

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH " C ": NEW DELHI  
BEFORE SHRI PRASHANT MAHARISHI,  
ACCOUNTANT MEMBER  
AND  
SHRI K. N. CHARRY, JUDICIAL MEMBER

ITA No. 4862/M/2011 & 6832/Del/2011  
Assessment year 2007 – 08

Hatch Associates India (P) Ltd 1 <sup>st</sup> floor, tower A, Building No. 9, DLF cyber city, Gurgaon 122002 PAN AABCH6540C	vS	ACIT Circle 1(1) Gurgaon
(Appellant)		(Respondent)

Assessee by :	Shri Piyush Kaushik, Advocate
Revenue by:	Shri S R Senapati SR DR
Date of Hearing	28/03/2018
Date of pronouncement	02/04/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

ITA No 4862/M/2011

01. This is the appeal [ITA No 4862/M/2011] is filed by assessee against the order of The Commissioner of Income Tax (Appeals) – 12, Mumbai [The Ld CIT (A)] dated 21/2 2011. The Id CIT (A) dismissed appeal of assessee preferred against the order of The Assistant Commissioner Of Income Tax, Circle – 6 (3), Mumbai [ The Ld AO ] made u/s 143 (3) of The Income Tax Act, 1961 [ The Act] on 2/12/2009. Another appeal is ITA No 6832/Del/2011 which is against penalty u/s 271(1) (C) of the act for same year.

02. The assessee has raised following 4 grounds of appeal:-

- i. the Ld. CIT (A) erred in confirming the action of the AO in disallowing expense of Rs. 2,35,48,974/- incurred towards project advisory services availed from Hatch associates Pty limited, Australia and utilized by it for providing services to its client namely, Blues Scope Steel India Private Limited.
- ii. The Ld CIT (A) erred in confirming the observation of the AO that the said expenditure should be disallowed on the basis interalia that payment has not been made and the same is not genuine and is merely a book-entry to generate loss and evade payment of taxes.
- iii. The Ld. CIT (A) erred in confirming the disallowance made by the AO on the basis that the appellant is not able to prove that the same is incurred wholly and exclusively towards business without appreciating that sufficient evidence was produced to establish the genuineness of the expenditure incurred.
- iv. The Ld. CIT (A) erred in confirming the observation of the assessing officer that the expenditure is not genuine without appreciating that HAA has offered the project advisory services fees for tax vide return of income filed for the assessment year involved and appropriate tax has been withheld at source by the appellant company on accrual of the said amount in its books of accounts.

03. At the time of hearing assessee moved an application under rule 11 of The Income Tax Appellate Tribunal Rules, 1963 for raising an additional legal ground as under:-

*"On the facts and circumstances of the case and in the law, no notice u/s 143 (2) having been served on the assessee subsequent to the filing of return of income on 30/10/2007 within the statutorily prescribed time period, the assessment proceedings completed by the AO vide order u/s143 (3) dated 2/12/09 is bad in law and deserves to be quashed."*

04. The authorized representative submitted that above ground raised in additional ground of appeal involves a question of law. He stated no further facts are required to be investigated and it goes to the root of

the matter of the appeal. Hence, he pleaded that it should be admitted. He submitted that where the tribunal is only required to consider the question of law there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee. For this proposition he relied up on decision of the Hon'ble Supreme Court in the case of National Thermal Power Company Ltd Versus CIT [ 229 ITR 383 (SC)] and decision of the Hon'ble Delhi High Court in case of Orissa Cement Limited versus CIT [(2001) 250 ITR 856 (Del)] and Gedore Tools Private Ltd versus CIT [(1999) 238 ITR 268 (Del) ]. He further relied upon the several decisions for the proposition that an additional ground can always be raised u/s254 before the tribunal if it involves the question of law although it might not have been raised before the Commissioner (Appeals).

05. The Ld. Departmental Representative vehemently objected to the additional ground raised by the assessee. He stated that it should not be admitted as it is not been raised before the CIT (A) or before the AO. He further submitted that the assessee has appeared before the AO and has not objected to the assessment proceedings. Therefore the assessee does not have any right to now agitate that no notice u/s143 (2) has been served on the assessee in time. He further stated that the Ld. AO has written in the assessment order that notice u/s143 (2) has been issued and served on the assessee. He therefore submitted that in view of the above facts it requires a fresh investigation of the facts whether such notices are served on the assessee in time or not. He therefore submitted that additional ground is not a legal ground but a factual ground and therefore it should not be admitted at all.

06. We have carefully considered the rival contentions and the additional ground raised by the assessee. The additional ground raised by the assessee is purely legal in nature and goes to the root of the appeal. Proper service of the notice to the assessee is a foundation for any assessment. Along with application for the admission of additional ground of appeal the assessee has also submitted photocopy of notice u/s 143 (2) of the act, issued by The Assistant Commissioner Of Income Tax, circle 6 (3), Mumbai for assessment year 2007 – 08 dated 17/8/2009. As the assessee has also submitted self certified copy of the notice, we are of the opinion that it does not require to investigate any fresh facts. In view of this, we admit the additional ground and proceed to adjudicate it.
07. The brief facts of the case are that assessee is a company engaged in the business of project advisory services. For AY 2007 – 08 it filed its original return of income on 30-10-2007. It is within the time allowed for filing return of income u/s 139 (1) of the act up to 30/10/2007. Assessee declared total loss of Rs. 1, 37, 07, 983/- and book loss at Rs. 1, 05, 45, 541/-. Subsequently the return was revised on 30/3/2009 where there was no change in the book loss however the loss as per the normal computation of income was revised at Rs. 1 636 5195/-.
08. Consequently, the assessment u/s 143 (3) was made on 2/12/2009. Ld AO made addition of Rs. 23548974/- on account of manpower cost for project advisory services holding that no manpower or technical consultant was deputed by the service provider under the above-mentioned agreement. Therefore, according to him there was no delivery of the services to the assessee. Hence, these expenses were disallowed in the normal computation of the income. Further Rs. 397652/- was also disallowed on account of professional fees

pertaining to assessment year 2006 – 07 which was disallowed in that particular year for non-deduction of the tax and claimed by the assessee as deduction in the current year on payment of tax deduction at source. However, the assessee could not submit the proof of deposit of TDS the Ld. AO disallowed it. Consequently the assessment was made at total income of Rs. 7581431/- where disallowance of various expenditure of Rs. 23946626/- was made to the returned loss of Rs. 16365195/-.

09. The assessee aggrieved with the order of the Ld. AO preferred an appeal before the Ld. CIT (A) who dismissed the appeal. Therefore assessee is in appeal before us.
10. As per the additional ground raised by the assessee it is submitted that the assessee has not been served notice u/s 143 (2) of the income tax act within the prescribed time up to 30/9/2009. The Ld. authorized representative submitted that assessee has filed its original return of income on 30/10/2007. Therefore, according to him, Notice u/s 143 (2) ought to have been served upon the assessee latest within 6 months from the end of the financial year 2007 – 08. He therefore submitted that the latest point of time for issue of notice u/s 143 (2) of the act was only up to 30/9/2008. He further submitted a copy of the notice issued by the Ld. AO u/s 143 (2) of the income tax act for AY 2007 – 08 dated 17/8/2009. According to that notice, date of hearing was fixed on 26/8/2009. He therefore submitted that as the first notice u/s 143 (2) was issued only on 17/8/2009 which is much beyond the stipulated time frame for assuming jurisdiction to frame assessment u/s 143 (3) of Act , assessment framed by the Ld. AO is bad in law. He further submitted that though Ld. AO has mentioned in the assessment order that the notice has been issued u/s 143 (2) to the assessee, however he has not mentioned the date

of issue of such notice and its service on the assessee. He further submitted that assessee has made applications before the Ld. AO including seeking information under Right to Information Act 2005 to permit file inspection to the assessee and also to provide copies of the notices issued and served u/s 143 (2). But unfortunately there is no reply from the Department. He further referred to the decision of the Hon'ble Supreme Court in the case of ACIT versus Hotel Blue Moon [ 321 ITR 362] wherein it has been held that it is mandatory on the part of the AO to issue and serve notice u/s 143 (2) within the stipulated time. Failing which, jurisdiction assumed u/s 143 (3) would be bad in law. He further stated that it is only well settled that the absence of notice u/s 143 (2) within the stipulated timeframe being the jurisdictional notice is not curable defect u/s 292 BB of the Act. He further referred to the several other decisions on the same issue. Therefore, he submitted that, as the notice has not been issued to the assessee within the prescribed period the assessment order passed by the Ld. AO cannot be sustained.

11. The Ld. departmental representative vehemently objected to the facts of the case and stated that the notice has been served and issued to the assessee in time. He referred to the assessment order also wherein it has been specifically mentioned by the Ld. AO that the notice u/s 143 (2) of the act has been issued and served on the assessee. He therefore submitted that the assessee has not objected to the same before the Ld. AO or before the Ld. CIT (A) and therefore now the claim of the assessee cannot be accepted. He further submitted that the assessee has submitted the Xerox copy of the notice u/s 143 (2) of the income tax act 1961 dated 17/8/2009. No original notice has been produced by the assessee before us and therefore the notice submitted by the assessee along with the

additional ground of appeal needs to be verified from the record of the assessment. He further submitted that no notice u/s 143 (2) of the income tax act is dated 17/8/2009 even if it is to be believed it may not be the 1<sup>st</sup> notice but the 1<sup>st</sup> notice has been issued by the Ld. AO within time allowed. He therefore submitted that the plea raised by the assessee deserves to be rejected.

12. We have carefully considered the rival contentions and perused the order of the Ld. AO and the Ld. CIT (A). Admittedly, the impugned assessment year before us is A Y 2007 – 08. For that, AY the assessee has filed return of income on 30/10/2007. Notice u/s 143 (2) of The Income Tax Act should have been served on the assessee within 6 months from the end of the assessment year. Therefore, it should have been served on or before 30/9/2008. The Ld. authorized representative has furnished before us a copy of the notice u/s 143 (2) of the income tax act which is issued on 17/8/2009. Admittedly if this is the first notice served on the assessee u/s 143 (2) of the income tax act, then naturally it has been issued beyond the time prescribed under the provisions of the income tax act. However, it is neither stated by the Ld. authorized representative that this is the only notice issued by the Ld. AO u/s 143 (2) of the income tax act and it has also been controverted by the Ld. Departmental representative that this may not be the first notice issued by the Ld. AO. This confusion has been further compounded by the fact that the Ld. AO has mentioned in the assessment order that notice u/s 143 (2) of the Act has been issued by the AO and served on the assessee. However there is no reference of any date in the assessment order that on which date such notices are issued by the Ld. AO and served on the assessee. It is also an accepted fact that production of the assessment record by the revenue before us for this appeal, which is pending

since 2011, would be a cumbersome task. It is also the fact that despite repeated requests made by the Ld. authorized representative for inspection of the records and even applying under The Right to Information Act 2005, his request has not been acceded to. In view of this, we are not inclined to call for the assessment record before us. For the reason that this appeal was originally filed before the Mumbai benches and subsequently on 21/10/2016 it has been transferred to Delhi benches as per the order of the Hon'ble president dated 30/9/2016. Further, this appeal has been adjourned 23 times, mostly at the request of the assessee. Admittedly, the assessee has not raised this issue before the lower authorities. Assessee neither raised this ground before the Ld. assessing officer but has participated in the assessment proceedings and not before the Ld. CIT (A) in the appellate proceedings but has been raised before us for the first time. As it has been held by the Hon'ble Supreme Court in case of ACIT versus Hotel Blue Moon (supra) that issuance of notice u/s 143 (2) within the statutory time limit is a mandatory requirement and cannot be a procedural irregularity and is not a curable defect. It is further held by the Punjab and Haryana High Court in the case of CIT versus Cebon India Ltd (2009 – TIOL – 351 – HC-PH – IT (347 ITR 583) (P&H) wherein it has been held that that absence of notice cannot be held to be a curable defect u/s 292 BB of the income tax act. In view of the above facts and in the interest of Justice, we set aside the additional ground raised by the assessee to the file of the Ld. CIT (A) to decide whether notice u/s 143 (2) has been issued to the assessee within the time prescribed as per the income tax act or not. The Ld. CIT (A) may also call for the remand report, if he finds it convenient, from the Ld. AO on these facts. He may also examine assessment record, if he deems fit. After such examination, he may decide the



issue in accordance with the law after giving assessee an opportunity of hearing. In the result, additional ground raised by the assessee is allowed with above direction.

13. On the jurisdictional issue, we have set-aside the quantum appeal back to the file of the Ld. CIT (A). Hence, we do not adjudicate other grounds raised by the assessee in the ITA No. 4862/MUM/2011. If the issue of jurisdiction is decided against the assessee, it is permitted to raise those grounds also along with any other grounds of appeal before the coordinate bench.
14. In the result, ITA No. 4862/MUM/2011 for assessment year 2007 – 08 is allowed for statistical purposes.
15. ITA No. 6832/Del/2015 is also filed by the assessee for assessment year 2007 – 08 against the order of the Ld. CIT (A)- Gurgaon, dated 16/1/2015 wherein the penalty levied by the Ld. AO u/s 271 (1) (C) of the income tax act of Rs. 8060435/- vide order dated 2/12/2009 was confirmed.
16. The Ld. authorized representative submitted before us that the above penalty has been levied on the disallowance made by the Ld. AO, which are covered in the quantum appeal in ITA No. 4862/M/2011. He submitted that the assessee has challenged the quantum appeal by raising the additional ground of appeal stating that no notice u/s 143 (2) of the act has been served on the assessee in time.
17. The Ld. departmental representative also reiterated the same facts.
18. We have carefully considered the rival contentions. As in ITA No. 4862/M/2011 in quantum proceedings where the assessee has challenged the appeal on the jurisdictional issue, we have set aside additional ground to the file of the Ld. CIT (A). As quantum appeal has been sent back, there is no reason to keep the penalty appeal pending before us. Therefore, we set aside ITA No. 6832/del/2015 (penalty

appeal) to the file of the Ld. AO. He may levy penalty based on the outcome of quantum appeal.

19. In the result, ITA No. 6832/del/2015 filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 02/04/2018.

-Sd/-  
(K. N. Charry )  
JUDICIAL MEMBER

-Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Date: 02/04/2018  
*A K Keot*

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi