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

% ***Judgment delivered on: 27.08.2024***

+ W.P.(C) 10298/2022

SHAILY JUNEJAPetitioner

Through: Mr. Sandeep Goel, Adv.

versus

ASSISTANT COMMISSIONER OF INCOME

TAX CIRCLE 34 -1 AND ANR.Respondents

Through: Mr. Vipul Agrawal, SSC with
Mr. Gibran Naushad and Ms.
Sakshi Shairwal, JSCs.

+ W.P.(C) 9705/2023

PRIMARY REAL ESTATE INVESTMENTSPetitioner

Through: Mr. Prakash Kumar, Adv.

versus

DEPUTY COMMISSIONER OF INCOME TAX,

CIRCLE, INTERNATIONAL TAX 2(2)(2),

DELHI & ANR.Respondents

Through: Mr. Vipul Agrawal, SSC with
Mr. Gibran Naushad and Ms.
Sakshi Shairwal, JSCs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. These two writ petitions impugn the reassessment action as initiated by the respondents in terms of the notices dated 27 March 2022 and 26 July 2022 under Section 147/148 of the **Income Tax Act**,



1961¹.

2. The writ petitioners also assail the final and draft orders of assessment drawn pursuant thereto. The principal ground of challenge to the reassessment action was based upon a conceded failure on the part of the respondents to comply with the requirements of Section 143(2) of the Act. It was thus contended that a failure to issue a notice referable to that provision would be fatal and render the entire proceedings invalid.

3. While considering these two writ petitions, we had in W.P.(C) 10298/2022 taken note of a contention addressed on behalf of the respondents who had sought to canvass the contention that the challenge would not sustain bearing in mind the decision rendered by the Court in **Ashok Chaddha vs. Income-tax Officer**².

4. It becomes pertinent to note that *Ashok Chaddha* was principally concerned with the issue of whether a Section 143 notice and the procedure prescribed therein was liable to be followed while undertaking an assessment under Section 153A. While dealing with the aforesaid, the Court had come to hold as follows:-

“11. It is also to be noted that section 153A provides for the procedure for assessment in case of search or requisition. Sub-section (1) starts with a non obstante clause stating that it was "notwithstanding" anything contained in sections 147, 148 and 149, etc. Clause (a) thereof provides for issuance of notice to the person searched under section 132 or where documents, etc., are requisitioned under section 132A, to furnish a return of income. This clause nowhere prescribes for issuance of notice under section 143(2). Learned counsel for the assessee/appellant sought to contend that the words, "so far as may be applicable" made it mandatory for

¹ Act

² 2011 SCC Online Del 3108



issuance of notice under section 143(2) since the return filed in response to a notice under section 153A was to be treated as one under section 139. Learned counsel relies upon *R. Dalmia v. CIT* (1999) 236 ITR 480 (SC) wherein the question of issue of notice under section 143(2) was examined with reference to section 148 by the Supreme Court in the context of section 147. The apex court held as under (page 488):

"As to the argument based upon sections 144A, 246 and 263, we do not doubt that assessments under section 143 and assessments and reassessments under section 147 are different, but in making assessment and reassessments under section 147 the procedure laid down in sections subsequent to section 139, including that laid down by section 144B, has to be followed."

12. The case of *R. Dalmia v. CIT* (1999) 236 ITR 480 (SC) primarily was with regard to the applicability of section 144B and section 153 (since omitted with effect from April 1, 1989) to the assessment made under sections 147 and 148 and thus cannot be said to be the decision laying down the law regarding the mandatory issue of notice under section 143(2).

13. The words "so far as may be" in clause (a) of sub-section (1) of section 153A could not be interpreted that the issue of notice under section 143(2) was mandatory in case of assessment under section 153A. The use of the words "so far as may be" cannot be stretched to the extent of mandatory issue of notice under section 143(2). As is noted, a specific notice was required to be issued under clause (a) of sub-section (1) of section 153A calling upon the persons searched or requisitioned to file return. That being so, no further notice under section 143(2) could be contemplated for assessment under section 153A.

14. No specific notice was required under section 143(2) of the Act when the notice in the present case as required under section 153A(1)(a) of the Act was already given. In addition, the two questionnaires issued to the assessee were sufficient so as to give notice to the assessee, asking him to attend the office of the Assessing Officer in person or through a representative duly authorized in writing or produce or cause to be produced at the given time any documents, accounts, and any other evidence on which he may rely in support of the return filed by him."

5. Mr. Vipul Agrawal, learned counsel appearing for the respondents, had submitted that bearing in mind the similarity in the language of the two provisions, the decision in *Ashok Chaddha* is



clearly an authority for the proposition that a failure to issue a notice under Section 143(2) would not render the proceedings a nullity. It was Mr. Agrawal's submission that the decision in *Ashok Chaddha* clearly appears to have escaped the attention of the various subsequent decisions handed down by this Court in the context of Section 143(2) and its mandatory application to proceedings pertaining to reassessment.

6. We find ourselves unable to sustain that contention for the following reasons.

7. It must at the outset be borne in mind that *Ashok Chaddha* was principally concerned with an assessment which was predicated upon a search and thus the same being regulated by Section 153A of the Act. It was in the aforesaid context that the Court noted that the **Assessing Officer**³ while undertaking a search assessment was obliged to comply with the assessment procedure otherwise codified only and insofar as they may be applicable. It was in the aforesaid backdrop that the Court in *Ashok Chaddha* came to the conclusion that it would not be mandatory to issue a notice under Section 143(2) while undertaking a search assessment.

8. Quite apart from the aforesaid distinguishing feature, we note that even prior to the judgment rendered by the Court in *Ashok Chaddha*, the mandatory imperatives of Section 143(2) and its applicability to reassessment action was one which had been duly considered by this Court in a host of judgments and those consistently taking the position that Section 143(2) was to be mandatorily

³ AO



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complied with.

9. In order to avoid a replication of the consistent view taken by the Court in this respect, we deem it apposite to extract the following passage from a recent decision rendered by the Division Bench in **Pr. Commissioner of Income Tax-Central-1 vs. Grant Express developers Pvt Ltd⁴**:-

“20. The argument advanced on behalf of the appellant/revenue that the absence of notice under Section 143(2) would not render the assessment order under Section 143(3) defective does not impress us as the import of Section 292BB is to remedy infirmities that arise in the service of notice under the Act. However, this is a case, where no notice under Section 143(2) was issued, as noted by the CIT(A) and affirmed by the Tribunal; which is different from saying that a notice was issued which was deficient. This issue is no longer res integra, as is demonstrable by the decision of the Supreme Court in Commissioner of Income-tax v. Laxman Das Khandelwal, (2019) 108 taxmann.com 183 (SC). For convenience, the relevant reasoning made in this behalf is set forth hereafter:

“7. A closer look at Section 292BB shows that if the assessee has participated in the proceedings it shall be deemed that any notice which is required to be served upon was duly served and the assessee would be precluded from taking any objections that the notice was (a) not served upon him; or (b) not served upon him in time; or (c) served upon him in an improper manner. According to Mr. Mahabir Singh, learned Senior Advocate, since the Respondent had participated in the proceedings, the provisions of Section 292BB would be a complete answer. On the other hand, Mr. Ankit Vijaywargia, learned Advocate, appearing for the Respondent submitted that the notice under Section 143(2) of the Act was never issued which was evident from the orders passed on record as well as the stand taken by the Appellant in the memo of appeal. It was further submitted that issuance of notice under Section 143(2) of the Act being prerequisite, in the absence of such notice, the entire proceedings would be invalid.

8. The law on the point as regards applicability of the requirement of notice under Section 143(2) of the Act is quite clear from the decision in Hotel Blue Moon's case (supra). The

⁴ 2023 SCC Online Del 7316



issue that however needs to be considered is the impact of Section 292BB of the Act.

9. According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.

10. Since the facts on record are clear that no notice under Section 143(2) of the Act was ever issued by the Department, the findings rendered by the High Court and the Tribunal and the conclusion arrived at were correct. We, therefore, see no reason to take a different view in the matter.

11. These Appeals are, therefore, dismissed. No costs.”

10. The aforesaid view came to be reiterated by the Court in **Principal Commissioner of Income-Tax vs. Dart Infrabuild Pvt Ltd⁵**, as would be evident from the following observations which appear in that decision:-

“15.2 The absence of notice, under section 143(2), impregnates the proceedings with a jurisdictional defect and, hence, renders it invalid in the eyes of the law. This position is no longer res integra, as demonstrated by the observations made in *Principal CIT v. Shri Jai Shiv Shankar Traders Pot. Ltd.*¹ (page 452 of 383 ITR):

"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 December 16, 2010, the date on which the assessee informed the Assessing Officer 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 Inter Bank Financial, Tele-

⁵ 2023 SCC OnLine Del 7382



communications', this court invalidated a reassessment proceeding 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 Assessing Officer.

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 Sharma² 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 (page 687):

‘The provisions contained in sub-section (2) of section 143 of the Act is mandatory and the Legislature in its 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 Assessing Officer 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 148, the entire procedure adopted for escaped assessment, shall not be valid.'

15. In a subsequent judgment in *CIT v. Salarpur Cold Storage (P.) Ltd.*³, it was held as under:

‘10. Section 292BB of the Act was inserted by the Finance Act, 2008 with effect from April 1, 2008. Section 292BB of the Act provides a deeming fiction. The deeming fiction is to the effect that once the assessee has appeared in any proceeding or co-operated 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,



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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 292BB 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 292BB of the Act cannot obviate the requirement or 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 *Salarpur Cold Storage (P.) Ltd. (supra)*, the Allahabad High Court noticed that the decision of the Supreme Court in *Asst. CIT v. Hotel Blue Moon'* 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 and Investments v. ITO*². 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 the assessment year 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 Assessing Officer 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 Assessing Officer found that there were problems with the return which required explanation by the assessee then the Assessing Officer 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 under section 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 under section 148



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of the Act and the Officer had also noted that the same would be considered for completing of assessment, would show that the Assessing Officer 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 under section 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 under section 143(2) of the Act'

18. As already noticed, the decision of this court in *CIT v. Vision Inc.*¹ 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 in so far as failure of 'service' of notice was concerned and not with regard to failure to 'issue' notice.

In other words, the failure of the Assessing Officer, in reassessment proceedings, to issue notice under section 143(2) of the Act, prior to finalising the reassessment 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 Assessing Officer to issue a notice to the assessee under section 143(2) of the Act subsequent to December 26, 2010 when the assessee made a statement before the Assessing Officer 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 reassessment." (emphasis is ours)"

11. It is also pertinent to note that the decision in *Ashok Chaddha* was also pressed into aid by the Revenue in **Commissioner of Income-Tax vs. Delhi Kalyan Samiti**⁶. This becomes evident from a reading of Para 4.8 of that decision and where the submissions of the respondents therein came to be recorded as follows:-

"4.8 Mr. Dileep Shivpuri, learned Senior Standing counsel submitted that since the Assessee had failed to file its returns for the relevant AYs within the time prescribed in the notices issued under Section 148 of the Act, the said returns were invalid and were rightly ignored

⁶ ITA 696/2015



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by the AO. He submitted that in the circumstances no notice under Section 143(2) of the Act was required to be issued to the Assessee. He further submitted that the present assessments were framed under Section 144(1)(b) of the Act - on account of failure on the part of an Assessee to comply with all terms of a notice issued under Section 142(1) of the Act or failure to comply with directions issued under Section 142(A) of the Act - and issuance of notice under Section 143(2) of the Act is not a necessary precondition for the same. He contended that the position would be no different even if the returns were filed in the regular course. Mr Dileep Shivpuri relied on the decision of this Court in *Ashok Chaddha v. ITO: (2011) 337 ITR 399 (Delhi)* in support of its contention that no notice under Section 143(2) was required to be issued.”

12. Having noticed the aforesaid contention, the Division Bench proceeded to hold as under:-

“9. It is now well established that if the AO does not accept the return filed by the Assessee on its face and he is required to issue a notice under Section 143(2) of the Act and provide an opportunity to the Assessee to produce the necessary material in support of his return. Mr Shivpuri had argued that a notice under Section 143(2) was required to be issued only in cases where the AO considers it necessary or expedient to do so and in cases where the Assessee had not filed its response to the notice under Section 142(1) it was not necessary for the AO to issue such notice under Section 143(2). In our view, this contention is bereft of any merits and completely ignores the scheme of the machinery provisions for assessment under the Act. It is now well settled by a number of decisions (See: *Pr. CIT v. Silver Line and Anr.: 283 CTR 148 (Del)*, *ACIT v. Hotel Blue Moon: 321 ITR 362 (SC)* and *CIT v. Pawan Gupta: 318 ITR 322 (Del)*) that whenever the return filed by an Assessee is not accepted at its face, it is mandatory for the AO has to issue a notice under Section 143(2) of the Act for proceeding further. It is thus not open for the AO to not issue a notice under Section 143(2) of the Act and proceed directly under Section 144 of the Act by rejecting the return filed by the Assessee.

10. The decision of this Court in *Ashok Chaddha* (supra) was rendered in the context of Section 153A of the Act and in our view, the same is not applicable in the present case. This Court in several cases pertaining to proceedings under Section 147 has held that a notice under Section 143(2) is mandatory. [See: *Alpine Electronics Asia (P.) Ltd. v. DGIT: 341 ITR 247 (Del)*, *DIT v. Society for Worldwide Interbank Financial Telecommunication: 323 ITR 249 (Del)*, *Pr. CIT v Shri Jai Shiv Shankar Traders Pvt. Ltd.: 282 CTR*



435 (Del) and CIT v. Rajeev Verma: 336 ITR (All)]. It is also relevant to note that clause (b) of the proviso to Section 148(1) of the Act also specifically extends the period for issuance of notice under Section 143(2) of the Act.”

13. Consequently, and in light of the above, we find ourselves unable to sustain the submissions addressed by Mr. Agrawal. In the facts of our case, the failure to comply with Section 143(2) was conceded. The reassessment action would thus be liable to be quashed on this short ground alone.

14. We consequently allow the instant writ petitions and quash the impugned notices under Section 147/148 dated 30.03.2021 and 30.05.2022 as well as the orders of assessment dated 27.03.2022 and 26.07.2022.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

AUGUST 27, 2024/RW