

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "SMC", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT

आयकर अपील सं. / ITA Nos. 1334/PUN/2019

निर्धारण वर्ष / Assessment Year : 2010-11

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| Bhupendra K. Pathak, B-103, Supreme Green Wood, Hindustan properties, NIBM Road, Kondhwa, Pune 411 018, Maharashtra PAN : AJUPP1585E | Vs. | ITO, Ward-13(3), Pune |
| (Appellant) | | (Respondent) |

Appellant by Shri K. Srinivasan
Respondent by Shri Piyush Kumar Singh Yadav
Date of hearing 27-06-2022
Date of pronouncement 28-06-2022

आदेश / ORDER

PER R.S. SYAL, VP :

This appeal by the assessee emanates from the order passed by the Id. CIT(A) on 28-06-2019 in relation to the assessment year 2010-11.

2. Succinctly, the factual matrix of the case is that the assessee filed original return u/s.139(1) of the Income-tax Act, 1961 (hereinafter also called 'the Act') declaring total income at Rs.5,87,500/-. Thereafter, a notice dated 12-03-2014 was issued u/s.148 of the Act. The assessee furnished his return in response to such a notice on 24-02-2015 declaring total income at Rs.5,72,500/-. The AO completed the assessment determining total

income at Rs.25,34,375/-. In the first appeal, the assessee challenged the assessment order, *inter alia*, arguing that in the absence of any notice having been issued u/s.143(2), the framing of the assessment by the AO u/s.143(3) r.w.s.147 was vitiated. The Id. CIT(A) did not accept this contention by invoking section 292BB of the Act and thus partly allowed the appeal on merits. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

3. I have cogitated over the rival submissions and scanned through the relevant material on record. The assessee has assailed the making of assessment u/s.143(3) r.w.s. 147 on the preliminary legal issue that no notice u/s.143(2) was issued. This contention was espoused before the Id. CIT(A), who has captured the relevant dates on page 6 of the impugned order. It is indisputable that a notice u/s.143(2) was issued on 15-04-2014, which is posterior to the issuance of notice u/s.148. However, return in response to the notice u/s.148 was filed only on 24-02-2015, which is after the date of the afore-referred notice u/s 143(2) of the Act. The AO completed the assessment without issuing any further notice u/s. 143(2) of the Act. Under such circumstances, a question arises as

to whether the assessment order passed by the AO was vitiated on this legal issue?

4. Section 143(2) of the Act stipulates that: `Where a *return has been furnished under section 139*, or in response to a notice under sub-section (1) of section 142, the *Assessing Officer* or the prescribed income-tax authority, as the case may be, *if, considers it necessary or expedient to ensure that the assessee has not understated the income* or has not computed excessive loss or has not under-paid the tax in any manner, *shall serve on the assessee a notice* requiring him, on a date to be specified therein, either to attend the office of the Assessing Officer or to produce, or cause to be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return'. It is manifest that issuance of notice u/s 143(2) is a pre-condition for acquiring jurisdiction to frame assessment where a return has been furnished u/s 139 etc. At the relevant point of time, section 148(1) provides that: `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 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.' On a conjoint reading of sections 143(2) and 148, it gets graphically clear that all the provisions of the Act, which apply to a return filed u/s 139, also apply, so far as may be, to the return filed in response to notice u/s 148, which impliedly includes the requirement of issuing notice u/s 143(2) of the Act. It is not disputed that a notice u/s 143(2) of the Act was issued in this case but prior to the filing of the return by the assessee.

5. What is further significant and needs to be accentuated is that not only the issuance of notice u/s.143(2) *per se* is necessary but equally relevant is its timing. Such a notice is issued to acquire jurisdiction for framing of assessment after the filing of the return as transpires from section 143(2) itself, which provides that '*Where a return has been furnished under section 139,...., the Assessing Officer if, considers it necessary or expedient to ensure that the assessee has not understated the income ... shall serve on the assessee a notice requiring him... to attend the office ...*'. A cursory look at the provision mandates that the notice under this provision is issued where a return has been furnished. In the sequence of timing, the furnishing of return precedes the issuing of

notice under section 143(2). Only when the assessee has furnished the return and the AO, on its examination, considers it necessary or expedient to ensure that the assessee has not understated the income etc., that a notice is issued u/s.143(2) of the Act. Even otherwise, it is axiomatic that the question as to whether or not the assessee has understated the income or computed excessive loss etc., can arise only after going through the return already filed by the assessee. Per contra, if notice is issued u/s. 143(2) before the furnishing of the return, the requirement of section 143(2) cannot be said to have been fulfilled as the AO cannot “consider it necessary or expedient to ensure that the assessee has not understated the income. . . .”. Thus, it is palpable that only when the assessee has furnished his return of income that the AO can issue notice u/s. 143(2) with reference to that return before taking up the assessment u/s. 147.

6. Reverting to the facts of the extant case, it is seen as an admitted position that no notice u/s.143(2) was issued after the furnishing of the return by the assessee on 24-02-2015. The earlier notice issued by the AO u/s.143(2) on 15-04-2014, prior to the filing of the return by the assessee in response to notice u/s 148, is of no avail, thereby in the ultimate analysis, having the effect of

thwarting the jurisdictional requirement for framing the assessment u/s.147 and *ex consequenti* rendering the subsequent proceedings as void.

7. Now I espouse the view point canvassed by the Id. CIT(A) that section 292BB of the Act would come to the rescue of the Revenue and since the assessee participated in the assessment proceedings, the requirement of issuance of notice u/s.143(2) to that extent got fulfilled. Here, it is relevant to note that section 292BB, deeming notice to be valid in certain circumstances, provides that: `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 was— (a) not served upon him; or (b) not served upon him in time; or (c) served upon him in an improper manner..’. It is explicitly comprehensible from language of the section that the notice is deemed to be valid *qua* its *service aspect* subject to the fulfillment of the given conditions. Service of notice

is distinct from its *issuance*. The instant dispute is not of not serving but of not issuing the notice u/s.143(2). This type of situation has not been dealt with in section 292BB of the Act. As I am instantly concerned with the non-issuance of notice u/s.143(2) and not of non-service of notice, it is held that the provisions of section 292BB do not come to support the case of the Revenue.

8. To sum up, the AO, before making the assessment, did not issue any notice u/s.143(2) of the Act after the filing of the return by the assessee in response to notice u/s.148. Non-fulfillment of this statutory jurisdictional requirement rendered the proceedings invalid and the order void. As section 292BB does not validate the case of non-issuance of notice u/s 143(2) on the assessee participating in the assessment proceedings, the *sequitur* is that the assessment proceedings are null and void. I, therefore, set-aside the impugned order.

9. In the result, the appeal is allowed.

Order pronounced in the Open Court on 28th June, 2022.

Sd/-
(R.S.SYAL)

उपाध्यक्ष/ VICE PRESIDENT

पुणे Pune; दिनांक Dated : 28th June, 2022

Satish

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) /
The CIT (Appeals)-5, Pune
4. The Pr. CIT-5, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "SMC"
/ DR 'SMC', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,**// True Copy //**Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

| | | Date | |
|-----|---|------------|-------|
| 1. | Draft dictated on | 27-06-2022 | Sr.PS |
| 2. | Draft placed before author | 28-06-2022 | Sr.PS |
| 3. | Draft proposed & placed before the second member | -- | JM |
| 4. | Draft discussed/approved by Second Member. | -- | JM |
| 5. | Approved Draft comes to the Sr.PS/PS | | Sr.PS |
| 6. | Kept for pronouncement on | | Sr.PS |
| 7. | Date of uploading order | | Sr.PS |
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| 11. | Date of dispatch of Order. | | |

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