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

% *Date of Decision: 06.09.2023*

\+ **ITA 509/2023**
\+ **ITA 510/2023**

PR. COMMISSIONER INCOME TAX CENTRE-2 ..... Appellant
Through: Mr Sanjeev Menon, Standing Counsel.

versus

M/S S.G. PORTFOLIO PVT. LTD. ..... Respondent
Through: None.

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

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM Appl.46135/2023 in ITA 509/2023 ***[Application moved on behalf of the appellant/revenue seeking condonation of delay of 421 days in re-filing the appeal]***

CM Appl.46136/2023 in ITA 510/2023 ***[Application moved on behalf of the appellant/revenue seeking condonation of delay of 421 days in re-filing the appeal]***

1. These are the applications filed on behalf of the appellant/revenue seeking condonation of delay in re-filing the appeals.

2. According to the appellant/revenue, the period of delay involved is 421 days.

3. Although the delay in re-filing is substantial, in view of the fact that

we are inclined to hear the matter on merits, *albeit*, at admission stage, the delay is condoned.

4. The applications are disposed of, in the aforesaid terms.

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5. These appeals concern Assessment Years (AYs) 2007-08 [ITA 509/2023] and 2008-09 [ITA 510/2023]. The appeals assail a common order dated 22.03.2021.

6. A perusal of the impugned order shows that since the issues which arose for consideration were common to the AYs 2007-08, 2008-09, 2009-10, and 2010-11, the facts that obtained in AY 2007-08 were taken into account.

7. We intend to do the same, because the issues arising in AYs 2007-08 and 2008-09 are common.

8. To dispose of the above-captioned appeals, the following broad facts which obtained in AY 2007-08, are required to be noticed:

9. The record shows that a survey was carried out on 06.03.2010 in cases involving the Asseem Kumar Gupta group of companies, as also the assessee/respondent.

10. The record also shows that the assessment proceeding under Section 143(3) read with Section 153C of the Act was completed *qua* the respondent/assessee on 26.12.2011. The income of the respondent /assessee was, at that juncture, assessed at Rs. 4,54,03,440/-, as against the returned income of Rs. 12,073/-. The original return was filed by the respondent/assessee on 31.08.2007.

11. Insofar as the original assessed income was concerned, it included

additions made on a protective basis amounting to Rs.1,02,70,000/- on account of unexplained share application money, and Rs. 3,43,30,095/- on account of unexplained 'other' deposits, found in the bank account maintained by the respondent/assessee.

12. In the original appellate proceedings, i.e., proceedings carried out before the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"], the respondent/assessee succeeded on the ground that the Assessing Officer (AO) had wrongly assumed jurisdiction under Section 153C of the Act. The CIT(A), thus, did not deal with the matter on merits, i.e., concerning the grounds on which the additions made to the respondent/assessee's income were assailed.

13. We may note that in the original assessment order, besides the two additions referred to hereinabove, the AO had also disallowed expenses amounting to Rs. 1,33,267/-, and added to the respondent/assessee's income unexplained cash deposits of Rs. 6,58,000/-.

14. In the second round, the AO made almost the same additions, i.e., unexplained expenditure of Rs.1,33,267/- was added.

15. Likewise, an addition was made on account of unexplained share application money. The amount deposited was Rs. 1,02,70,000/-.

15.1 Moreover, deposits made in the bank account maintained by the respondent/assessee, i.e., Rs. 4,52,58,095/- were also added to the respondent/assessee's income. In the reasons recorded, the AO concluded that the findings given by the AO in the first round constitute 'information' within the meaning of Section 147 of Act.

16. In the appeal filed against the assessment order in the second round, the CIT(A) ruled in favour of the respondent/assessee. The CIT(A) set aside

the assessment order dated 02.03.2015 broadly on the following grounds:

(i) That there was no tangible material available with the AO.

(ii) The sanctioning authority had not applied its mind, independently, to appraise the material based on which reasons to believe have been recorded by the AO.

(iii) That no notice under Section 143(2) of the Act had been issued to the respondent/assessee, although there was material on record to show that the respondent/assessee had communicated to the AO that the return originally filed by it on 31.08.2007 should be treated as a return in response to the notice issued under Section 148 of the Act. Thus, because the return was on the record, the AO concluded that the notice under Section 143(2) of the Act was mandatorily required to be issued; failure to issue such notice had resulted in occurrence of a jurisdictional error.

17. The record shows that the Tribunal appraised the aforementioned observations and findings returned by the CIT(A), along with the material on record and dismissed the appeal of the appellant/revenue.

18. We find upon perusal of the record that, apart from anything else, the appellant/revenue had not raised any ground before the Tribunal which assailed the finding returned by the CIT(A) that the sanctioning authority had not applied its mind independently to the approval granted by it for triggering the reassessment proceeding. The grounds that the appellant/revenue took before the Tribunal were confined to whether the respondent/assessee had communicated to the AO that the return originally filed should be treated as a return in response to the notice issued under Section 148 of the Act.

19. It is in this context that the appellant/revenue had taken the ground that there was, in law, no occasion to issue a notice under Section 143(2) of the Act. For the sake of convenience, grounds taken by the appellant/revenue before the Tribunal as set out in paragraph 4 of the impugned order are extracted hereafter:

> *"4. The Grounds raised by the Revenue in this appeal are as under:*
> *1. That the Ld. CIT(A) has erred in law and facts in quashing the assessment order passed without appreciating the fact that assessee never filed the return of income in pursuance to notice u/s 147 of the I.T. Act, 1961 and as no return of Income was filed, there was no occasion to issue notice u/s 143(2) of the I.T. Act, 1961.*
> *2. That the Ld. CIT (A) had erred in law by ignoring the provisions of Section 282BB [sic. Section 292BB] of the Income Tax Act 1961 and quashing the assessment order under Section 147/144.*
> *3. That the Ld. CIT(A) has erred in in law and facts of the case by ignoring that the case was reopened based on the new facts and evidences that were brought to the light in the survey action u/s 133A and on findings made during the earlier assessment proceedings."*

20. During the hearing, we are told by Mr Sanjeev Menon, learned standing counsel who appears on behalf of the appellant/revenue, that the revised grounds were filed; a hard copy of the same was furnished to us in the course of the hearing.

21. We find that none of the revised grounds contained in the appeal dealt with the issue concerning the sanction accorded by the specified authority under Section 151 of the Act.

22. Be that as it may, *qua* the aspect concerning the issue as to whether or not the respondent/assessee had communicated to the AO that the return

originally filed should be treated as a return in response to the notice issued under Section 148 of the Act, the CIT(A) recorded the following findings of fact which were again, sustained by the Tribunal. For the sake of easy reference, the relevant part of the CIT(A)'s order dated 29.02.2016 is extracted hereafter:

> "*8.9 Appellant has also raised the issue that no notice u /s 143(2) was served on the appellant after filing the return in response to notice issued by the AO u/s 148. In order to verify the contention of the appellant, assessment records for the assessment year under consideration were requisitioned. In the paper book filed by the appellant,* ***I find that the appellant has filed a letter dated 25.5.2013 submitted in the office of the AO on 21.6.2013 (Page 21 of the Paper book) wherein the assessee requested the AO to treat the original return filed on 31/08/ 2007 as return filed in pursuance of the notice issued u/s 148. On the contrary AO has mention at page 3 of the impugned order that no return in compliance to notice u/s 148 was filed. On verification of the assessment records, I find that no such letter is available in the records of the AO. Even the AO has not recorded the order sheet for the period between 22.5.2013 to 26.10.2014. However, there is a subsequent letter dated 6.9.2013 filed by the assessee, in the assessment records which has a reference of letter filed by the assessee dated 25.5.2013. No notice u/s 143(2) is found on the record maintained by the AO which proves that the AO has not issued statutory notice u/s 143(2) of the Act. Once a return has been filed u/s 148, AO is bound to issue a notice u/s 143(2) in order to assume jurisdiction to frame assessment u/s*** *143(3) or u/s 144 which has not been done by the AO in the present case. Therefore, also the assessment so completed without issuance of notice u/s 143(3) does not empower the AO to complete an assessment u/s 143(3) or u/s 144 of the Act. Hon'ble Supreme Court in the case of ACIT & Anr Vs. Hotel Blue Moon 321 ITR 362 held that the provisions of section 142 and subsections (2) and (3) of section 143 would have mandatory application in a case where the Assessing Officer in repudiation of return filed*

> *in response to a notice issued under section 158BC(a) proceeds to make an inquiry. Similarly when a return is filed u/s 147, assessment cannot be completed u/s 143(1) of the Act, and it is mandatory to complete the assessment u/s 143(3).* ***Therefore, when assessment is completed u/s 143(3) or u/s 144 of the Act, issuance of notice u/s 143(2) is mandatory and in case no such statutory notice is issued, the AO cannot assume jurisdiction to frame assessment u/s 143(3).***
> *Hon'ble ITAT, New Delhi in the case of Mohinder Kumar Chhabra Vs. Income Tax Officer, in [2014] 48 taxmann.com 120 held after considering the judgment of the Hon'ble Delhi High Court in the case of Alpine Electronics Asia Pvt. Ltd. v. Director General of Income-tax [2012] 341 ITR 247 / 205, that assessment completed under section 147 without issue of notice under section 143(2) would be invalid.*" [Emphasis is ours.]

23. These findings of fact have not been disputed by the Tribunal.

24. We also find that there is no ground taken in the instant appeal that the findings returned by the CIT(A) on the aforementioned aspect, which are, as noticed above, affirmed by the Tribunal, were perverse. A broad question has been proposed by the appellant/revenue that no return was filed by the respondent/assessee, without assailing the details given in paragraph 8.9 of the CIT(A)'s order.

25. For the moment, even if we were to agree with the appellant/revenue that the respondent/assessee had never communicated to the AO that the original return should be treated as a return as against the notice dated 143(2) of the Act, the impugned order will still stand as the assessment order was set aside by the CIT(A) on other grounds, including the ground that the sanctioning authority has not applied its mind independently. No ground, even according to Mr Menon, was taken before the Tribunal assailing the conclusion reached by the CIT(A) in that regard.

26. Therefore, according to us, no interference is called for with the impugned order passed by the Tribunal. In our view, no substantial question of law arises for our consideration.

27. The Tribunal and CIT(A) have returned findings of fact, none of which, in our view, are perverse.

28. The appeals are, accordingly, closed.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

SEPTEMBER 6, 2023/pmc