

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'SMC-I', NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER
(THROUGH VIDEO CONFERENCE)

ITA NO. 447/DEL/2017

A.Y. : 2007-08

M/S VIKAS STRIPS LTD. 10, ASHOKA PARK, MAIN ROHTAK ROAD, DELHI - 110 035 (PAN: AABCV7134J)	Vs.	DCIT, CIRCLE 26(2), C.R. BUILDING, NEW DELHI
(Appellant)		(Respondent)

Assessee by	Sh. Kapil Goel, Adv.
Department by	Ms. Rakhi Vimal, Sr. DR.

ORDER

PER H.S. SIDHU, JM:

This appeal filed by the Assessee is directed against the impugned order dated 25.11.2016 passed by the Ld. CIT(A)-9, New Delhi in relation to assessment year 2007-08 on the following grounds:-

1. That Ld. AO has erred in assuming jurisdiction without satisfying requirement of proviso to

section 147 i.e. reopening assessment after four years without failure on the part of assessee to disclose fully and truly all material facts necessary for assessment.

2. That Ld. AO has erred in assuming jurisdiction under section 147/148 without reason to believe i.e. the basic condition for assuming for jurisdiction thereby making assessment order bad in law.
3. That Ld. AO has erred in assuming jurisdiction under section 147/148 without taking approval u/s. 151(1) as applicable to the facts of the case.
4. That Ld. AO has erred in assuming jurisdiction under section 147/148 on the satisfaction of higher officer which makes assessment bad in law.
5. That Ld. AO has erred in passing order in breach of principle of natural justice i.e. without providing the material on the basis of which Ld. AO has formed his reason to believe in spite of specific request of assessee vide letter dated 29.12.2014.

6. That order passed by the Ld. AO is bad in law because the whole assessment is based on the change of opinion on the same facts and information provided at the time of original assessment proceedings u/s. 143(3).

7. That Ld. AO has erred in making addition only on the premise of non-production of Director of M/s Clax Marketing Pvt. Ltd. which cannot be a reason for making addition as held by Hon'ble Supreme Court and / or various High Courts and therefore assessment made is bad in law.

8. That AO has erred in making addition without appreciating that the documents submitted by assessee are proving identity, creditworthiness and genuineness of transaction with M/s Clax Marketing Pvt. Ltd. and no addition is warranted.

9. That order passed by AO is bad in law.

2. The assessee company filed its return of income for the assessment year in dispute declaring income of Rs. 7,89,440/- on 13.10.2007. The Assessing Officer completed the

assessment u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred as "Act") determining the total income of Rs.8,45,075/-. Subsequently, the case of the assessee was reopened u/s. 147 of the Act by issue of notice u/s. 148 of the Act dated 29.03.2014 alongwith copy of reasons for reopening was sent to the assessee by Speed Post after obtaining the prior approval of the Ld. CIT, Delhi-VI, New Delhi. In response to the same, the Authorised Representatives of the assessee appeared and filed the submissions which were perused by the Assessing Officer. The Assessing Officer issued notice u/s. 142(1) of the Act dated 08.05.2014 asking the assessee to furnish the return of income, information /documents. In the assessment order, the AO has further mentioned that in response to the notice u/s 143(2) dated 11.08.2014, a letter dated 21.08.2014 was filed by Sh. Shantanu Goel, Authorised Representative of the assessee submitted Income Tax Return for the year 2007-08 alongwith Audit Report, Balance Sheet, Profit And Loss Account for the year ending 31.03.2007. The Assessee's Counsel filed objections to the notice u/s. 148 of the Act dated 30.08.2014 on the grounds that notice u/s. 148 was served upon the assessee on 04.04.2014. i.e. after the period

prescribed u/s. 148 and 149 of the Act and that information from ITO of M/s Calx Marketing Pvt. Ltd. does not constitute the 'reason to believe'. According to the Assessing Officer, the objections raised by the assessee dated 30.08.2014 received in his office on 03.09.2014 which have been examined and the objections raised by the assessee were not acceptable and the AO rejected the same as mentioned in the assessment order at page no. 2 & 3 with the support of various case laws cited by the Assessee and AO running in page no. 4 to 11 of the assessment order. The AO vide letter dated 13.01.2015 asked the assessee to submit various details and documents, the contents of the letter dated 13.01.2015 are reproduced at page no. 11 & 12 of the assessment order. In response to the letter dated 13.01.2015, the assessee submitted details/ documents vide letters dated 29.12.2014 and 31.03.2015. The AO examined the same and held that 10,000 equity shares of Rs. 10/- each of the assessee company was issued at a premium of Rs. 90/- each to M/s Calx Marketing Pvt. Ltd. Neither the assessee nor the share applicant provided with any justification for issue of share at premium. According to the AO, the assessee has given the share-holding pattern of M/s Calx

Marketing Pvt.Ltd. and as per this 50% of shares are held by Sh. Ranjeet Kumar who signed the Share Application Form and the Affidavit. Notice u/s. 133(6) of the Act was issued on 13.02.2015 to Sh. Ranjeet Kumar, Director of M/s Calx Marketing Pvt. Ltd. and he was asked to furnish information/documents in respect of the share transaction with M/s Vikas Strips for AY 2007-08, but Sh. Ranjeet Kumar has not responded to the notice. Further, a notice u/s. 133(6) of the Act was issued by the AO to the Bank Manager, Jammu & Kashmir Bank Ltd., Vikas Marg, New Delhi on 13.02.2015 to furnish the copy of account of M/s Calx Marketing Pvt. Ltd.; copy of account opening form and person authorised to operate the bank account. On 23.02.2007 the amount of Rs. 15,20,600/- has been shown as by clearing cheque and the cheque no. was shown as 3702. The AO requested to give the photocopy of cheque and the name of the drawer of the cheque, Bank and Branch were the drawer of the cheque is maintaining the bank account. In response to the same, Jammu and Kashmir Bank replied that the captioned account of M/s Calx Marketing Pvt. Ltd. does not belong to this Branch, as per records available with them, but the Bank has not replied

whether there is any account in the name of M/s Calx Marketing Pvt. Ltd. and the Bank has not provided a copy of bank account and that information called for.

2.1 The Assessing Officer on 27.02.2015 issued a letter to the assessee company to furnish various documentary evidences which the AO has described at page no. 13 & 14 of the assessment order. But none attended nor any reply was field by the assessee company and the AO presumed that assessee has no explanation to furnish. Keeping in view of the above and after examining the documentary evidences filed by the assessee, the AO was of the view that assessee company had introduced its income from undisclosed sources through entry operator. The creditworthiness, genuineness of deposits in the name of above company with the assessee company has not been proved. The assessee company has introduced its own money in the garb share application money / share premium. The assessee company was provided opportunity to produce the Principal Officers of the Company and to prove the identity, creditworthiness and genuineness of the transactions of the assessee company to discharge its onus. The AO was of

the view that assessee has given its unaccounted cash to the entry providers and the same has been received back by the assessee through cheques. The assessee has not come forward to prove creditworthiness of these parties on account of failure to produce parties for verification of the transactions. Therefore, he has not accepted the submissions of the assessee for the reasons mentioned by the AO at page no. 14 & 15 of the assessment order. The AO reopened the case of the assessee on the basis of specific information received from the office of DCIT, Central Circle-22, New Delhi. The AO issued notice u/s. 148 of the Act on the basis of discovery that the assessee had transactions with a name of lender is valid. The reopening on the basis of the Investigation Report is justified. Therefore, there is no case for the assessee to claim that his onus is discharged, as the letter of the DCIT, Central Circle has specifically pointed out that the receipts are bogus; they are mere accommodation entries and this channel has been utilized by the assessee to introduce its own unaccounted money in its books of accounts.

2.2 Keeping in view of the aforesaid facts and circumstances, the AO was of the view that assessee has failed to discharge its onus of proving the creditworthiness of concerned party, and genuineness of the transactions in terms of provisions of section 68 of the Act. Therefore, the amount of Rs. 10,00,000/- received from the above entry operator represents the credit entry whose nature and source could not be satisfactorily proved by the assessee and hence, it is covered within the mischief of section 68 of the Act and the same was held to be the income of the assessee company u/s. 68 of the Act and further the company M/s Calx Marketing Pvt. Ltd. is not assessee group company or of anyone known to it. Such transaction are carried out by the accommodation entry operators who charge commission upto 3.5% of the transactions. Therefore, Rs. 35,000/- was added to the income of the assessee u/s. 69C of the Act being unexplained expenditure being spent from undisclosed sources being given infuse such funds in the garb of Share Application Money in respect of non-family members of the assessee i.e. excluding the Company's Directors and their family members. Considering the facts and circumstances, as discussed above,

the AO also satisfied for initiation of penalty proceedings u/s. 271(1)(c) of the Act which was granted in this case on this issue also and completed the assessment at a total income of Rs. 18,80,075/- u/s. 147/148 of the Act dated 17.03.2015.

3. Aggrieved by the assessment order, assessee filed an appeal before the Ld. First Appellate Authority who vide his impugned order dated 25.10.2016 partly allowed the appeal of the assessee by deleting the addition of Rs. 35,000/- made by the AO u/s. 69C of the Act by holding that the AO has made this addition on account of commission @3.5% on such transactions which is only on estimation basis and is not sustainable in the eyes of law.

4. Now the Assessee is aggrieved by the impugned order dated 25.11.2016 passed by the Ld. First Appellate Authority, filed the present appeal on the grounds reproduced in the preceding paragraphs.

5. At the time of hearing, Ld. Counsel for the assessee stated that assessee has filed various grounds of appeal at the time of filing of this appeal, but assessee has also filed additional ground of appeal. He draw our attention towards the additional

ground of appeal filed by the assessee. For the sake of convenience, the additional ground is reproduced as under:-

"That Ld. AO made invalid assessment u/s. 147/148 on the basis of notice u/s. 143(2) dated 11.08.,2014 where as admitted in impugned assessment order (page 2) return was filed on 21.8.2014 after which no valid notice u/s. 143(2) of the Act is issued and served on assessee as per law so as to frame lawful assessment u/s. 143(3) and no where section 144 is invoked in assessment order by Ld. AO and therefore assessment framed by the Ld. AO u/s. 147/148 and as confirmed by Ld. CIT(A) deserves to be nullified and quashed as void ab initio and ultra vires and section 143(2) of the Act which is issued prior to return u/s. 148 being filed."

5.1 Ld. Counsel for the assessee stated that the AO has made the invalid assessment u/s. 147/148 of the Act on the basis of notice u/s. 143(2) of the Act dated 11.08.2014 whereas AO admitted in the impugned assessment order that assessee has filed the return on 21.08.2014 after which no valid notice u/s. 143(2) of the Act was issued and served upon the assessee, as per law, so as to frame lawful assessment u/s. 143(3) of the

Act and nowhere section 144 was invoked in assessment order by which the assessment framed by the AO u/s. 147/148 of the Act and confirmed by the Ld. CIT(A) deserve to be quashed, void abinito and ultra-vires to section 143(2) of the Act which was issued prior to the filing of return u/s. 148 of the Act. In support of this contention, he draw our attention towards the following cases laws:-

- Recent Apex Court decision in Singhad Technical Society (order dated 29.8.2017) 397 ITR 344.
- Hon'ble Delhi High Court decision in the case of Fast Booking (I) Pvt. Ltd. order dated 02.09.2015 (ITA No. 334/2015) (378 ITR 693)
- Hon'ble Delhi High Court decision in the case of Silver Line, order dated 04.11.2015 (ITA No. 578/2015) (383 ITR 455)
- Hon'ble Punjab and Haryana High Court decision in case of M/s VMT Spinning Co. Ltd, order dated 16.09.2016 (ITA No. 445/2015) (389 ITR 326).

- Hon'ble Gujarat High Court in the case of Jolly Fantasy World Ltd. 373 ITR 530.
- Decision of Hon'ble Bombay High Court in CIT vs. Lalitkumar Bardia (2017) 84 taxmann.com 213 (Bom)
- Decision of the Hon'ble Supreme Court of India in the case of Laxman Das Khandelwal dated 13th August, 2019.
- Decision of the Hon'ble Supreme Court of India in the case of ACIT vs. Hotel Blue Moon (2010) 321 ITR 362
- Decision of Hon'ble High Court of Delhi dated 24.10.2017 in the case of PCIT vs. M/s Paramount Biotech Industries Ltd. in ITA No. 887/2017 & 888/2017.
- Decision of Hon'ble High Court of Delhi dated in the case of Alpine Electronics Asia Pte. Ltd. vs. DGIT (2012) 341 ITR 247

- Decision of Hon'ble High Court of Delhi in the case of CIT vs. Delhi Kalyan Samiti in ITA No. 696 to 699/2015.
- ITAT Lucknow Bench-B decision dated 29.3.2019 passed in IT(SS)A No. 311/LKW/2018 (AY 2008-09)
 - Dolphin Developers Ltd.

He especially draw our attention towards the recent decision of the Hon'ble Supreme Court of India in the case of Laxman Das Khandelwal dated 13th August, 2019. He also draw our attention towards the Date-wise Events in which he stated that assessee company filed its original return of income on 13.10.2017 declaring income of Rs. 7,89,440/- which was completed by the Assessing Officer u/s. 143(3) of the Act on 29.12.2009 and assessed the income at Rs. 8,45,075/-. AO issued notice u/s. 148 of the Act and reopened the case of the assessee vide notice dated 29.03.2014; assessee requested to supply the copy of reasons recorded vide letter dated 22.04.2014 which was supplied to the assessee on 08.05.2014 and the AO issued notice u/s. 143(2) of the Act dated 11.8.2014 for which he has attached the

copy of notice with additional ground of petition which is on record. He further submitted that on the basis of this Date of Events, the assessee in response to the notice u/s. 148 of the Act filed the Income Tax Return dated 21.8.2014. He has also attached the copy of letter filed submitting Income Tax Return u/s. 148 of the Act etc. with the additional ground of appeal and assessee has also filed objections on the notice u/s. 148 of the Act to the Assessing Officer dated 30.08.2014. The said objections were overruled by the Assessing Officer on 16.12.2014 and final assessment order was passed u/s. 147/148 of the Act on 17.03.2015. Briefly, he stated that the AO has issued notice u/s. 143(2) of the Act on 11.08.2014 whereas the assessee filed return of income in response to the notice u/s. 148 of the Act on 21.08.2014. That notice u/s. 143(2) of the Act is prior to the filing of the return which is illegal and against the provisions of law and is not sustainable in the eyes of law. In support of this contention, he cited the above mentioned case laws. In view of above, he requested that the additional ground filed may be admitted and the assessment passed on illegal notice which needs to be quashed.

6. On the contrary, Ld. DR relied upon the orders of the revenue authorities and stated that additional ground raised by the assessee is not sustainable in the eyes of law, because this issue has already been adjudicated and decided in favour of the Revenue by the various Hon'ble High Courts, which the AO as well as Ld. CIT(A) has discussed in detail in their respective impugned orders. He further stated that assessee remained non-cooperative before the revenue authorities and has not filed proper evidences in support of its claim. The AO has disposed of the objections raised by the assessee by passing an elaborate order, because in this year the case of the assessee has been reopened on the information received from the Investigation Report which is made after thorough enquiries made by the Investigation Wing of the Department. She further stated that assessee has not proved the identity, creditworthiness and genuineness of the transaction, as required u/s. 68 of the Act, therefore, the AO has rightly made the addition in dispute and Ld. CIT(A) has rightly upheld the same. Hence, the appeal filed by the Assessee may be dismissed.

7. We have heard both the parties and perused the orders passed by the Revenue authorities especially the judgment / orders of the Hon'ble Supreme Court of India; Hon'ble High Courts and the ITAT cited by both the parties. Ld. Counsel for the assessee filed the additional ground and has argued that the additional ground may be admitted in view of the arguments advanced by him at the time of hearing. We have also reproduced the additional ground raised by the Assessee in the aforesaid paragraphs in which the assessee has challenged the assessment u/s. 147/148 on the basis of notice u/s. 143(2) of the Act dated 11.08.2014 whereas the assessee has filed the return of income on 21.08.2014. Ld. Counsel for the assessee stated that notice u/s. 143(2) of the I.T. Act was issued prior to the filing of return of income u/s. 148 of the Act meaning thereby the AO has not applied his mind before issuing the notice u/s. 143(2) of the Act and reassessment is invalid because in response to the notice u/s. 148 of the Act the assessee filed his return of income on 21.08.2014. Ld. AR for the assessee further stated that the assessment framed by the AO u/s. 147/148 of the I.T. Act has wrongly been confirmed by the Ld. CIT(A) which deserve to be quashed. In

support of this contention, he has cited various case laws which we have mentioned in para no. 5.1 at pages 12-14 of this order. We have thoroughly gone the citations mentioned by the Ld. Counsel for the assessee on the issue involved in the additional ground of appeal. Keeping in view of the facts and circumstances of the present case and the legal issue involved in the present appeal, we are admitting the additional ground of appeal and adjudicating the same in the forgoing paragraphs.

7.1 We have gone through the assessment order as well as the impugned order passed by the Ld. CIT(A) and we are of the view that notice u/s. 148 of the Act dated 08.05.2014 was issued asking the assessee to file the return of income. In response to the same, the assessee filed letter dated 21.08.2014 filed the return of income in response to these notices. But the AO has issued notices u/s. 143(2) of the Act dated 11.08.2014 i.e. prior to the filing of the return of income i.e. on 21.08.2014. We are of the view that notice u/s. 143(2) of the I.T. Act dated 11.08.2014 was issued by the AO before the date when the assessee filed his return of income i.e.

21.08.2014. We are of the view that the assessment framed by the AO on the basis of these notices is not sustainable in the eyes of law, hence, we quash the same. Our view is supported by the various following judgments/decisions especially the Hon'ble Supreme Court Decision in the case of Laxman Das Khandelwal order dated 13th August, 2019 in which the Hon'ble Court has observed as under:-

".....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/rom 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 fwd participated in the proceedings. the provisions of Section 292BB would be a complete answer. On the other

hand, Mr. Ankit Vijaywargia, learned Advocate, appearing/or 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 Blue Moon's case . The 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, there/ore, see no reason to take a different view in the matter.

11. These Appeals are, there/ore, dismissed. No costs... "

7.1.1 Further in the case of M/s Alpine Electronics Asia Pte Ltd. vs. DGIT (2012) 341 ITR 247, the Hon'ble High Court of Delhi has observed as under:-

"Section 143(2) of the Income Tax Act, 1961 is applicable to proceedings under section 147/148 of the Act. The proviso to section 148 of the Act grants liberty to the Revenue to serve notice under section 143(2) of the Act before passing the assessment order for returns furnished on or before October 1, 2005. In respect of returns filed pursuant to notice under section 148 of the Act after October 1, 2005, it is mandatory to serve notice under section 143(2) of the Act, within the stipulated time limit.

Section 292BB incorporates the principles of estoppels. It stipulates that an assessee, who has appeared in any proceeding and cooperated

in any enquiry relating to assessment or reassessment shall be deemed to be served with any notice which was required to be served and would be precluded from objecting that the notice was not served upon him or was served upon him in an improper manner or was not served upon him in time. However, the proviso states that the principles of estoppels incorporated in the main section would not apply, if the assessee has raised objection in reply to the notice before completion of assessment or reassessment.”

7.2 We further note that assessee has filed the return on 21.08.2014 and thereafter no notice u/s. 143(2) of the Act was issued by the AO, however, the same is mandatory requirement under the provisions of law and in view of the case laws as referred above.

7.3 Keeping in view of the facts and circumstances of the present case as well as on the anvil of the judgments /

decisions of the Hon'ble Supreme Court of India and Hon'ble High Court, as reproduced above, we cancel the reassessment.

8. In the result, the Assessee's Appeal is allowed.
9. The decision is pronounced on 10.09.2020.

Sd/-

(O.P. KANT)
ACCOUNTANT MEMBER
"SRB"

Sd/-

(H.S. SIDHU)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi