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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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\+ **ITA 519/2015**

PR. COMMISSIONER OF INCOME TAX-08 ..... Appellant

Through: Ms. Suruchi Aggarwal, Senior Standing counsel with Ms. Lakshmi Gurung, Junior Standing counsel with Ms.Radhika Gupta and Mr. Abhishek Sharma, Advocates.

versus

SHRI JAI SHIV SHANKAR TRADERS PVT. LTD. ..... Respondent

Through: Dr. Rakesh Gupta, Ms Poonam Ahuja, Mr.Somil Agarwal and Mr. Rohit Kumar Gupta, Advocates.

CORAM:
DR. JUSTICE S.MURALIDHAR
MR. JUSTICE VIBHU BAKHRU

O R D E R

% 14.10.2015

1. This appeal by the Revenue is against an order dated 18th February, 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.1068/Del/2013 for the Assessment Year ('AY') 2008-09.

2. The Assessee filed its return of income for the AY in question on 16th September, 2008. The said return was accepted by the Department and an acknowledgement was issued under Section 143(1) of the Act.

3. It appears that subsequently the return was picked up for scrutiny. After recording reasons, notice apparently was issued by the Assessing Officer (AO) to the Assessee on 30th March, 2010 under Section 148 of the Act. It is not in dispute that this notice was never served on the Assessee.

4. Subsequently, on 1st October, 2010, a notice was issued under Section 143(2) of the Act by the AO stating that there were certain points in connection with the return filed for the AY in question on which the AO "would like some further information". The date for the Assessee to attend the AO's office was fixed for 25th October, 2010. Again, it is not in dispute that this notice under Section 143(2) of the Act was also never served on the Assessee.

5. On 21st October, 2010, a notice was issued under Section 142 (1) of the Act fixing the returnable date as 29th October, 2010. A further notice under Section 142 (1) of the Act was issued on 10th December, 2010 with a returnable date of 16th December, 2010. On 16th December, 2010, the Authorized Representative (AR) of the Assessee appeared and informed the AO that the return originally filed on 16th September, 2008 should be treated as the return filed pursuant to the notice under Section 148 of the Act.

6. The AO then proceeded to pass an assessment order on 31st December, 2010 whereby, *inter alia*, an addition of Rs.1 crore was made to the income of the Assessee under Section 68 of the Act as unexplained credits. In the appeal before the Commissioner of Income Tax (Appeals), the Assessee, *inter alia*, raised the issue that in the absence of a notice under Section

143(2) of the Act the order of re-assessment was invalid. The CIT (A) negatived the above contention holding that no specific notice was required to be issued under Section 143(2) of the Act and that questionnaires dated 11th November, 2003 and 21st January, 2004 issued by the AO had provided the Assessee's sufficient opportunity to support his return by documentary evidence. Secondly, it was held that non issue of notice under Section 143(2) did not render the reassessment invalid.

7. The Assessee's further appeal has been allowed by the ITAT by the impugned order. Relying, *inter alia,* on the decision of the Supreme Court in ***ACIT v. Hotel Blue Moon (2010) 321 ITR 362*** and a plethora of judgments of the High Courts, the ITAT concluded that for completing the assessment under Section 148 of the Act compliance with the procedure under Section 143 (2) was mandatory. It was held that if notice was not issued to the Assessee before completion of the re-assessment, then such reassessment was not sustainable in law.

8. When this appeal was first listed before this Court on 29th July, 2015 reliance was placed by Ms Suruchi Aggarwal, learned Senior Standing counsel for the Revenue on the decision of this Court in ***'Commissioner of Income Tax v. Madhya Bharat Energy Corporation Ltd. (2011) 337 ITR 389) Del*** which purported to hold that non-issue of notice under Section 143(2) of the Act on an Assessee prior to completion of the reassessment would not be fatal to the reassessment. She also sought to distinguish the decision in ***ACIT v. Hotel Blue Moon*** (*supra*) on the ground that it pertained to a block assessment.

9. Dr Rakesh Gupta, learned counsel appearing for the Assessee, at the outset drew the attention of this Court to an order passed by this Court on 17th August, 2011 in Review Petition No.441/2011 in ITA No.950/2008 (*CIT v. Madhya Bharat Energy Corporation*) whereby this Court reviewed its main judgment in the matter rendered on 11th July 2011 on the ground that the said appeal had not been admitted on the question concerning the mandatory compliance with the requirement of issuance of notice under Section 143(2) of the Act. In its review order, this Court noted that at the time of admission of the appeal on 17th February, 2011 after noticing that in the said case that no notice under Section 143(2) had ever been issued, the Court held that no question of law arose on that aspect. The upshot of the above discussion is that the decision of this Court in ***CIT v. Madhya Bharat Energy Corporation*** (*supra*) is not of any assistance to the Revenue as far as the issue in the present case is concerned.

10. Ms Aggarwal nevertheless urged that notwithstanding the above position, the decision of this Court in ***CIT v. Vision Inc. (2012) 73 DTR 201 (Del)*** would apply. The said judgment held that since on the facts of that case the Assessee had been properly served with the notice under Section 143(2) of the Act within the statutory time limit prescribed under the proviso thereto, the ITAT should not have set aside the re-assessment in toto. Ms Aggarwal placed reliance on Section 292BB of the Act and urged that the Assessee having not raised any objection about non service of the notice under Section 143(2) of the Act either at any time before the AO or prior to, or during the reassessment proceedings, the Assessee was precluded from

raising such an objection in the subsequent stages of the proceedings.

11. Dr Rakesh Gupta for the Assessee on the other hand placed reliance on a large number of decisions of the High Courts apart from the decision of the Supreme Court in ***ACIT v. Hotel Blue Moon*** (*supra*). He submitted that the failure to issue a notice under Section 143(2) of the Act subsequent to the Assessee having informed the AO that the return originally filed should be treated as the return filed pursuant to the notice under Section 148 of the Act, was fatal to the order of re-assessment.

12. The narration of facts as noted above by the Court makes it clear that no notice under Section 143(2) of the Act was issued to the Assessee after 16th December 2010, the date on which the Assessee informed the AO that the return originally filed should be treated as the return filed pursuant to the notice under Section 148 of the Act.

13. In ***DIT v. Society for Worldwide Interbank Financial Telecommunications (2010) 323 ITR 249 (Del),*** this Court invalidated an reassessment proceedings after noting that the notice under Section 143(2) of the Act was not issued to the Assessee pursuant to the filing of the return. In other words, it was held mandatory to serve the notice under Section 143(2) of the Act only after the return filed by the Assessee is actually scrutinised by the AO.

14. The interplay of Sections 143 (2) and 148 of the Act formed the subject matter of at least two decisions of the Allahabad High Court. In ***CIT v.***

Rajeev Sharma (2011) 336 ITR 678 (All.) it was held that a plain reading of Section 148 of the Act reveals that within the statutory period specified therein, it shall be incumbent to send a notice under Section 143(2) of the Act. It was observed:

> "the provisions contained in sub-Section (2) of Section 143 is mandatory and the legislature in their wisdom by using the word 'reason to believe' had cast a duty on the Assessing Officer to apply mind to the material on record and after being satisfied with regard to escaped liability, shall serve notice specifying particulars of such claim. In view of the above, after receipt of return in response to notice under Section 148, it shall be mandatory for the AO to serve a notice under sub-Section 2 of Section 143 assigning reason therein. In absence of any notice issued under sub-Section 2 of Section 143 after receipt of fresh return submitted by the Assessee in response to notice under Section, the entire procedure adopted for escaped assessment, shall not be valid."

15. In a subsequent judgment in ***CIT v. Salarpur Cold Storage (P.) Ltd. (2014) 50 Taxmann.com 105 (All)*** it was held as under:

> "10. Section 292 BB of the Act was inserted by the Finance Act, 2008 with effect from 1 April 2008. Section 292 BB of the Act provides a deeming fiction. The deeming fiction is to the effect that once the assessee has appeared in any proceeding or cooperated in any enquiry relating to an assessment or reassessment, it shall be deemed that any notice under the provisions of the Act, which is required to be served on the assessee, has been duly served upon him in time in accordance with the provisions of the Act. The assessee is precluded from taking any objection in any proceeding or enquiry that the notice was (i) not served upon him; or (ii) not served upon him in time; or (iii) served upon him in an improper manner. In other words, once the deeming fiction comes into operation, the assessee is precluded from raising a challenge about the service of a notice, service within time or service in an improper manner. The proviso to Section 292 BB

> of the Act, however, carves out an exception to the effect that the Section shall not apply where the assessee has raised an objection before the completion of the assessment or reassessment. Section 292 BB of the Act cannot obviate the requirement of complying with a jurisdictional condition. For the Assessing Officer to make an order of assessment under Section 143 (3) of the Act, it is necessary to issue a notice under Section 143 (2) of the Act and in the absence of a notice under Section 143 (2) of the Act, the assumption of jurisdiction itself would be invalid."

16. In the same decision in ***v. Salarpur Cold Storage (P.) Ltd.***(*supra*), the Allahabad High Court noticed that the decision of the Supreme Court in ***ACIT v. Hotel Blue Moon*** (*supra*) where in relation to block assessment, the Supreme Court held that the requirement to issue notice under Section 143(2) was mandatory. It was not "a procedural irregularity and the same is not curable and, therefore, the requirement of notice under Section 143(2) cannot be dispensed with."

17. The Madras High Court held likewise in ***Sapthagiri Finance & Investments v. ITO (2013) 90 DTR 289 (Mad)***. The facts of that case were that a notice under Section 148 of the Act was issued to the Assessee seeking to reopen the assessment for AY 2000-01. However, the Assessee did not file a return and therefore a notice was issued to it under Section 142 (1) of the Act. Pursuant thereto, the Assessee appeared before the AO and stated that the original return filed should be treated as a return filed in response to the notice under Section 148 of the Act. The High Court observed that if thereafter, the AO found that there were problems with the return which required explanation by the Assessee then the AO ought to

have followed up with a notice under Section 143(2) of the Act. It was observed that:

> "Merely because the matter was discussed with the Assessee and the signature is affixed it does not mean the rest of the procedure of notice under Section 143(2) of the Act was complied with or that on placing the objection the Assessee had waived the notice for further processing of the reassessment proceedings. The fact that on the notice issued u/s 143(2) of the Act, the assessee had placed its objection and reiterated its earlier return filed as one filed in response to the notice issued u/s 148 of the Act and the Officer had also noted that the same would be considered for completing of assessment, would show that the AO has the duty of issuing the notice under Section 143(3) to lead on to the passing of the assessment. In the circumstances, with no notice issued u/s 143(3) and there being no waiver, there is no justifiable ground to accept the view of the Tribunal that there was a waiver of right of notice to be issued u/s 143(2) of the Act."

18. As already noticed, the decision of this Court in ***CIT v. Vision Inc.*** proceeded on a different set of facts. In that case, there was a clear finding of the Court that service of the notice had been effected on the Assessee under Section 143 (2) of the Act. As already further noticed, the legal position regarding Section 292BB has already been made explicit in the aforementioned decisions of the Allahabad High Court. That provision would apply insofar as failure of "service" of notice was concerned and not with regard to 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 finalising the re-assessment order, cannot be condoned by referring to Section 292BB of the Act.

19. The resultant position is that as far as the present case is concerned the

failure by the AO to issue a notice to the Assessee under Section 143(2) of the Act subsequent to 16th December 2010 when the Assessee made a statement before the AO to the effect that the original return filed should be treated as a return pursuant to a notice under Section 148 of the Act, is fatal to the order of re-assessment.

20. Consequently, there is no legal infirmity in the impugned order of the ITAT. No substantial question of law arises. The appeal is dismissed.

S.MURALIDHAR, J

VIBHU BAKHRU, J

OCTOBER 14, 2015
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