IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B" : HYDERABAD
(THROUGH VIDEO CONFERENCE)

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

I.T.A. No. 669/HYD/2017
Assessment Year: 2008-09

Sudhakar Chakkilam, HYDERABAD [PAN: AAUPC0462G]	Vs	The Income Tax Officer, Ward-6(1), HYDERABAD
(Appellant)		(Respondent)

For Assessee	:	Shri P.Murali Mohana Rao, AR
For Revenue	:	Shri K.N.Suresh Babu, DR

Date of Hearing	:	13-10-2020
Date of Pronouncement	:	21-10-2020

O R D E R

PER Smt. P. MADHAVI DEVI, J.M. :

This is assessee's appeal for the AY.2008-09, directed against the order of the Commissioner of Income Tax (Appeals)–6, Hyderabad, dated 17-01-2017.

2. Brief facts of the case are that the assessee, an individual, filed his return of income for the AY.2008-09 on 31-07-2008, admitting income from salary, consultancy business and income from house property at Rs.2,08,280/-. The said return was processed u/s.143(1) of the Income Tax Act [Act] on 23-06-2009 with NIL demand. Thereafter, the Assessing Officer (AO) received information that the assessee has sold a

plot admeasuring 900 sq. yds., situated in Survey No.92, Devarakonda Nagar, Shaikpet Village for a consideration of Rs.98,00,000/-, but the same was not disclosed by the assessee in his return of income. Since the Long Term Capital Gain was not offered to tax by the assessee, the AO re-opened the assessment u/s.147 of the Act by issuance of notice u/s.148 of the Act. The AO obtained the copy of the sale deed from SRO, Banjara Hills, Hyderabad and observed that the property was purchased by the assessee on 05-06-2003 for a consideration of Rs.9 Lakhs. Accordingly, the indexed cost of acquisition was worked out to Rs.10,71,058/-. The AO invoked the provisions of Section 50C of the Income Tax Act and worked out the sale consideration at Rs.3,04,28,942/-. Thereafter, after considering the assessee's submissions and on the request of assessee, the matter was referred to DVO, who valued the property at Rs.4,05,59,000/-. The AO observed that Section 50C(3) of the Act provides that where the Fair Market Value determined by the DVO is higher than the valuation or assessment of the property as per the Stamp Valuation Authority, the computation of capital gain is to be done with reference to the value whichever is lower. Accordingly, the AO adopted Rs.3,15,00,000/- as the value of the property for the purpose of computation of capital gain and brought the same to tax.

3. Aggrieved, the assessee filed an appeal before the CIT(A), who granted partial relief to the assessee by directing the AO to compute the Long Term Capital Gain by allowing the deduction for indexed cost of acquisition, since the AO had

admitted the full value of the consideration as Long Term Capital Gain.

4. Against the said order of the CIT(A), the assessee is in appeal before us by raising the following Grounds:

"1. The Ld.CIT(A) erred both in law and on facts in partly allowing the appeal.

2. The Ld.CIT(A) has erred in holding that the reopening of assessment u/s 147 of the Act, is valid.

3. The Ld.CIT(A) erred ill upholding the application of the provisions of Sec.50C and computing the capital gains on the sale of the impugned property in the appellants case.

4. The Ld.CIT(A) ought to have appreciated that the assessee holds impugned property as stock in trade and that the provisions of Sec.50C would not apply on its sale.

5. The Ld.CIT(A) ought to have appreciated that the assessee purchased the said property and sold the same as a stock in trade for the year under consideration during the course of its regular business.

6. Though ground No.4 and 5 have not been taken before the lower authorities, it is now taken before the Hon'ble ITAT, in view of the Supreme Court Decision in the case of NTPC vs. CIT (229 ITR 383) (SC).

7. The Ld.CIT(A) ought to have appreciated that the assessee derives income from consultancy business.

8. Without prejudice to other grounds, the CIT(A) ought to have appreciated that the property was not a free hold one and that the title of the same was under severe litigation having locational disadvantages which made the appellant to sell the same at a lower price".

4.1. Thereafter, the assessee has raised the following additional grounds of appeal, by filing an application for admission of the same:

"10. As per the ratio laid down by the Honourable Supreme Court of India in the case of National Thermal Power Co. Ltd v. CIT (1998) 229 ITR 383 (SC), the Hon'ble ITAT has jurisdiction to examine the question of law which has been taken before the ITAT for the first time though not taken before the first appellate authority.

11. The Ld.CIT(A) ought to have annulled the assessment Proceedings on failure to issue notice U/s143(2) within the time limit prescribed under the Income Tax Act, 1961.

12. The Ld.CIT(A) erred in its order by not adhering to the provisions of Section 143(2) of the Income Tax Act,1961 wherein the law specifically provides that "No Notice shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished"

13. The Ld.CIT (A) ought to have appreciated that notice issued under section 148 was to be preceded by a sanction duly obtained from Chief Commissioner / Commissioner as per proviso to section 151 (1), whereas such sanction had been obtained only from Additional Commissioner is not as per law and failure of such compliance shall invalidate the issuance of Notice U/s148 and hence ultimately the Assessment Proceedings made U/s147 of the Act shall be liable to be annulled.

14. As per the ratio laid down by the Honourable Supreme Court of India in the case of National Thermal Power Co. Ltd v. CIT (1998) 229 ITR 383 (SC), the Hon'ble ITAT has jurisdiction to examine the question of law which has been taken before the ITAT for the first time though not taken before the first appellate authority.

15. The CIT(A) ought to have appreciated the settled position of law that Referring to DVO by an assessing authority without rejecting books of account is not permissible as held by the Hon'ble Supreme Court in the case of Sargam Cinema in 197 Taxman 203 (SC)

16. The Ld.CIT(A) has erred in confirming the addition without considering the fact that the reference to DVO is improper.

17. The Ld.CIT(A) ought to have considered that the appellate authority is not binded by the report obtained from DVO and should have independently considered the plea of appellant applying the principles of natural justice".

5. The case was taken up for hearing on 13-10-2020 through video conferencing and both the parties were heard.

6. Since the additional ground of appeal No.11 is a legal ground on the jurisdictional issue, we deem it fit and proper to admit and adjudicate the same.

7. In support of the additional grounds raised by the assessee, Ld.Counsel for the assessee submitted that in this case, notice u/s.143(2) of the Act was issued on 23-10-2013 in response to which, the assessee filed his return of income on 25-11-2013. He submitted that under the proviso to Section 143(2) of the Act, the notice u/s.143(2) of the Act should be issued within six months from the end of the Financial Year in which the return is filed. Therefore, in this case, notice u/s.143(2) of the Act should have been issued on or before 30th September, 2014, whereas the notice u/s.143(2) of the Act was issued on 24-11-2014. Therefore, the assessment order is not valid.

8. In reply, Ld.DR has filed a copy of the notice u/s.143(2) of the Act and also the order sheet entries from the assessment record.

9. After hearing both the parties and considering the material on record, we find from the order sheet entry

dt.10-09-2014, that the assessee has filed a letter on 25-11-2013, requesting that the return filed on 11-07-2008 vide acknowledgment No.1611004041 be treated as the return filed in response to the notice issued u/s.148 of the Act. He has further sought reasons for reopening of assessment u/s.147 of the Act. As the assessee has complied with the notice, by requesting the return filed earlier to be considered as filed in response to notice u/s.148A of the Act, the copy of the reasons recorded were communicated to the assessee on 10-09-2014. Thus, as seen from the copy of the notice u/s.143(2) of the Act, it was issued on 20-11-2014. It is therefore to be examined if it was issued within the prescribed time.

9.1. Section 143(2) of the Act reads as under:

"143(1).......

(2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer or the prescribed income-tax authority, as the case may be, if, considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, shall serve on the assessee a notice requiring him, on a date to be specified therein, either to attend the office of the Assessing Officer or to produce, or cause to be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return:

Provided that no notice under this sub-section shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished".

9.2. It is settled law that even in the re-assessment proceedings u/s.147 of the Act, the AO can proceed only by issuance of notice u/s.143(2) of the Act. The Hon'ble Supreme Court of India in the case of CIT Vs. Laxman Das Khandelwal

reported in (2019) 8 TMI 660 (SC) has held that - *the notice u/s.143(2) being prerequisite, in the absence of such notice, the entire proceedings would be invalid.* Therefore, the provisions of Section 143(2) of the Act and the proviso thereunder would clearly apply to the case before us. Admittedly notice u/s.143(2) of the Act was given on 24-11-2014, which is beyond the prescribed period of six months from the end of the financial year, in which the return was furnished by the assessee. In view of the same, we agree with the contentions of the Ld.Counsel for the assessee on additional grounds No.11 raised by the assessee. It is accordingly allowed and the assessment order is set aside. Since the assessment order itself is set aside, the other grounds of appeal raised by the assessee on merits of the issue are not adjudicated at this stage as it would only result in an academic exercise.

10. In the result, the appeal of assessee is treated as partly allowed.

Order pronounced in the open court on 21st October, 2020

Sd/-	Sd/-
(A. MOHAN ALANKAMONY)	**(P. MADHAVI DEVI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated: 21-10-2020

TNMM

Copy to :

1.Sudhakar Chakkilam, Hyderabad. C/o. P.Murali & Co., Chartered Accountants, 6-3-655/2/3, 1st Floor, Somajiguda, Hyderabad.

2.The Income Tax Officer, Ward-6(1), Hyderabad.

3.CIT(Appeals)-6, Hyderabad.

4.Pr.CIT-6, Hyderabad.

5.D.R. ITAT, Hyderabad.

6.Guard File.