आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

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

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री एन. के. प्रधान लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI NK PRADHAN, AM

आयकर अपील सं./ ITA No. 1744/Mum/2016

(निर्धारण वर्ष / Assessment Year 2010-11)

Shri Sudhir Menon 501, Swapnalok, Marve Road, Malad (West), Mumbai-400 064	Vs.	The Asst. Commissioner of Income Tax, Central Circle-8(2), 676A, 6th Floor, Aayakar Bhavan, Mumbai-400 020
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**
स्थायी लेखा सं./**PAN No. AAJPM4604R**		

आयकर अपील सं./ ITA No. 1466/Mum/2016

(निर्धारण वर्ष / Assessment Year 2010-11)

The Asst. Commissioner of Income Tax, Central Circle-8(2), 676A, 6th Floor, Aayakar Bhavan, Mumbai-400 020	Vs.	Sudhir Menon 501, Swapnalok, Marve Road, Malad (West), Mumbai-400 064
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**

अपीलार्थी की ओर से / **Appellant by**	:	S/Shri SE Dastur, Hiten Chande ARs'
प्रत्यर्थी की ओर से **/ Respondent by**	:	Shri R. Manjunatha Swamy, CIT DR

सुनवाई की तारीख **/ Date of hearing:**	03-10-2018
घोषणा की तारीख **/ Date of pronouncement :**	03-10-2018

आदेश / O R D E R

PER MAHAVIR SINGH, JM:

These cross appeals are arising out of the order of Commissioner of Income Tax (Appeals)-50, Mumbai [in short CIT(A)], in appeal No. CIT(A)-

50/IT-116/2014-15, dated 27.01.2016. The Assessment was framed by the Dy. Commissioner of Income Tax, Central Circle-8(2), Mumbai (in short 'DCIT/ AO') for the A.Y. 2010-11 vide order dated 19/03/2015 under section 143(3) read with section 147 of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The first issue in this appeal of assessee is against the order of CIT(A) confirming the action of the AO in upholding the assessment order which is bad in law as no notice under section 143(2) of the Act was issued, after filing of return of income in pursuant to notice under section 148 of the Act. For this assessee has raised the following additional grounds: -

> *"1. The reassessment proceedings is bad in law as no notice under section 143(2) of the Income-tax Act, 1961 ('the Act') was issued after filing the return of income on 23 May 2013 pursuant to notice issued under section 148 of the act. The notice under section 143(2) of the act on 03. May 2013 is before the filing of the return of income on 23 May 2013 and is therefore illegal and hence the order passed by the assessing officer is bad in law."*

3. The assessee has filed this additional ground vide letter dated 24.09.2018 and urged that the additional ground is in the relation to the validity of the assessment and this being a jurisdictional issue goes to the root of the matter. The learned Counsel for the assessee stated that the facts relating to this jurisdictional ground are already available on the record of the AO or the CIT(A). He relied on the decision of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. Vs. CIT 229 ITR 383 (SC). When these facts were confronted to the learned CIT

DR, he has not objected to the admission of additional ground. Hence, we admit this additional ground and adjudicate the same.

4. Brief facts relating to the additional ground are that the assessee filed his return of income on 31.07.2010 declaring total income at ₹ 46,76,95,780/- and this return was processed under section 143(1) of the Act on 21.03.2012. Thereafter, the case was reopened by issuing notice under section 148 of the Act dated 01.04.2013, which was served on assessee at 08.04.2013. The ACIT, Central Circle-45, Mumbai issued notice under section 143(2) of the Act dated 03.05.2013 requiring the assessee to attend his office on 13.05.2013. The assessee in a response to notice under section 148 of the Act dated 01.04.2013, which was served on assessee on 08.04.2013, filed a letter dated 23.05.2013 stating that return originally filed be treated as return filed in response to notice under section 148 of the Act. According to the learned Counsel no notice under section 143(2) of the Act was issued after the filing of return by assessee i.e. vide letter dated 22.05.2013 which was received in the office of the ACIT, Central Circle-45, Mumbai on 23.05.2013. It means that the return of income was filed on 23.05.2013 in response to notice under section 148 of the Act. The learned Counsel for the assessee now before us stated that when no notice under section 143(2) of the Act, which is a jurisdictional notice, is issued to the assessee in response to return filed under section 148 of the Act, the assessment framed is invalid and bad in law. The learned Counsel for the assessee relied on the decision of Hon'ble Bombay High Court in of ACIT vs. Geno Pharmaceuticals Ltd. (2013) 32 taxmann.com 162 (Bombay) & in CIT vs. Ms. Malvika Arun Somaiya (2010) 2 taxmann.com 144 (Bombay) and Hon'ble Delhi high Court in the case of DIT vs. Society for Worldwide Inter Bank Financial, Telecommunications (2010)323 ITR 249 (Delhi) and also Tribunal's decision of Delhi Bench in ITAs No. 5163 &

5164/Del/2010, 5554/Del/2012 for AY 2004-5 & 2005-06 vide order dated 02.07.2018. When these facts were pointed to the learned CIT Departmental Representative, he only relied on the orders of the lower authorities and on this jurisdictional issue he could not controvert the arguments of the learned Counsel of the assessee.

5. We have heard rival contentions and gone through the facts and circumstances of the case. We find from the facts of the case that an original return of income was filed by assessee on 31.07.2010 and the same was processed under section 143(1) of the Act. Thereafter a notice under section 148 of the Act was issued dated 01.04.2013 and consequently, the notice under section 143(2) of the Act was also issued on 03-05-2013. The assessee in response to notice under section 148 and 143(2) of the Act submitted a reply, which is enclosed at assessee's paper book page 49 filed on 23.05.2013 and the same reads as under: -

"to

The Asst. Comm. Of Income Tax

Central Circle-45,

Mumbai

Ref: Sudhir Menon
AY 2010-11
Sub Notice under section 143(2) rws 148

Sir,

With reference to your notice under section 143(2) read with section 148, we have to submit that return already filed be treated as filed in response to Notice under section 149.

Hope your honour will find this in order.

Thanking you."

6. We find from the facts of the case that notice under section 148 of the Act dated 1.04.2013 and AO before filing of return by assessee in response to this notice, a notice under section 143(2) of the Act dated 03.05.2013 requiring the assessee to attend the office on 13.05.2013. Up to this date no return of income was filed by the assessee in response to notice under section 148 of the Act. Now, can the AO issue notice under section 143(2) of the Act in the absence of pending return of income. In our view, the provisions of section 143(2) of the Act is clear that notice can be issued only when a valid return is pending assessment. Accordingly, this notice has no meaning. The assessee filed return of income under section 148 of the Act vide letter dated 23.05.2013 stating that the original return of income can be treated as return filed in response to notice under section 148 of the Act. It means that the assessee has filed return of income only on 23.05.2013. No notice under section 143(2) of the Act was issued by the Department on or after 23.05.2013. Can assessment be framed without issuing a notice under section 143(2) of the Act when the return was filed by the assessee in response to notice under section 148 of the Act? This issue has been examined by Hon'ble Bombay High Court Geno Pharmaceuticals Ltd. (supra), wherein it is held as under: -

> *"5. Apart from that, it is an admitted position that no notice under Section 143(2) had been issued while making assessment under Section 143(3) read with Section 147. The Apex Court in the case of National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383 has held that the Tribunal has discretion to allow or not to allow a new ground to be raised. But in a case where the Tribunal is only required to*

> *consider the question of law arising from facts which are on record in the assessment proceedings, 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. The ITAT, after relying on the judgment of the Apex Court in R. Dalmia v. CIT [1999] 236 ITR 480/102 Taxman 702, came to the conclusion that issuance of notice under Section 143(2) was mandatory. The ITAT has taken into consideration the relevant provisions and has also taken into consideration the judgment of the Apex Court and relying on the said judgments, the ITAT has held that notice under Section 143(2) is mandatory and in the absence of such service, the Assessing Officer cannot proceed to make an inquiry on the return filed in compliance with the notice issued under Section 148.."*

7. Similar is the position in the case of Ms. Malvika Arun Somaiya (supra), wherein Hon'ble Bombay High Court has considered the similar issue.

8. Further, Hon'ble Delhi High Court in the case of Society for Worldwide Inter Bank Financial, Telecommunications (supra), wherein Hon'ble High Court considered identical situation on facts and held as under: -

> *"5. We are of the view that the impugned order does not call for any interference. Both the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal have returned a concurrent and clear finding of fact that the notice under Section*

143 (2) was issued on 23.03.2000 and since the return was filed on 27.03.2000, the notice was not a valid one and, therefore, the assessment completed on the basis of the notice was also invalid and was consequently set aside. It is for the first time before us that the learned counsel for the appellant contends that the notice, in fact, was issued on 27.03.2000 and not on 23.03.2000, the date which is recorded on the notice itself. No such contention was raised before the Lower Appellate Authorities. Consequently, the said contention cannot be raised before us for the first time.

6. However, even if we accept what the learned counsel for the appellant / revenue submits, it does not make the case any better for him. In para 3.4 of the memorandum of appeal, the appellant has stated that the return was filed by the assessee on 27.03.2000 and the notice under Section 143(2) was served upon the Authorized Representative of the assessee by hand when the Authorized Representative of the assessee came and filed return. However, the date of the notice was mistakenly mentioned as 23.03.2000.

7. Assuming the aforesaid to be true, the notice was served on the Authorized Representative simultaneously on his filing the return which clearly indicates that the notice was ready even prior to the filing of the return. Section 143(2) of the said Act clearly indicates that where a return has been furnished under Section 139, or in response to a

notice under Section 142(1), the Assessing Officer shall-

(i) Where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim.

(ii) Notwithstanding the aforesaid, if the Assessing Officer considers it necessary or expedient to ensure that the assessee has not under-stated the income or has not computed excessive loss or has not under-paid the tax in any manner, he may serve the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support return."

8. The provisions of Section 143(2) make it clear that the notice can only be served after the Assessing Officer has examined the return filed by the assessee. Whereas what para 3.4 indicates is that when the assessee came to file the return, the notice under Section 143(2) was served upon the Authorized Representative by hand. Thus, even if we take the statement of the Assessing Officer at face value, it would amount to gross violation of the scheme of Section 143 (2) of the said Act.

> *9. In any event, we do not agree with the contentions raised by the learned counsel for the appellant that the notice was issued on 27.03.2000 in as much as the Tribunal has already returned a finding that the notice was issued on 23.03.2000. That being the case, no interference with the impugned order is called for."*

9. In view of the fact that notice under section 148 of the Act dated 1.04.2013 was issued and AO before filing of return by assessee in response to this notice, a notice under section 143(2) of the Act dated 03.05.2013 requiring the assessee to attend the office on 13.05.2013 was also issued. Up to this date i.e. 13.05.2013 no return of income was filed by the assessee in response to notice under section 148 of the Act. According to us, in view of consistent view of jurisdictional High Court and Delhi High Court, in the absence of pending return of income, the provisions of section 143(2) of the Act is clear that notice can be issued only when a valid return is pending for assessment. Accordingly, this notice has no meaning. The assessee filed return of income under section 148 of the Act vide letter dated 23.05.2013 stating that the original return of income can be treated as return filed in response to notice under section 148 of the Act. It means that the assessee has filed return of income only on 23.05.2013. No notice under section 143(2) of the Act was issued by the Department on or after 23.05.2013. According to us the assessment framed without issuing a notice under section 143(2) of the Act when the return was filed by the assessee in response to notice under section 148 of the Act, the assessment framed is bad in law. Accordingly, assessment is quashed. This issue of assessee raised by way of additional ground is allowed.

10. The issue on merits in the appeal of assessee and that of the revenue need no adjudication as we have already quashed the assessment.

11. **In the result, the appeal of assessee is allowed and that of the Revenue is dismissed.**

Order pronounced in the open court on 03-10-2018.

आदेश की घोषणा खुले मे दिनंक 03-10-2018 को की गई ।

Sd/-	Sd/-
(एन. के. प्रधान / NK PRADHAN)	(महावीर सिंह /MAHAVIR SINGH)
(लेखा सदस्य / ACCOUNTANT MEMBER)	(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 03-10-2018

सुदीप सरकार, व.निजी सचिव / *Sudip Sarkar, Sr.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)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai