

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "SMC-3", NEW DELHI  
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

	I.T.A.No.3002/Del/2016	
	A.Y. : 2006-07	
ZAKIA BEGUM R-7, DDA FLATS, TURAKMAN GATE, ASIF ALI ROAD, NEW DELHI - 110 002 (PAN: AJJPB2357F)	VS.	ITO, WARD 30(I), DRUM SHAPE BUILDING, NEW DELHI
(APPELLANT)		(RESPONDENT)

Assessee by : Sh. WA Khan, Adv.  
Department by : Sh. Anil Kumar Sharma, Sr. DR

**ORDER**

The Assessee has filed the present appeal against the impugned order dated 14/12/2015 passed by the Ld. Commissioner of Income Tax (Appeals), 35, New Delhi on the following grounds:-

1. *That the CIT(A) has not appreciated that the orders of the AO are highly arbitrary, illegal and against the facts of the case.*
2. *That the CIT(A) has not appreciated that the ITO has grossly erred in deciding the case exparte without service of notice u/s. 143(2) within the prescribed time.*
3. *That Ld. CIT(A) has not appreciated that notice u/s. 143(2) of Income Tax Act, 1961 dated 27.6.2007 issued by the ITO was served upon some unknown person/ unrelated person and not upon the assessee. Hence, the orders of the ITO are liable to be quashed on this ground alone.*

4. *That Ld Commissioner Of Income Tax (Appeals) XXV Has Not Appreciated That Ld Income Tax Officer Was Not Justified In Deciding The Case Exparte On 29-12-2008. As No Notice For Fixing The Case For 29-12-2008 Was Issued Or Served Upon The Appellant.*
5. *That Ld Commissioner Of Income Tax (Appeals) XXV Has Not Appreciated That Ld Income Tax Officer Was Not Justified In Determining The Sale Amounting Rs 7,00,000/- . .*
6. *That Ld Commissioner Of Income Tax (Appeals) XXV Has Not Appreciated That Ld Income Tax Officer Has Wrongly / Arbitrarily Determined The Said Sale, Which Is Without Any Basis And Without Any Reasonable Material Available On Record.*
7. *That Ld Commissioner Of Income Tax (Appeals) XXV Has Not Appreciated That All The Additions Made By The A.O. Are Bad In Law, Illegal And Against The Principal Of Natural Justice.*
8. *That Appellant Craves Leave To Add, Alter, Omit To /From The Grounds Of Appeal At The Time Of Hearing.*

*Prayer: -*

*In View Of The Above Mentioned Circumstances It Is Most Respect Fully Prayed That Please Quashed The Orders Of A.O./ Ld Commissioner Of Income Tax (Appeals) XXV Or Alternatively Addition Of Rs. 77600.- Be Deleted Or May Pass Such Orders As Your Good self Consider Fit And Proper In The Interest Of Natural Justice.*

2. The facts in brief are that in this case Return was filed on 4.9.2006 at the income of Rs. 1,32,400/-. The case was processed vide intimation u/s. 143(1) of the I.T. Act, 1961, dated 3.2.2007, at returned income. The case was selected for scrutiny assessment under CASS. Notice u/s. 143(2) of I.T. Act, 1961 dated 27.6.2007, for hearing dated 14.8.2007, was issued. As per AO on non-compliance the case was again re-fixed and notice u/s. 143(2) of the I.T. Act, 1961, dated 25.7.2008, for hearing dated 8.9.2008, was issued. Subsequently notice u/s. 142(1) of the I.T. Act, 1961 dated 24.10.2008 and 12.11.2008, along with questionnaire for hearing dated 24.11.2008 and 08.12.2008, was issued upon the assessee. AO observed that on non-compliance and even after given ample opportunity neither assessee nor her authorized representative has attended the proceedings and he completed the assessment on ex parte basis on the basis of information / documents, keeping in view of the time barred matter. During the year assessee has carried out Trading of cut pieces of Cloths and declared the income u/s. 44AF of the I.T. Act, 1961 @30%, on the Sale of Rs. 441,335/-. AO observed that the turnover at Rs. 7.00 lacs and accordingly taking the profit of the assessee u/s. 44AF of I.T. Act, 1961 @30% and completed the assessment at the income of Rs. 210,000/- as against declared income of Rs. 132,400/- vide his order dated 29.12.2008 passed u/s. 144 of the Income Tax Act, 1961.

3. Aggrieved with the aforesaid order dated 29.12.2008, assessee filed the Appeal before the Ld. CIT(A), who impugned order dated 14.12.2015 has confirmed the additions made by the AO.

4. Against the aforesaid order dated 14.12.2015 passed by the Ld. CIT(A), assessee is in appeal before the Tribunal.

5. At the time of hearing Ld. Counsel of the assessee argued only on the issue involved in ground nos. 2 to 4 relating to non-service of notice u/s. 143(2) of the I.T. Act within the prescribed time; served the notice dated 27.6.2007 to some unknown person/ unrelated person and decided the exparte on 29.12.2008 as no notice for fixing the case for 29.12.2008 was issued and exparte assessment order has been passed. He submitted that the assessee has filed his written submissions on this issue before the Ld. First Appellate Authority but he has also rejected the request of the assessee in routine manner. Finding of the Ld. CIT(A) is contrary to the law and the facts and circumstances of the present case as well as the decision of the Hon'ble Supreme Court of India in the case of ACIT & Anr. Vs. Hotel Blue Moon [2010] 321 ITR 362 (SC) wherein the Hon'ble Supreme Court has held that the issue of notice u/s. 143(2) of the I.T. Act is mandatory and not procedural. If the notice is not served within the prescribed period, the assessment order is invalid. He further submitted that the Ld. CIT(A) has ignored the order of the Hon'ble Supreme Court of India (Supra) and passed the impugned order which is contrary to law and facts on file and deserve to be cancelled.

5.1 Ld. Counsel of the assessee further stated that there are plethora of judgments passed by the Hon'ble Supreme Court of India; Hon'ble Jurisdictional High Courts and the various Hon'ble High Courts wherein the Hon'ble Courts held that non-service of the notice u/s. 143(2) of the I.T. Act, the assessment made in such cases is invalid. He requested that on this ground the assessment in dispute as well as the impugned order passed by the Ld. CIT(A) may be declared invalid, void abinitio. In support of his contention Ld counsel of the assessee cited following relevant judgment:-

- ACIT & anr. Vs. Hotel Blue Moon (2010) 321 ITR 362 (SC)

6. Ld. DR relied upon the order passed by the Ld. CIT(A) and stated that the Ld. First Appellate Authority has passed a well reasoned order on the basis of the records and as per the provisions of law, therefore, the impugned order may be upheld by dismissing the Appeal filed by the Assessee.

7. I have heard both the parties and perused the relevant records especially the order passed by the Revenue Authorities alongwith the documentary evidence filed by the assessee supporting the claim of the assessee as well as the decision rendered by the Hon'ble Supreme Court of India on the legal issue in dispute. No doubt assessee has raised so many grounds of appeal in which the assessee challenged the non-service of the notice u/s. 143(2) of the Act. In support of his contention he has also cited various decisions. Assessee has also challenged the addition in dispute on merit also by producing various documentary evidence supporting its claim before the Revenue Authority as well as before us, but he argued only on the issue involved in ground no. 2 to 4. Keeping in view of the facts and circumstances of the present case and the arguments raised by the Ld. AR, I am of the view that the issue raised in ground No. 2 to 4 regarding the non-issuance of notice u/s. 143(2) of the I.T. Act which goes to the root of the matter, can be taken up first and decide according to the facts and circumstances of the case laws cited by the Ld. Counsel of the assessee.

7.1 I have also perused the assessment order dated 29.12.2008 passed by the Assessing Officer u/s. 144 of the I.T. Act. I find considerable cogency in the assessee's counsel contention that there was non-service of notice u/s. 143(2) of the I.T. Act within the prescribed time; the notice dated 27.6.2007 was served to some unknown person/ unrelated person and decided the exparte on 29.12.2008 as no notice for fixing the case for 29.12.2008 was issued and

exparte assessment order has been passed. I am of the view that the AO has not issued notice u/s. 143(2) of the I.T. Act which is mandatory and it is a failure on the part of the AO for not complying with the procedure laid down in section 143(2) of the I.T. Act. If the notice is not issued to the assessee, then the assessment is not sustainable in the eyes of law and deserve to be cancelled. In view of above facts circumstances of the present case, the issue in dispute raised in ground no. 2 to 4 relating to non service of the mandatory notice u/s. 143(2) of the Act is decided in favor of the assessee by declaring the assessment order dated 29.12.2008 passed u/s. 144 of the I.T. Act as invalid. My view is supported by the various judgment of the Hon'ble Supreme Court, Hon'ble Jurisdictional High Court, other High Courts and Special Benches decision of the ITAT. The relevant portion of the various judgments of the Hon'ble Courts are reproduced as under:-

***ACIT & Anr. vs. Hotel Blue Moon: [(2010) 321 ITR 362 (SC)]***

*HELD: "It is mandatory for the AO to issue notice u/s 143 (2). The issuance and service of notice u/s 143 (2) is mandatory and not procedural. If the notice is not served within the prescribed period, the assessment order is invalid Reassessment-----Notice-----Assessee intimating original return be treated as fresh return--- Reassessment proceedings completed despite assessee filing affidavit denying serviced of notice under section 143(2)---- Assessing Officer not representing before Commissioner (Appeals) that notice had been issued----- Reassessment order invalid due to want of notice under section 143(2)--- Income-tax Act, 1961, ss. 143, 147, 148(1), prov.----ITO v. R.K. GUPTA [308 ITR 49 (Delhi)Tribu.,"*

***DIT vs. SOCIETY FOR WORLDWIDE INTERBANK FINANCIAL TELECOMMUNICATIONS in ITA 441 OF 2010 (Delhi High Court) [(2010) 323 ITR 249]***

*“The notice u/s 143(2) was issued on 23-03-2000 while the return was filed on 27-03-2000. Even if it was issued on 27-03-2000 without examining the return, it was invalid. The notice was invalid and so was the assessment.”*

***DCIT vs. Indian Syntans Investments (P) Ltd. [(2007) 107 ITD 457 (Chennai)]***

*Validity of reassessment order - Non-service of notice under s.143(2) - “The amended Proviso to s.148 of the Income Tax Act 1961 was not applicable in case where the assessee was not served a notice under s.143(2) of the Act. The reassessment made in such a case was invalid S.143(2) and s.148 of the Income Tax Act 1961.”*

***CIT vs. M/s Panorama Builders Pvt. Ltd. in Tax Appeal no. 435 of 2011 of Hon'ble Gujarat High Court***

*Issue Involved: “Whether non-issuance of the notice u/s 143(2) within the prescribed time, made the whole block assessment order null and void and bad in law, despite the assessee not having raised any objection before the passing of the assessment order and despite the provisions of section 292BB of the Act? ”*

*Held: “In this case, Hon'ble High Court has held that section 292BB cures the defects in service of notice but section 292BB is 'confined to only service of notice under this Act and this section does not apply to 'Issuance of notice' under the provisions of Act. It does not lay down that if a mandatory notice is required to be issued by the assessing officer and it has not been issued within the period of limitation fixed under the law, then such notice shall be deemed to have been issued within time.*

*It has been further held that resort cannot be taken by the Revenue to section 292BH to give a go-bye to*

*mandatory requirement of issuance of notice within the statutory fixed by the proviso to section 143(2) of the Act.”*

***CIT vs Rajeev Sharma 336 ITR 678, High court of Allahabad.***

*“In view of above submissions and case laws, it has been established that no notice u/s 143(2) was issued in the present case and therefore the impugned assessment is liable to be annulled.”*

***M/s Saphthagiri Finance and Investments vs. ITO: TC(A). No. 159 of 2006 dated 17.07.2012 (Mad HC) [(2013) 90 DTR (Mad) 289]***

*Relevant para reproduced here under:*

*“13. As far as the present case is concerned, the provisions of Section 148 also uses the expression “so far as may be apply accordingly as if such return were a return required to be furnished under Section 139”. Thus, understanding this provisions in the background of the decision of the Apex Court, on the facts available, we are of the view that in completing the assessment under Section 148 of the Act, compliance of the procedure laid down under Sections 142 and 143 (2) is mandatory. On the admitted fact that beyond notice under Section 142(1), there was no notice issued under Section 143(2), and in the light of the fact that the very basis of the reassessment was the failure on the part of the assessee in not disclosing the capital gains arising on the transfer of property for assessment and that admittedly the assessee had requested the officer to accept the original return as a return filed in response to Section 148 of the Act, we hold that there was total failure on the part of the Revenue from complying with the procedure laid down under Section 143(2) of the Act, which is mandatory one as held by the Apex Court.”*

***Alpine Electronics Asia Pte Ltd. vs. DGIT & Ors: [(2012) 341 ITR 247 (Del)***



*Held: "The service of notice u/s 143(2) within the statutory time limit is mandatory and is not an inconsequential procedural requirement. Omission to issue notice u/s 143 (2) is not curable and the requirement cannot be dispensed with. S. 143(2) is applicable to proceedings u/s 147 & 148."*

***JYOTI PAT RAM VS. ITO [(2005) 92 ITD 423 (Lucknow) - ShreeJai Shiv Shonhor Traders (P) Ltd. - A.Y. - 2008-09***

*"Reassessment order passed under section 143(3)/148 without issue of a valid notice under section 143(2) was illegal."*

***CIT vs. Pawan Gupta & Ors. [(2009) 318 ITR 322 (Del)***

*Hon'ble Delhi High Court held in Para 38 of the order observed as under:-*

*"Thus, we are of the clear view that where the assessing officer is not inclined to accept the return of undisclosed assessment filed by the assessee issuance of a notice under section 143(2) is a prerequisite for framing the block assessment order under chapter XIV B of the Income Tax Act, 1961. We are also of the view that if an assessment order is passed in such a situation without complying with section 143(2), it would be invalid and not be merely irregular."*

***RAJ KUMAR CHA WLA AND ORS. VS. ITO - (2005) 94 ITD 1 (Del)(SB)***

*Limitation for re-assessment- Service of notice u/s143(2) in time - A.Y.1995-96. "It was presumed by legal fiction that a return filed u/s 148 of the Income Tax Act 1961 would be treated as a return filed u/s 139 of the Act. The assessee had filed its return in response to a notice issued u/s 148 of the Income Tax Act 1961. The service of notice u/s143(2) of the Act within 12 months of filing the return u/s 148 of the Act was mandatory, but the notice had been served beyond 12 months.*

*Therefore, as the re-assessment was barred by limitation, no re-assessment could be made u/s 143(3) r/w S.147 of the Act.- ITAT Delhi 'F' Special Bench."*

8. In the background of the aforesaid discussions and precedents relied upon, I am of the considered view that the AO has not issued any notice u/s 143(2) of the I.T. Act to the assessee. During the entire assessment proceedings, the assessment order in dispute is invalid, void abinitio and against the provisions of the law and the impugned order is not sustainable in the eyes of law and hence, I cancel the same by accepting the appeal filed by the Assessee.

9. In the result, the appeal of the Assessee is allowed.

Order pronounced in the Open Court on 09/01/2017.

SD/-

[H.S. SIDHU]  
JUDICIAL MEMBER

*Date 09/01/2017*

*Dragon NS*

*Copy forwarded to: -*

1. Appellant -
  2. Respondent -
  3. CIT
  4. CIT (A)
  5. DR, ITAT
- TRUE COPY

By Order,

Assistant Registrar, ITAT, Delhi Benches