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

Judgement reserved on: 18.08.2023
% *Judgement pronounced on : 17.11.2023*

\+ **ITA 10/2022**

PR. COMMISSIONER OF INCOME TAX-1, DELHI
..... Appellant
Through: Mr Sanjay Kumar, Sr. Standing Counsel with Ms Hemlata Rawat and Ms Easha, Advs.

versus

M/S DART INFRABUILD (P) LTD. ..... Respondent
Through: Mr Salil Aggarwal, Sr. Adv. with Mr Madhur Aggarwal, Mr Mahir Aggarwal and Mr Uma Shankar, Advs.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE GIRISH KATHPALIA

RAJIV SHAKDHER, J.:

I. Prefatory facts:

1. This appeal concerns Assessment Year (AY) 2010-11. *Via* the instant appeal, the appellant/revenue seeks to assail the order dated 25.08.2020 passed by the Income Tax Appellate Tribunal [hereafter referred to as "Tribunal"].

2. Two issues arise for consideration by this Court.

2.1 First, whether the notice dated 30.03.2015 issued under Section 148 of the Income-tax Act, 1961 [hereafter referred to as "the Act"] was served at the correct address of the respondent/assessee.

2.2 Second, whether the appellant/revenue was obliged, in the facts and circumstances of the case, to mandatorily serve a notice under Section 143(2) of the Act before passing the assessment order dated 28.03.2016 under Section 147/144 of the Act.

3. Thus, before we proceed further, insofar as the first issue is concerned, what is required to be ascertained is whether the appellant/revenue had the correct address available in its record when it triggered the reassessment proceedings *qua* the respondent/assessee, as the controversy centres on the availability of the new address in the database of the appellant/revenue.

3.1 The old address of the respondent/assessee [which then went by the name Kiwi Infrabuild Private Limited] was the following:

"*C-78, Ganga Vihar, Delhi-110094*." [hereafter referred to as "old address"]

3.2 While the new address of the respondent/assessee was as follows:

"*Mahajan House, E-1, South Extension, Part-II, New Delhi-110049*." [hereafter referred to as "new address"]

4. The facts, as gleaned from the record concerning the above-mentioned issues, reveal the following.

4.1 The respondent/assessee had not filed its Return of Income (ROI) for the AY in issue, i.e., AY 2010-11 up until 04.12.2015. However, insofar as ROI for AY 2013-14 was concerned, it was filed on ***01.08.2013***, bearing the ***old address***. The ROI for ***AY 2013-14*** was processed under ***Section 143(1)***

of the Act, and an intimation in this behalf, dated ***07.03.2014***, was directed to the ***new address***. The Assessing Officer's (AO) record, concededly, included the Ministry of Corporate Affairs (MCA) website screenshot that contained the ***new address*** of the respondent/assessee. The record also reveals that, *via* ***communication dated 14.03.2014***, the respondent/assessee had intimated to the Income Tax Officer, Ward-5(3) [hereafter referred to as "ITO"] that its registered office had been relocated. Furthermore, *via* the same communication, the respondent/assessee indicated that its ***new email ID*** was sagarpnp@hotmail.com. For ease of reference, the communication was accompanied by Form 18, filed with the Registrar of Companies, National Capital Territory of Delhi and Haryana [ROC] as per the provisions of Section 146 of the Companies Act, 1956.

4.2 The ROI for AY 2014-15 was filed on ***03.11.2015***, depicting the ***new address***.

5. Interestingly, despite the appellant/revenue being given intimation about the new address, it issued a notice dated ***03.06.2015*** to the respondent/assessee under Section 142(1) of the Act concerning the AY in issue, i.e., AY 2010-11 [accompanied by a list that set out aspects *qua* which the respondent/assessee was required to furnish details], at the ***old address***. However, a course correction was made when the Section 142(1) notice dated 12.06.2015 was issued to the respondent/assessee, albeit at the ***new address***.

5.1 As alluded to above, it is in response to the notice dated 12.06.2015 that the respondent/assessee lodged a letter dated 29.12.2015 with the AO, which was accompanied by an acknowledgement dated 04.12.2015, received by it concerning the ROI for AY 2010-11. Via this letter, the

respondent/assessee also sought a copy of the document in which the AO would have recorded his 'reason to believe' for triggering reassessment proceedings *qua* AY 2010-11.

6. Although the appellant/revenue has also referred to notices dated 18.09.2015 and 26.11.2015, claimed to have been issued under Section 142(1) of the Act, these notices have not been placed on record for reasons best known to it.

7. The record also reveals that on 28.01.2016, the Chartered Accountant of the respondent/assessee attended the assessment proceedings and filed his Power of Attorney. Furthermore, *via* letter dated 16.02.2016, the respondent/assessee filed a copy of the balance sheet, and at its request, the case was adjourned to 23.02.2016. As the respondent/assessee was not represented at the proceedings that day, a final show cause notice dated 29.02.2016 was issued, fixing the hearing on 04.03.2016. On this date, the AO claims to have received a letter from the respondent/assessee with a request to adjourn the case, and accordingly, at its request, the case was adjourned to 07.03.2016. The record shows that no one from the respondent's/assessee's side attended the hearing on 07.03.2016. However, on 08.03.2016, the CA of the respondent/assessee participated in the assessment proceedings and filed a letter dated 07.03.2016 requesting to be furnished with a copy of the approval granted by the Joint Commissioner of Income Tax (JCIT) to reopen the case. This query of the respondent/assessee was disposed of *via* final show cause notice dated 09.03.2016. Furthermore, it is also noticed that through a letter dated 10.03.2016 [received by the AO on 14.03.2016], the respondent/assessee had stated that the assessment proceedings initiated under Section 147 were illegal and void as no

permission was granted as per the provisions of Section 151 of the Act.

8. Regarding the second issue, it has come to the fore that the appellant/revenue, concededly, had not issued a notice under Section 143(2) of the Act to the respondent/assessee. The appellant/revenue, however, has taken the stand, both before the Tribunal as well as before this Court, that since the ROI for the AY in issue, i.e., AY 2010-11, was filed beyond the thirty (30) days provided in the notice dated 30.03.2015, issued under Section 148 of the Act, it was not obliged to issue a notice under Section 143(2) of the Act before passing the assessment order.

9. On merits, the record reveals that the AO has made an addition under Section 68 and disallowance under Section 14A of the Act. Under Section 68 of the Act, the AO had made an addition amounting to Rs. 25,07,50,000/, besides initiating penalty proceedings under Section 271(1)(c) of the Act.

9.1 The addition amounting to Rs. 25,07,50,000/- was on account of monies received by the respondent/assessee towards share capital and share premium, which, in turn, had been invested in equity shares of unquoted or unlisted companies, and for according loans and advances. Towards share capital, Rs. 8,50,000/- was received by the respondent/assessee. Insofar as the share premium was concerned, the respondent/assessee received Rs. 24,99,00,000/-. Apart from this, the addition made under Section 14A of the Act was pegged at Rs. 6,25,825/-.

II. Submissions by counsels:

10. Mr Sanjay Kumar, learned senior standing counsel who appears on behalf of the appellant/revenue, made the following submissions concerning the issues mentioned above.

(i) The notice dated 30.03.2015, issued under Section 148 of the Act, was directed to the ***old address*** as that was the address available in the record of the appellant/revenue. Besides this, service *qua* the said notice was also effectuated via affixation at the old address. The Tribunal's conclusion to the contrary, i.e., that the Section 148 notice should have been directed to the new address is erroneous. This submission finds support from the fact that the ROI for AY 2013-14 depicted the old address.

(ii) The Tribunal failed to appreciate the scope and ambit of the provisions of Section 292BB of the Act, which provides that the concerned assessee would be deemed as having been served in proceedings taken out against him if he fails to object to the absence of service before the completion of the assessment proceedings.

(iii) In the letter dated 16.03.2016, filed with the AO during the assessment proceedings, the respondent/assessee did not raise the issue that it had not been served at the correct address. The focus of the said letter was that the Section 148 notice issued to the respondent/assessee was beyond the period prescribed under Section 149 of the Act. It was emphasised that six (6) years, as prescribed, concerning the AY in issue, i.e., AY 2010-11, had expired on 31.03.2016. Besides this, the other objection raised was that the notice under Section 148 could not have been issued by an officer below the rank of JCIT. In sum, practically no objection was raised about the Section 148 notice being directed to the wrong address, i.e., the ***old address***.

(iv) The conclusion reached by the Tribunal concerning service of notice under Section 148 is contrary to the ratio of the following decisions: ***Principal Commissioner of Income Tax-Mumbai v. I-Ven Interactive Ltd.*** (2019) 110 taxmann.com 332 (SC) and ***Commissioner of Income-tax-III v.***

Sudev Industries Ltd. (2018) 94 taxmann.com 373 (Delhi).

(v) As regards the issue concerning obligation cast on the appellant/revenue with regards to the service of notice under Section 143(2) of the Act, the same did not arise in this case as the respondent/assessee had failed to file its return within thirty (30) days, as stipulated in the notice dated 30.03.2015, issued under Section 148 of the Act. Besides this, since the respondent/assessee failed to comply with the directions contained in the notice issued under Section 142(1), the AO was well within his rights to pass an assessment order by taking recourse to Section 144 of the Act. In that regard, the final show cause notice was issued on 09.03.2016. As there was no compliance, the assessment *qua* the respondent/assessee was completed based on the material available on record.

(vi) The Tribunal's conclusion that, since the belated ROI filed by the respondent/assessee was considered, it could not be treated as an invalid return was erroneous. An invalid return forms part of the 'material available on record'; hence, the AO was entitled in law to frame the assessment order under Section 144 of the Act. 'Invalid' return falls within the ambit of the expression "all relevant material" referred to in Section 144 of the Act.

(vii) The Tribunal has taken a diametrically opposite view to the one taken by the coordinate bench of the Income Tax Appellate Tribunal in the matter of ***Rakesh Aggarwal v. ITO***. In this case, the Tribunal had ruled that since the assessee had not filed its return in time, the belated return was non-est in law, and, therefore, there was no requirement to issue a notice under Section 143(2) of the Act.

11. In rebuttal, Mr Salil Agarwal, Senior Advocate, who appeared on behalf of respondent/assessee, relied on the impugned order passed by the

Tribunal. Broadly, it was Mr Agarwal's submission that the Tribunal had recorded findings of fact concerning both issues. It was emphasised that the notice dated 30.03.2015 issued under Section 148 of the Act was, admittedly, directed towards the ***old address***, although the AO had been informed about the ***new address***. Furthermore, the order sheets on record do not reveal that service had been affected on the respondent/ assessee concerning the notice issued under Section 148 by affixation. On this aspect, Mr Agarwal's submissions can be broadly paraphrased as follows:

(i) Since the AO has not set out reasons for taking recourse to affixation, and that too, at the old address, the service said to have been affected via affixation is invalid in law. It must be highlighted that there is no reference to the notice server's report in the assessment order. The burden of service of Section 148 notice rests on the appellant/revenue, which has not been discharged in this case. [See ***CIT v. Hotline International Pvt. Ltd.*** (2008) 296 ITR 333 (Delhi HC); ***CIT v. Chetan Gupta*** (2016) 382 ITR 613 (Delhi HC)].

(ii) The reliance placed on the provisions of Section 292BB of the Act is misdirected for the following reasons. First, the appellant/revenue did not advance this argument before the Tribunal. The Tribunal, therefore, had no occasion to deal with this submission. Second, in the reply dated 16.03.2016, the respondent/assessee had, amongst other objections, squarely taken the objection that the proceedings were invalid in the eyes of law as the Section 148 notice had not been directed to the correct address. [See ***CIT v. Chand Ratan Bagri*** (2010) 329 ITR 356 (Delhi); ***CIT v. Indoconut Finance Ltd.*** (2004) 136 Taxman 23 (Delhi); ***Rambhai Mafatlal Patel v. ITO*** (2021) 281 Taxman 196 (Gujarat)].

11.1 As regards the second issue, concededly, the respondent/assessee had brought to the notice of the AO, *via* its reply dated 29.12.2015, in response to the notice dated 12.06.2015 issued under Section 142(1), that it had filed its ROI on 04.12.2015 in response to the Section 142(1) notice issued on 12.06.2015 and the Section 148 notice issued on 30.03.2015. Therefore, although the ROI was available on record, which was considered while framing the assessment order, no notice, under Section 143(2) of the Act, was issued to the respondent/assessee before framing the assessment order. A perusal of the order sheets framed by the AO would also establish this fact. Thus, the impugned assessment order, which has been framed without a notice being issued to the respondent/assessee under Section 143(2) of the Act, is unsustainable in law. Such an infraction, being a jurisdictional defect, would render the impugned assessment order untenable in the eyes of the law. [See ***CIT v. Delhi Kalyan Samiti*** *in ITA 696/2015*; ***PCIT v. Atlanta Capital Pvt. Ltd.*** 2015:DHC:7888-DB; ***CIT v. Laxman Das Khandelwal*** (2019) 108 taxmann.com 183 (SC); ***PCIT v. Shri Shiv Shankar Traders*** (2015) 64 taxmann.com 220 (Delhi); ***PCIT v. Silverline*** (2016) 383 ITR 455 (Delhi)]

III. Analysis and Reasons:

12. Having heard learned counsel for the parties and perused the record, what emerges is that the notice dated 30.03.2015, issued under Section 148 of the Act to the respondent/assessee, was, indeed, directed to its ***old address*** even though the AO had been intimated, on 14.03.2014, that there had been not only a change in the physical address of the respondent/assessee but also its email ID. Furthermore, the appellant/revenue had directed the intimation

dated 07.03.2014, issued under Section 143(1) of the Act, concerning AY 2013-14, to the new address. This occurred even though the ROI, filed for AY 2013-14 on 01.08.2013, bore the old address. The reason, perhaps, was that the AO was already aware of the address change.

12.1 The Tribunal has also recorded a finding of fact that the new address was available in the record of the AO. The AO had in his record the screenshot of the material available with the MCA indicating a change of address.

13. The argument advanced on behalf of the appellant/revenue that, as per Section 292BB, Section 148 notice would be deemed as served on the respondent/assessee as it did not object to it during the assessment proceedings is misconceived for the following reason.

13.1 A perusal of the reply dated 16.03.2016 would show that, amongst other aspects, the respondent/assessee had objected to the notice under Section 148 being directed to the old address. The reply bears out this fact. For convenience, the relevant extract from the reply is set out hereafter:

> "*Dear Sir,*
>
> *The assessee is in receipt [of] notice U/s 148 of the Income Tax Act, 1961 (hereinafter called as "ACT" for short) dated 12.06.2015 for the Assessment year 2010-11. The assessee['s] broad submissions is, this regard are given in as under:*
>
> 1. *The registered office of the company was changed and same has been informed to department of Income Tax Ward 5(3) on dated 14-3-2014. This change was properly registered with [the]Registrar Of Companies Delhi and*

Haryana.

2. *The assessee has first time received the notice at the above address on 12.06.2015*.

xxx xxx xxx

Sir during the last communication it came to our notice that Your goodself is addressing letter at old address. ***Your goodself is requested to update your records. You are also further requested that if you have sent notice and mail at old address that will not treated as valid notice. So your goodself is requested to drop assessment proceedings.***"

[Emphasis is ours]

13.2 Since the objection was taken before the completion of the assessment/reassessment proceedings, in our opinion, the provision of Section 292BB would have no application.

14. Although we may note that submissions based on Section 292BB were not advanced on behalf of the appellant/revenue before the Tribunal, in our opinion, since it was a pure legal submission, that by itself, cannot come in the way of the appellant/revenue. However, in this case, the provision can have no applicability as the respondent/assessee objected to the notice under Section 148 not being directed to the correct address.

15. This brings us to the second aspect of the matter, i.e., the consequences of the failure of the appellant/revenue to issue notice under Section 143(2) of the Act before framing the assessment order. Concededly, the appellant/revenue did not issue a notice under Section 143(2) of the Act, although it had on record the ROI filed by the respondent/assessee for the

AY in issue, i.e., 2010-11. The return was, concededly, filed on 04.12.2015. This return was considered while framing the assessment under Section 147/144 of the Act. The only reason furnished for not issuing a notice under Section 143(2) of the Act is that the ROI was not filed within the thirty (30) days provided *via* the notice dated 30.03.2015 issued under Section 148. This argument does not impress us because if we were to hold [as we have], that the said notice was directed towards the wrong address, the respondent/assessee could have not adhered to the timeline provided in the said notice.

15.1 The respondent/assessee became aware of the Section 148 notice being issued after it received the notice dated 12.06.2015 under Section 142(1) of the Act. The fact that the respondent/assessee had filed an ROI on 04.12.2015 is not disputed. The fact that this ROI, as noticed above, was taken into account is also not in dispute. Therefore, in our opinion, before framing an assessment order, the AO ought to have issued a notice under Section 143(2) of the Act. The submission advanced on behalf of the appellant/revenue that, while it could consider the invalid return while framing the assessment order, it was not obliged to issue a notice under Section 143(2) of the Act because it was not filed within the timeframe given in the Section 148 notice is untenable in law, since the ROI, which was belated, was considered by the AO while carrying out the assessment.

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 Commissioner of Income-tax v. Shri Jai Shiv Shankar Traders (P.) Ltd.*** (2015) 64 taxmann.com 220 (Delhi):

"***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 Interbank Financial Telecommunications [2010] 323 ITR 249 (Delhi),* ***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 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 (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 duly 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.*** *[2014] 50 taxmann.com 105 (All), 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 282BB 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 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 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 [2012] 25 taxmann.com 341/210 Taxman 78 (Mad.) (Mag.). 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 Vision Inc. (supra) 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."

[Emphasis is ours]

IV. Conclusion:

16. On both aspects, the Tribunal is right. The Tribunal has returned findings of fact on the two issues adverted to hereinabove.

17. Thus, for the foregoing reasons, which are i) that notice under Section 148 of the Act was improperly served, and ii) that notice under Section 143(2) should have been issued before framing of assessment order under Section 147/144 of the Act, we are not inclined to interfere with the impugned order passed by the Tribunal.

18. According to us, no substantial question of law arises for our consideration.

19. The appeal is, accordingly, closed.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

NOVEMBER 17, 2023
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