IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C', NEW DELHI

Before Sh. N. K. Saini, AM and Smt. Beena A. Pillai, JM

ITA No. 5163/Del/2010 : Asstt. Year : 2004-05
ITA No. 5164/Del/2010 : Asstt. Year : 2005-06
ITA No. 5554/Del/2012 : Asstt. Year : 2005-06

Halcrow Group Ltd., R-27, 2nd Floor, Pratap Market, Jangpura-B, New Delhi	Vs	ADIT, International Taxation, New Delhi-110002
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACH7866E		

Assessee by : Sh. Salil Kapoor, Sumit Lal Chandani &
Ms. Ananya Kapoor, Advs.
Revenue by : Sh. G. K. Dhall, CIT DR

Date of Hearing : 03.05.2018		**Date of Pronouncement : 02.0 7.2018**

ORDER

Per N. K. Saini, AM:

The appeals by the assessee are directed against the separate orders each dated 15.10.2010 passed by the AO u/s 143(3) r.w.s. 144C(5) of the Income Tax Act, 1961 (hereinafter referred to as the Act) for the assessment years 2004-05 and 2005-06 and another appeal is against the order dated 28.09.2012 for the assessment year 2005-06 passed by the AO u/s 154 of the Act.

2. Since, the appeals were heard together, so, these are being disposed off by this consolidated order for the sake of convenience and brevity.

3. At the first instance, we will deal with the appeal in ITA No. 5163/Del/2010 for the assessment year 2004-05. Following grounds have been raised in this appeal:

"1. That the notice issued U/s 148 is illegal, bad in law and without jurisdiction and the reassessment order passed is also illegal, bad in law, without jurisdiction and liable to be quashed.

2. There is no escapement of income as the earlier assessment was completed U/s 143(3) after considering all relevant material and facts. The notice issued U/s 148 is illegal, bad in law has been issued without any application of mind.

3. The notice U/s 148 has been issued on the basis of change of opinion and such notice is illegal, bad in law and without jurisdiction.

4. That no Notice U/s 143(2) has been issued within 12 months from the end of the month in which the return is filed, hence the reassessment framed is illegal, bad in law and without jurisdiction and no addition could have been made by the AO. The notice issued U/s 143(2) on 23.3.2009 is much before the service of notice U/s 148 and the same is illegal and bad in law and do not conform with the legal requirements.

5. That the directions issued by Dispute Resolution Panel U/s 144C are incorrect, bad in law and have been passed without properly and judicially considering the submission of the appellant. The directions issued are against the principle of natural justice.

6. That in view of the facts and circumstances of the case, the AO has erred in law and facts in treating the contract receipt as Fee for Technical Service (FTS), He has failed to appreciate that neither under the provisions of section 9 of the Income Tax nor under the provision of Article 13 of Double Taxation Avoidance Agreement (DTAA) between India and United Kingdom, the said receipts could be taxed as Fee for Technical services. The income from said receipt is chargeable as normal business profit of the PE and the provisions of section 44D are not applicable. The addition / disallowances have

been wrongly and illegally made and the tax has been wrongly charged.

7. That the interest u/s 234A, 234B, 234C has been wrongly and illegally charged as there is no delay in filling of return and there is no default of payment of Advance tax as the receipt / income is liable to TDS.

8. That the explanations given, evidence produced and material placed and made available on record have not been properly considered and judicially interpreted and the same do not justify the addition made.

9. That the addition / disallowance made is based on mere surmises and conjunctures and the same cannot be justified by any material on record.

10. The Appellant craves leave to add, amend, alter and/or delete any of the above grounds of appeal at or before the time of hearing."

4. The assessee also raised the following additional grounds vide letter dated 17.07.2017:

"11. That without prejudice, the income has been wrongly computed as the reimbursement of expenses has also been treated as fees for technical services and tax thereon has been wrongly and illegally charged on the total amount."

5. The main grievance of the assessee relates to the validity of the assessment framed u/s 143(3) of the Act on the basis of the notices issued u/s 143(2) of the Act much before the service of notice u/s 148 of the Act.

6. Facts of the case in brief are that the assessee filed the original return of income on 31.10.2004 declaring an income of Rs.74,23,837/- which was processed u/s 143(1) of the Act on 05.05.2005. The assessment was completed u/s 143(3) of the Act on 18.12.2006 at an income of Rs.93,03,655/-. Thereafter, the AO noticed that the income chargeable to tax had escaped assessment as per clause (i) and (ii)

of Explanation 2 to Section 147 of the Act. Accordingly, the AO recorded the reasons on 17.03.2009 and notice u/s 148 of the Act was issued on 23.03.2009. The assessee filed the return of income u/s 148 of the Act on 19.11.2009 declaring an income of Rs.97,66,700/- and also filed the objections to the reopening of the assessment. The said objections were disposed off by the AO on 26.11.2009. The AO passed the draft assessment order dated 11.12.2009 u/s 144C(1) of the Act on the basis of assessment order earlier passed u/s 143(3) of the Act wherein gross receipts of Fees for Technical Services (FTS) for certain projects, the agreements for which were entered into before 1st day of April 2003, were taxed u/s 44D r.w.s. 115A of the Act. The AO held that the assessee was providing the services through project offices, therefore, it was having a Permanent Establishment (PE) in India. It was also held that the special provision for computing the income by law etc. in case of foreign companies/non-residents is provided in Section 44D of the Act which applies in case where the agreement made by the foreign company with the Government or with the Indian concern is after 31st day of March, 1976 but before 1st day of April, 2003. The AO applied the provisions of Section 115A(1)(b)(A) of the Act and charged Income Tax @ 20%.

7. Being aggrieved the assessee filed the objections before the ld. DRP and challenged the validity of the reopening of the assessment by issuing the notice u/s 148 of the Act. It was stated that the reopening was done only on account of change of opinion and that the AO while making the original assessment u/s 143(3) of the Act, completed the assessment after going into facts and details submitted by the assessee. It was further submitted that the AO had not given any notice u/s 143(2) of the Act after filing of the return by the assessee on 19.11.2009 and that the notice had been issued only on 08.09.2009 which was before filing of the return by the assessee and as such the reassessment made by the AO was invalid.

8. The ld. DRP after considering the submissions of the assessee observed that the reopening of the assessment had been done within four years of the relevant assessment years, as such, the first proviso to Section 147 of the Act does not come into play. It was held that Clause (c) of Explanation 2 below Section 147 of the Act empowers the AO to reopen the assessment, even after no fresh information has come in the possession of the AO. It has further been held that the notice issued on 08.09.2009 was within the stipulated time provided for issuance of notice u/s 143(2) of the Act and that the deficiency, if any, in issue of notice was not fatal to the assessment made by the AO as provided by the amended Section 292BB of the Act, which says that where the assessee appeared in any proceedings or cooperated in any enquiry relating to an assessment or reassessment it shall be deemed that any notice which was required to be served upon him has been duly served in time in accordance with the provisions of the Act and such assessee will be precluded for taking any objection on this account. The reliance was placed on the decision of the ITAT Delhi Bench in the case of Kuber Tobacco Product reported at 117 ITD 273 (Del.) (SB). Accordingly, the objections of the assessee were rejected. Thereafter, the AO passed the impugned assessment order.

9. Now the assessee is in appeal. The ld. Counsel for the assessee submitted that the assessment proceedings were initiated by the AO on the basis of the notice issued u/s 143(2) of the Act much before the service of notice u/s 148 of the Act. It was further submitted that the notice was issued u/s 143(2) of the Act on 08.09.2009 while the return was filed by the assessee in response to the notice issued u/s 148 of the Act on 19.11.2009. Therefore, the reassessment framed was invalid. The reliance was placed on the following case laws:

- *Somlata Ghalaut Vs ITO in ITA No. 413/Del/2013 order dated 23.04.2018*

- *Halcrow Group Ltd. Vs ADIT in ITA Nos. 5161 & 5162/Del/2010 order dated 20.05.2011*
- *CIT Vs Batra Bhatta Company (2010) 321 ITR 526 (Del.)*
- *Bakulbhai Ramanlal Patel Vs ITO (2011) 56 DTR 212 (Guj.)*
- *CIT Vs Orient Craft Ltd. in SLP CC No. 1589/2013 (SC)*
- *CIT Vs Orient Craft Ltd. (2013) 354 ITR 536 (Del.)*
- *CIT Vs Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)*
- *Hindustan Lever Ltd. Vs R.B. Wadkar (2004) 268 ITR 332 (Bom.)*
- *Mohan Gupta (HUF) Vs CIT (2014) 366 ITR 115 (Del.)*
- *Ranbaxy Laboratories Vs DCIT (2013) 351 ITR 023 (Del.)*
- *Atma Ram Properties Pvt. Ltd. Vs DCIT (2011) 343 ITR 141 (Del.)*
- *NYK Line (India) Ltd. Vs DCIT (2013) 346 ITR 361 (Bom.)*
- *CIT Vs Excel Industries Ltd. (2013) 358 ITR 295 (SC)*
- *Madhukar Khosla Vs ACIT (2014) 367 ITR 165 (Del.)*
- *Pr. CIT Tupperware India Pvt. Ltd. in ITA No. 415/2015 (Del.)*
- *Sabharwal Properties Industries Ltd. Vs ITA in W.P.(C) 8994/2014 (Del.)*
- *Sun Pharmaceutical Industries Ltd. Vs DCIT in W.P.(C) 6729/2011 (Del.)*
- *Indu Lata Rangwal Vs DCIT in W.P.(C) 1393/2002 (Del.)*
- *Oracle Systems Corporation Vs ADIT (2015) 62 Taxmann.com 291 (Del.)*
- *Pr. CIT Vs Silver Line in ITA No. 578/2015 (Del.)*
- *Pr. CIT Vs Shri Jal Shiv Shankar Traders (P.) Ltd. (2015) 64 Taxmann.com 220 (Del.)*
- *DIT Vs Society for Worldwide Interbank Financial, Telecommunications in ITA No. 441/2010 (Del.)*

10. In his rival submissions, the ld. Sr. DR strongly supported the order of the AO and also reiterated the observations made in the order dated 30.09.2010 of the ld. DRP.

11. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is noticed that the original assessment for the assessment year 2004-05 was framed by the AO u/s 143(3) of the Act on 18.12.2006 at an income of Rs.93,03,655/- as against the returned

income of Rs.74,23,837/-. Thereafter, the AO recorded the reasons on 17.03.2009 (copy of which is placed at page nos. 39 & 40 of the assesseeôs paper book) which read as under:

"REASONS RECORDED FOR ISSUE OF NOTICE U/S 148 OF THE INCOME TAX ACT, 1961 IN THE CASE OF HALCROW GROUP LTD. FOR A.Y. 2004-05.

The assessee is a company incorporated under the laws of United Kingdom. It carries on business of providing consultancy services. In the case of the assessee, assessment order u/s 143(3) of the Act for the A.Y. 2004-05 was passed on 18.12.2006 at the total income of Rs. 93,03,655/- as against the returned income of Rs. 74,23,837/-. During the year, the assessee was Involved in the execution of five projects namely Ahmedabad-Vadodra Project (contract dated 07.08.2000), Srinagar-Nagpur Project, Grand Trunk Project(contract dated 19.03.2002), Panagarh-Palsive Project (contract dated 06.03.2002) and West Bengal State Highways (contract dated 24.05.2002). In the assessment order, receipts from all the projects have been taxed @ 41% on net profit as business income except receipts of West Bengal State Highways Project Receipts from West Bengal State Highways Project have been correctly taxed as per Section 44D r.w.s. 115A. As the receipts from other projects were also of the nature of FTS and effectively connected to the PE (i.e. Project Offices) of the assessee, the provisions of Section 44D r.w.s.115A should have been applied upon those receipts.

In the case of the assessee, an assessment order for A.Y. 2006-07 has recently been passed on 18.12.2008. During the assessment proceedings, it was noticed that the assessee has wrongly been computing Its tax liability since beginning, being lesser of tax payable @ 41.82% or 42% on net profit of the PE or tax @ 20.91% on gross amount of FTS. As an undisputed fact, the consideration received by the assessee is determined in the said assessment order of the nature of fee for technical services as per Explanation 2 to Section 9(1)(vii) of the Act. Since the assessee provides the services through various project- offices, therefore, the FTS arised to the assessee are effectively connected to such Project Offices/Permanent

Establishment of the assessee In India and are liable to be taxed as per Article 7 of the DTAA between India and UK and as per Section 44D/44DA r.w.s. 115A of the Act depending upon the date of agreement.

After a detailed discussion on the above provisions of DTAA and the Act, ft was held in the assessment order for A.Y. 2006-07, that the income of the assessee with regard to the Projects, wherein contract entered before 1.4.2004, no deduction for the expenses are allowable and the assessee is liable to pay tax In India as per Section 44D r.w.s. 115A of the Act and with regard to the Projects, wherein contract entered after 1.4.2004, the provisions of Section 44DA of the Art will apply.

In view of the above, and the fact that the income of the assessee has been wrongly computed, I have reason to believe that income chargeable to tax has escaped assessment for A.Y. 2004-05 as per Clause (c)(I) & (II) of Explanation 2 to the Section 147 of the Act. Considering the findings of the assessment order passed for 2006-07, I believe that income chargeable to tax, which has escaped assessment amounts to or is likely to more than Rs.1 lakh for the year. Accordingly notice u/s 148 of the Act is being issued."

12. On the basis of the aforesaid reasons recorded, the AO issued the notice dated 23.03.2009 u/s 148 of the Act, copy of which is placed at page no. 38 of the assesseeôs paper book and read as under:

"Sir,
Whereas I have reason to believe that your income, in respect of which you are assessable/chargeable to tax for the Asstt. Year 2004-05 has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961.

I, therefore, propose to assess/reassess the income for the said Assessment Year and I hereby require you to deliver to me within 30 days from the date of service of this notice, a return in the prescribed form of your Income, In respect of which you are assessable for the said assessment year.

This notice is being issued after obtaining the necessary satisfaction of the Addl. Director of Income Tax, Range-1, International Taxation, New Delhi.

Yours faithfully,
Sd/-
(NISHTHA TIWAR1)
Assistant Director of Income Tax
Circle-1(2), International Taxation,
New Delhi.

13. It is also noticed that the AO issued the notice u/s 143(2) of the Act on 08.09.2009, copy of which is placed at page no. 41 of the assesseeôs paper book which read as under:

"Sir/Madam,
There are certain points in connection with the return of income submitted by you for the Assessment Year 2004-05, on which I would like some further information.

2. You are hereby required to attend my office on 24.09.2009 at 3.15 PM either in person or by a representative duly authorized in writing in this behalf or produce or cause there to be produced at the said time any documents, accounts and any other evidence on which you may rely in support of the return filed by you.

Yours faithfully,
Sd/-
(Sudhir K. Sharma)
Dy. Director of Income Tax
Circle-1(2), International Taxation,
New Delhi.

14. In response to the aforesaid notice u/s 143(2) of the Act, the assessee submitted a letter dated 24.09.2009 to the AO stating therein as under:

"Dear Sir,
Kindly refer to your notice above mentioned dated 08/09/2009 for assessment year 2004-2005.

As per our records, we have filed our return of income for assessment year 2004-2005 on 31/10/2004, which has since been, assessed and thus there is no such return on record which is pending for assessment and for which notice u/s 143(2) of the Act can be served on us. It therefore seems that notice has been served on us wrongly' for the assessment aforesaid and needs to be withdrawn.

Under the circumstance, we request you to kindly withdraw the notice and drop the proceedings u/s 143(2) of the Act for the assessment year aforesaid and oblige.

We also wanted to bring to your notice that we do not have any office at "C-1,Panchsheel Enclave, New Delhi - 110017".

Thanking you,
Yours faithfully,

For Halcrow Group Limited
Sd/-
[Authorised Representative]

15. From the aforesaid narrated facts, it is crystal clear that the AO issued the notice u/s 143(2) of the Act on 08.09.2009 i.e. prior to furnishing of return of income on 19.11.2009 (copy of which is placed at page no. 45 of the assesseeôs paper book).

16. A similar issue has been decided by the ITAT Delhi Bench ñGò, New Delhi in the case of Somlata Gahalaut, Noida Vs ITO, Ward-9(1), New Delhi in ITA No. 413/Del/2013 for the assessment year 2006-07 (wherein one of us the Accountant Member is Author), the relevant findings have been given in paras 9 to 13 which read as under:

"9. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the AO issued the notice dated 12.10.2011 u/s 143(2) of the Act to

the assessee. However, in response to the notice u/s 148 of the Act, the assessee intimated the AO vide letter dated 27.10.2011 that the earlier return filed u/s 139(1) of the Act may be treated as the return filed in response to the notice u/s 148 of the Act. Therefore, prior to the issuance of notice u/s 143(2) of the Act on 12.10.2011, there was no valid return of income filed by the assessee in response to the notice u/s 148 of the Act.

10. On a similar issue the Hon'ble Jurisdictional High Court in the case of DIT Vs Society for Worldwide Inter Bank Financial Telecommunications (2010) 323 ITR 249 (supra) held as under:

> *"that in the memorandum of appeal, the Revenue had stated that the return was filed by the assessee on March 27,2000 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 and that the date of the notice was mistakenly mentioned as March 23,2000. Even if it was true, the notice was served on the authorized representative simultaneously on his filing the return which clearly indicated that the notice was ready even prior to the filing of the return. The provisions of section 143(2) make it clear that the notice could only be served after the Assessing Officer had examined the return filed by the assessee. Thus, even if the statement of the Assessing Officer was taken at face value, it would amount to gross violation of the scheme of section 143(2) of the Act."*

11. Similarly, the Hon'ble Jurisdictional High Court in the case of Pr. CIT Vs Shri Jai Shiv Shankar Traders Pvt. Ltd. (2016) 383 ITR 448 (supra) held as under:

> *"Pursuant to a scrutiny of the return filed by the assessee, the Assessing Officer issued notice under section 148 of the Income-tax Act, 1961 and another notice under section 143(2) requiring further information and fixing a date for the assessee to appear. The notices were not served on the assessee. A further notice under section 142(1) was issued*

with a returnable date. On the returnable date the assessee's authorized representative gave a statement that the original return filed should be treated as a return filed pursuant to the notice under section 148. An assessment order was passed making an addition of a sum as unexplained credits under section 68. The Commissioner (Appeals) dismissed the appeal of the assessee holding that sufficient opportunity was provided through questionnaires to support his return by documentary evidence and that non issuance of notice under section 143(2) did not invalidate the reassessment. The assessee's further appeal was allowed by the Tribunal holding that the order of reassessment was unsustainable as a notice was not issued by the Assessing Officer before the completion of reassessment."

It has further been held as under:

"that there was no legal infirmity in the order of the Tribunal. Subsequent to the statement of the assessee on the returnable date to treat the original return filed as a return filed pursuant to a notice under section 148, the Assessing Officer's failure to issue notice under section 143(2) invalidated the order of reassessment. No question of law arose."

12. A similar view has also been taken by the Hon'ble Jurisdictional High Court in the case Pr. CIT Vs Silver Line (2016) 383 ITR 455 (Del.) wherein it has been held as under:

"The proposal to reopen an assessment under section 147 of the Income-tax Act, 1961, is to be based on reasons to be recorded by the Assessing Officer. Such reasons have to be communicated to the assessee. Merely because the assessee participates in the proceedings pursuant to such notice under section 148 of the Act, it does not obviate the mandatory requirement of the Assessing Officer having to issue to the assessee a notice under section 143(2) of the Act before finalizing the order of reassessment. A reassessment order cannot be passed without compliance with the mandatory requirement of notice being issued by

the Assessing Officer to the assessee under section 143(2). The requirement of issuance of such notice is a jurisdictional one. It does go to the root of the matter as far as the validity of the reassessment proceedings under section 147/148 of the Act is concerned.

Section 292BB was inserted in the Income-tax Act, with effect from April 1, 2008. It talks of the drawing of a presumption of service of notice on an assessee and is basically a rule of evidence. It introduces a fiction that once the assessee appears in any proceeding or has co-operated in any enquiry relating to assessment or reassessment it shall be deemed that any notice under any provision of the Act that is required to be served has been duly served upon him in accordance with the provisions of the Act and the assessee in those circumstances would be precluded from objecting that a notice that was required to be served upon him under the Act was not served upon him or not served in time or was served in an improper manner. The failure of the Assessing Officer, in reassessment proceedings, to issue notice under section 143(2) of the Act, prior to finalizing the reassessment order, cannot be condoned by referring to section 292BB of the Act."

13. We, therefore, by keeping in view the ratio laid down by the Hon'ble Jurisdictional High Court in the aforesaid referred to cases, are of the confirmed view that the reassessment framed by the AO u/s 143(3)/147 of the Act, in the present case, on the basis of the notice issued u/s 143(2) of the Act dated 12.10.2011 i.e. prior to the furnishing of return of income on 27.10.2011 in response to notice u/s 148 of the Act, was not valid. Accordingly, the same is quashed."

17. In the present case also, since the notice u/s 143(2) of the Act was issued prior to the furnishing of return by the assessee in response to the notice u/s 148 of the Act. Therefore, the notice issued u/s 143(2) of the Act was not valid and the reassessment framed on the basis of said notice deserves to be quashed. We, therefore, quash the reassessment framed by the AO.

18. The facts for the assessment year 2005-06 in ITA No. 5164/Del/2010 are identical to the facts involved in ITA No. 5163/Del/2010 for the assessment year 2004-05 (supra). Therefore, our findings given in the former part of this order shall apply *mutatis mutandis.*

19. As regards to the appeal in ITA No. 5554/Del/2012 for the assessment year 2005-06 is concerned, it is noticed that the same has been filed against the order passed by the AO u/s 154 of the Act on 28.09.2012 which was subsequent to the assessment completed u/s 143(3) of the Act on 15.10.2010. Since, we have already quashed the said assessment order dated 15.10.2010, therefore, the subsequent order for rectification u/s 154 of the Act passed on 28.09.2012 is also quashed.

20. In the result, the appeals of the assessee are allowed.

(Order Pronounced in the Court on 02/07/2018)

Sd/-	**Sd/-**
(Beena A. Pillai)	**(N. K. Saini)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 02/07/2018
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR