Delhi High Court in the case of Pr. CIT vs. Jai Shiv Shankar Traders Pvt. Ltd.

reported in 383 ITR 448 (Delhi) and has rightly followed the same, which is not challenged.

6. In that view of the matter, we are in complete agreement with the view taken by the tribunal. Hence, no substantial question of law arises.

7. The appeal stands dismissed.

