

आयकर अपीलिय अधिकरण, 'सी' न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH: CHENNAI**

श्री एबी टी. वर्की, न्यायिक सदस्य एवं
श्री जगदीश, लेखा सदस्य के समक्ष

**BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND
SHRI JAGADISH, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.1198/Chny/2023
निर्धारणवर्ष/Assessment Year: 2010-11

Netherlands Operating Company B.V. RMZ Millenia (Phase-1), Business Park, 4 th Floor, Campus 1C, 11, Dr. M.G.R. Road, Kandanchavadi, Perungudi, Chennai-600 096.	v.	The ACIT, International Taxation -2(1), Chennai.
[PAN: AABCL 0573 D]		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)
अपीलार्थी की ओर से/ Appellant by	:	Shri Vishal Kalra, Adv. & Shri Ankit Sahi, Adv. & Shri Yishu Goel, Adv. & Shri S.S.Tomar, Adv.
प्रत्यर्थी की ओर से /Respondent by	:	Shri R. Clement Ramesh – Kumar, CIT
सुनवाईकीतारीख/Date of Hearing	:	11.07.2024
घोषणाकीतारीख /Date of Pronouncement	:	21.08.2024

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Learned Commissioner of Income Tax (Appeals), (hereinafter in short "the Ld.CIT(A)"), Chennai-16, dated 31.08.2023 for the Assessment Year (hereinafter in short "AY") 2010-11.

:: 2 ::

2. At the outset, the Ld.AR of the assessee drew our attention to the legal issue that has been raised by the assessee at Ground No.4, which is reproduced as under:

4. That on the facts and circumstances of the case and in law, the AO has erred in passing assessment order under section 143(3) read with section 147 of the Act, without issuing statutory notice under section 143(2) of the Act.

3. The brief facts regarding the legal issue i.e. non-issuance of statutory notice u/s.143(2) of the Income Tax Act, 1961 (hereinafter in short "the Act") by the AO after re-opening of assessment u/s.147 of the Act would vitiate the consequent action of framing of assessment order; and since, the assessee is challenging the jurisdiction of the AO to frame the assessment order after re-opening the assessment, we will adjudicate the same first; The brief facts relevant to legal issue are that the AO noted that the assessee company had filed its return of income (RoI) for AY 2010-11 on 19.09.2010 declaring total income of Rs.6,58,20,854/-. The AO issued notice u/s.148 of the Act on 31.03.2017 conveying his desire to re-open the assessment of the assessee and directed the assessee to file RoI. In response to the notice u/s.148 of the Act, assessee filed letter dated 07.04.2017 requesting the AO to consider the return originally filed on 19.09.2010 as the return filed pursuant to notice u/s.148 of the Act; and also requested for a copy of the reasons recorded to re-open the assessment. The AO gave copy of the reasons recorded

:: 3 ::

for re-opening vide letter dated 15.09.2017; and the assessee's objections against re-opening dated 12.10.2017 was disposed off by the AO on 30.11.2017, and thereafter, the AO proceeded with the assessment proceedings and passed the draft assessment order u/s.144C(1) of the Act on 29.12.2017; and since, assessee didn't file any objection before the Dispute Resolution Panel (hereinafter in short 'DRP'), the AO completed the assessment u/s.144C(3)(b) of the Act on 28.02.2018 by computing the total income at Rs.32,18,84,460/- in place of returned income of Rs.6,58,20,850/-.

4. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A), wherein, the assessee raised legal issue questioning the legal validity of the re-opening of assessment proceedings completed u/s.144C(1) of the Act without issuing notice u/s.143(2) of the Act, which according to the assessee was incurable defect, which vitiates the assessment proceedings and therefore, was *ab initio void*. The Ld.CIT(A) has adjudicated the same from Para Nos.4.3 to 4.1.4 of his order (Page Nos.7-44) and has dismissed the same, after considering the Remand Report from the AO which he reproduced from Para Nos.4.4 to 4.5 (Page Nos.7-23), wherein, the AO has concluded his remand report at Para No.23 as under:-

The emerging principles are:

- (i) Section 147 is a self-contained provision and the limitations and conditions are only those specifically stated therein.

:: 4 ::

(ii) There exist a clear distinction between the assessment under section 143 and that under section 147 read with section 148 and that assessment under section 147 did not depend upon the authority of section 143 for its completion.

(iii) As to the question of assumption of jurisdiction, the same is assumed as sufficient reasons are recorded by the Assessing Officer in order to issue a notice seeking to re-open the assessment under Section 147 of the Act.

(iv) The notice u/s 143(2) is usually issued in the proforma marked as "ITNS-33". It is a communication by the Assessing Officer to the assessee giving him the opportunity as required under section 143(2).

(v) Even though a formal notice mentioning the section 143(2) of the Act was not issued various letters seeking details and evidences were issued to the assessee to produce or cause to be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return.

(vi) While the mandate for 143(2) is 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, the same purpose has been served already under the provisions of section 147 of the Act as a reason to believe with regard to the understatement of income was already present.

(vii) The history of evolution of the provisions of section 143 clearly reveals that the purpose of section 143(2) is to provide opportunity to the assessee.

(viii) Therefore, the requirement, if any, of section 143(2) has been satisfied.

(ix) Section 143 is procedural because it does not deal with any charge of tax, which falls in Chapter II of the Act, Section 143 is not a charging section and thus cannot be said to be substantive. It is a procedural section.

(x) Without prejudice to the above, Non-compliance with the procedural law is merely a procedural irregularity, which can be cured unlike the defects of inherent lack of jurisdiction in an authority to pass an order which of course will be a nullity.

(xi) Once 148 notice is validly issued then the Assessing Officer would be in seizing of the case and have jurisdiction to determine the income escaping assessment. Once this jurisdiction is validly assumed then any lapse in the procedural part would not render the assessment order to be null and void.

(xii) Non-issue of notice or mistake in the issue of notice or defective service of notice does not affect the jurisdiction of the assessing officer, if otherwise reasonable opportunity of being heard has been given.

(xiii) Issue of notice as prescribed in the Rules constitutes a part of reasonable opportunity of being heard.

(xiv) In a given case when the principles of natural justice are stated to have been violated it is open to the Appellate Authority in appropriate cases to set aside the order and require the Assessing Officer to decide the case de novo.

(xv) The legislature, vide Finance Act. 2008 introduced section 292BB thereby giving immunity to the Department by applying Principle of Estoppel in cases

:: 5 ::

where an assessee has appeared or co-operated in any proceeding relating to an assessment or reassessment

5. And the Ld.CIT(A) has dismissed the legal issue by holding as under:

4.6 After consideration of both the submissions my finding on the above issue is recorded below:-

(a) The facts on record exactly fit into the legal issues raised in the case of Rajesh Jhaveri Stock Brokers vs. Asst. commissioner of Income-tax in which the Honourable Supreme Court held as under:

"Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase 'reason to believe' would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in central provinces Manganese ore co. Ltd. vs. ITO (1991[191] ITR 662), for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceedings is not relevant. In other words, at the initiation stage, what is required is, reason to believe but not the established fact of escapement of income.

At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief, whether the materials would conclusively prove the escapement is not the concern the stage. This is so because the formation of belief by the Assessing Officer is with the realm of subjective satisfaction (see ITO vs. selected Dalurband Coal Co. Pvt Ltd. (1996 (217) ITR 597 (SC)), Raymond woolen mills Ltd. vs. ITO (1999/286) ITR 34 (SC)) 17. The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied: firstly, the Assessing Officer must have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Office would have jurisdiction to issue notice under section 148 read with section 147(a). But under the

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substituted section 147 existence of only the first condition suffices. In other words, if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment, it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso."

4.7 Thus, following the above principles laid down by The Honourable Supreme Court, it is concluded that the Assessing Officer acted like a reasonable person for arriving at a "reason" of escaped income on the basis of survey proceedings conducted, during the course of which certain material evidence was found. As 143(1) is a summary assessment, there was no "change of opinion". The appellant has contested the case throughout the assessment proceedings on merits and never asked for an opportunity to cross examine the third party. Having not asked for an opportunity to cross-examine the third party, the appellant cannot raise the question now.

Thus, the reopening proceeding initiated are found to be valid in law.

4.8 Coming to the next issue of non-issue of notice u/s 143(2), I am in complete agreement with Assessing Officer, as the same is a procedural error. It is clear from the assessment record that the appellant was afforded opportunity of hearing and the appellant was aware about the reasons for reopening. There was nothing done at the back of the assessee, so as to be in prejudice. The remand report by the Assessing Officer is relied upon. The need for remand proceedings arise in this case because the question of non-issue of notice u/s 143(2), cross examination of third party, change of opinion and invocation of section 163 were raised first time before me.

4.9 Add to that is the recent Supreme Court decision in the case of Kalinga Institute of Industrial Technology vs. Deputy Commissioner of Income-tax (Exemption), (2023) 151 taxmann.com 434 (SC)/ (2023) 454 ITR 582 (SC) (01.05.2023), in which the Honourable Supreme Court held as under:

"The jurisdiction has been changed after the returns were filed. However, the records also reveals that the assessee had participated pursuant to the notice issued under section 142(1) and had not questioned the jurisdiction of the Assessing Officer.

Section 124(3)(a) precludes the assessee from questioning the jurisdiction of the Assessing Officer if he does not do so within 30 days of receipt of notice under section 142(1)."

4.10 Section 124(3)(a) reads as under:

(3) No person shall be entitled to call in question the jurisdiction of an Assessing Officer-

(a) where he has made a return [under sub-section (1) of section 115WD or under sub-section (1) of section 139, after the expiry of one month from the date on which he was served with a notice under sub-section (1) of section 142 or (sub-section (2) of section 115WE or] sub-section (2) of section 143 or after the completion of the assessment, whichever is earlier,

4.11 The appellant is aware that there is no notice u/s 143(2). However, it has participated in the assessment proceedings willingly and compliantly and

:: 7 ::

haven't raised any question about assumption of jurisdiction. Having not done so during the course of assessment proceedings, the appellant's contest regarding the same before me takes the character of opportunism and unfairness. Thus, on this count also, the appellant fails, and the reassessment proceedings are held to be valid in law

4.12 Further, in the factual matrix as available, there is no requirement for the Assessing Officer to invoke section 163 of the Act. as CB & I Lummus Mauritius is a created structure to avoid tax and is not a distinct legal entity. The same would be discussed in the later part of the order.

4.13 The Assessing Officer in her concluding remarks via her remand report submitted that a procedural error which was not pointed out by the appellant during the course of assessment proceedings cannot nullify the proceedings. I am of the same opinion. The Honourable Supreme Court's decision/in Kaljiga Institute of Industrial Technology adds strength to the same.

4.14 Thus, Grounds of Appeal No.2, 2.1, 2.2, 2.3, 2.4 and 2.5 stand dismissed and the order passed u/s.144C (1) r.w.s 148 of Income-tax Act, 1961 stands strong.

6. Aggrieved by the aforesaid action of the Ld.CIT(A), the assessee is before us.

7. We have heard both the parties and perused the material available on record. We note that the AO found that the assessee company had filed its return of income for AY 2010-11 on 19.09.2010 declaring total income of Rs.6,58,20,854/-. And the AO issued notice u/s.148 of the Act on 31.03.2017 conveying his desire to re-open the assessment of the assessee for AY 2010-11 and directed the assessee to file return of income. In response to the notice u/s.148 of the Act, it is noted that assessee filed letter dated 07.04.2017 requesting the AO to consider the return filed originally for AY 2010-11 on 19.09.2010, and also requested for copy of the reasons recorded for re-opening of assessment. Pursuant thereto, the AO gave a copy of the reasons recorded for re-opening vide

:: 8 ::

letter dated 15.09.2017 and the assessee's objections against reopening dated 12.10.2017 was disposed off by the AO on 30.11.2017. And thereafter, the AO proceeded with the assessment proceedings and passed draft assessment order u/s.144C(1) of the Act on 29.12.2017; and since, assessee didn't file any objection before the Ld.DRP. The AO completed the assessment u/s.144C(3)(b) of the Act on 28.02.2018 by computing the total income at Rs.32,18,84,460/- in place of returned income of Rs.6,58,20,850/-. On appeal, the assessee assailed before the Ld.CIT(A) the action of the AO framing assessment after re-opening of assessment u/s.147 of the Act without issuing mandatory notice u/s.143(2) of the Act. However, the Ld.CIT(A) has dismissed the same (supra). It is undisputed fact that after re-opening of assessment u/s.147 of the Act by issuing notice u/s.148 of the Act on 31.03.2017, the AO before framing the assessment has not issued notice u/s.143(2) of the Act. We find that the legal issue that has been raised before us is *no longer res integra*. A similar case/issue had come up for consideration before the jurisdictional High Court in the case of M/s Amec Foster Wheeler Iberia SLU-India Project Office v. DCIT reported in [2023] 451 ITR 117 (Madras). It is noted that before Hon'ble High Court, the specific argument was that assumption of jurisdiction by an Officer commences with, and is triggered by the issuance of a notice under section 143(2) and failure to do so, would compromise the proceedings fatally. And in

:: 9 ::

that case also, it is noted that the AO had issued notice u/s.148 of the Act, but the AO didn't issue notice u/s.143(2) of the Act, and the AO had referred certain matters to the TPO for determination of the ALP and assessee challenged the action of AO before Hon'ble Madras High Court by filing Writ, since the AO didn't issue notice u/s.143(2) within the timeline prescribed by the Act. And the assessee's prayer before the Hon'ble High Court was that the omission/non-issuance of notice u/s.143(2) of the Act would vitiate the assessment proceedings fatally, and as a sequence of which, the notice u/s.148 of the Act was bad and the assumption of jurisdiction by the AO/TPO was *ab initio void*; and the Hon'ble Madras High Court relying on the decision of the co-ordinate Division Bench in the case of Saptagiri Finance & Investments v. ITO reported in 210 Taxman 78 (Madras), & the decision in the case of CIT v. Alstorm T & D India Ltd., reported in [2014]226 Taxman 103 (Mad.) and the decision of Hon'ble Apex Court in the case of ACIT v. Hotel Blue Moon reported in [2010] 321 ITR 362 (SC) as well as the decision of the Hon'ble Delhi High Court in the case of Alpine Electronics Asia Pte. Ltd. reported in [2012] 341 ITR 247 (Delhi), wherein the Hon'ble Delhi High Court in Alpine Electronics Asia Pte. Ltd. (supra) held as under:

24. Section 143(2) is applicable to proceedings under sections 147/148 of the Act. Proviso to Section 148 of the Act protects and grants liberty to the Revenue to serve notice under section 143(2) of the Act before passing of the assessment order for returns furnished on or before 1st October, 2005. In respect of returns filed pursuant to notice under section 148 of the Act after 1st

:: 10 ::

October, 2005, it is mandatory to serve notice under section 143(2) of the Act, within the stipulated time limit.

8. And the Hon'ble Madras High Court in M/s Amec Foster Wheeler Iberia SLU-India Project Office v. DCIT (supra) also took note of similar decision of the Delhi High Court in the case of Indus Towers Ltd. v. DCIT reported in [2017] 82 taxmann.com 430 (Delhi) which decision was carried in the appeal before the Hon'ble Supreme Court which was dismissed; and the Hon'ble Madras High Court also observed at Para Nos.21-23 CBDT Instruction on the subject as under:-

21. Thus, this point also stands clarified and with that, there is complete uniformity in the conclusion of Courts on the issue as to whether non-issue of notice under section 143(2) would vitiate the assessment, answering the issue in the affirmative.

22. CBDT Instruction No. 3 of 2003 elucidates upon and explains the provisions relating to Transfer Pricing, as contained in sections 92 and 92F of the Act that had come into force, with effect from assessment year 2002-03 onwards.

23. The Circular reinforces the position that it is sine qua non for the Assessing Officer to assume jurisdiction prior to taking any steps in the matter of assessment, including reference of the matter to the TPO. The jurisdiction assumed by an officer in terms of section 120 of the Act is activated by issuance of notice under section 143(2), and as a consequence, failure to issue the statutory notice will lead to the inevitable result of the Officer not having assumed jurisdiction, for all practical purposes.

9. And the Hon'ble Madras High Court was pleased to quash the notice issued u/s.148 of the Act and consequently reference to the TPO was held to be vitiated for non-issuance of notice u/s.143(2) of the Act. We note that in the following cases also the Hon'ble Constitutional Courts have quashed the assessment:

1. Amec Foster Wheeler Iberia SLU - India Project Office vs DCIT [2023] 451 ITR 117 (Madras)
2. CIT vs Alstom T & D India Ltd. [2014] 45 taxmann.com 424 (Madras)

:: 11 ::

3. Sapthagiri Finance & Investments vs ITO (TC(A) No. 159 of 2006 - Madras High Court)
4. ACIT vs Indo Swiss Exports Ltd. [2013] 57 SOT 125 (Chennai) (URO.)
5. ACIT vs Laxman Das Khandelwal [2019] 108 taxmann.com 182 (M.P.) affirmed by the Hon'ble Supreme Court in [2019] 417 ITR 325 (SC)
6. ACIT vs Hotel Blue Moon [2010] 321 ITR 362 (SC)
7. PCIT vs Silver Line [2016] 383 ITR 455 (Delhi)
8. PCIT vs Shri Jai Shiv Shankar Traders (P) Ltd. [2016] 383 ITR 448 (Delhi)
9. CIT vs Rajeev Sharma [2011] 336 ITR 678 (Allahabad)
10. ACIT vs P & R Infraprojects Ltd. (ITA No. 4944/Del/2018)

10. Before us, the Ld.DR submitted that even if notice u/s.143(2) was not issued, it could be cured by sec.292BB of the Act. We don't agree with such a contention of the Ld.DR. We note that similar contention was raised by the Revenue before the Hon'ble Delhi High Court in the case of PCIT v. Silver Line reported in [2016] 383 ITR 455 (Delhi), wherein, the Hon'ble Delhi High Court had repelled such a contention and held that sec.292BB wouldn't come to the rescue of the AO for failure to issue notice u/s.143(2) of the Act prior to finalizing the re-assessment order u/s.143/147 of the Act by holding as under:-

13. In Shri Jai Shiv Shankar Traders (P) Ltd. (supra), this Court has also discussed the distinction between a failure to 'issue' notice and a failure to 'serve a notice on an Assessee. It was held, after noticing the decisions of the Allahabad High Court in CIT v. Rajeev Sharma (2011 336 ITR 678 (2010) 192 Taxman 197 and CIT v. Salarpur Cold Storage (P) Lid [2014] 50 taxmann.com 105 / [2015] 228 Taxman 48 (All.) (Mag.) and the decision of the Madras High Court in Sapthagiri Finance & Investments v. 170 [2012] 25. taxmann.com.341/210 Laxman 78 (Mag.) that Section 292 BB of the Act would apply insofar as failure of 'service' of notice was concerned and not with regard to the 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 finalizing the re-assessment order, cannot be condoned by referring to Section 292BB of the Act.

14. Consequently, the Court does not find merit in the objection of the Revenue that the Assessee was precluded from raising the point concerning the non-issuance of notice under Section 143 (2) of the Act in the present case in view of the proviso to Section 292BB of the Act.

:: 12 ::

11. In the light of the aforesaid discussion, when it is undisputed that no notice u/s.143(2) of the Act was issued by the AO after issuing notice u/s.147 of the Act, the action of the AO framing assessment order dated 28.02.2018 is vitiated and the impugned action of the AO is held to be wholly without jurisdiction and therefore, the assessee succeeds on the legal issue; and the assessment order dated 28.02.2018 is quashed.

12. In the result, appeal filed by the assessee is allowed.

Order pronounced on the 21st day of August, 2024, in Chennai.

Sd/-
(जगदीश)
(JAGADISH)

लेखा सदस्य/**ACCOUNTANT MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 21st August, 2024.

TLN, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai / Madurai / Salem / Coimbatore.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF

Sd/-
(एबी टी. वर्की)
(ABY T. VARKEY)

न्यायिक सदस्य/**JUDICIAL MEMBER**