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**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH: 'H' NEW DELHI**

**BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER AND**
**SHRI T.S. KAPOOR, ACCOUNTANT MEMBER**

**(I.T.A .NO. 4719/Del/2011 A.Y. 2005-06)**
**&**
**(ITA No. 4720/Del/2011 A.Y.2006-07)**

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| UKT Software Technologies Pvt. Ltd.<br>1st Floor, The Great Eastern Centre<br>70 Nehru Place, Behind IFCI Tower<br>New Delhi-110019<br>**PAN: AABCN7897E**<br>**(APPELLANT)** | **Vs.** | ITO<br>Ward-18(1)<br>New Delhi<br><br>**(RESPONDENT)** |

Appellant by: Shri Ved Jain, Miss Rano Jain & Sh. Venketesh Chourasia, CAs
Respondent by: Smt. Meeta Sinha, Sr. DR.
Hearing on 25/10/2012
Pronounced on the date:

**ORDER**

**PER T.S. KAPOOR, ACCOUNTANT MEMBER:**

These are two appeals filed by the assessee against the combined order of CIT (A) dated 30/8/2011.

2. The grounds of appeal taken by assessee in both these years are similar, however, the amount as per ground no.7 in both years is different which is Rs.32,85,500/- in respect of A.Y. 2005-06 and Rs.30,41,975/- for A.Y. 2006-07. Moreover the assessee has taken additional ground in A.Y.

2006-07 which is recorded as ground of appeal no. 11. For the sake of convenience, the grounds of appeal in respect of A.Y. 2006-07 are reproduced below:

1. *On the facts and circumstances of the case, the order passed by the learned Commissioner of income Tax (Appeals) [CIT(A)] is bad both in the eye of law and on facts.*

2.(i) *On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in upholding the reassessment framed under section 143(3) despite the fact that no notice under section 143(2) has been issued, a fact admittedly by the AO in remand report.*

(ii) *That the order passed by the AO has been upheld by the learned CIT (A) despite a clear finding of fact that the notice u/s 143(2) was never issued, in clear violation of the specific direction given by the Hon'ble ITAT in this regard.*

3. *On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in not interpreting the judgment of the Delhi High court in the case of Madhya Bharat Energy Corp Ltd, ingnoring the judgment of the apex court in the case of R Dalmia 286 ITR 480, whereby it has been held that once the return has been furnished in response to notice under section 147, all the requirements of assessment, as contemplated in section 143 and 144 shall apply.*

4. *On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in upholding the validity of the reopening of assessment under section 147 of the Act.*

5. *On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in rejecting the contention of the appellant that the reasons recorded for*

*reopening are bad in law & as such the reassessment done in consequence to the needs to be quashed.*

6. *On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in rejecting the contention of the appellant that the assessment order is bad in law & is liable to be quashed as the same has been made without first disposing of the objections raised by the appellant against the reopening.*

7. *On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in confirming the addition of Rs.30,41,975/- on account of purchases of software, professional charges for designing and development.*

8. *On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in rejecting the contention of the appellant that no reliance can be placed on the statement of Sh. S.K. Gupta recorded at the back of the assessee without providing cross examination.*

9. *On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in rejecting the contention of the appellant that the A.O. has misinterpreted the statement of Sh. S.K. Gupta & has wrongly used the same against the assessee, as the appellant has not been named in the said statement & there is no allegation against it coming out of the said statement.*

10. *On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in arbitrarily rejecting the evidence submitted in support of the expenditure incurred despite the fact that even in the remand report A.O. has not pointed out any defect and has not given any adverse comment on that.*

11. *On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in rejecting the*

*contention of the appellant that the appellant being eligible for deduction u/s 10B the same was required to be recomputed on the assessed income and benefit of the same ought to have been allowed.*

*12. That the appellant craves leave to add, amend or alter any of the grounds of appeal.*

3. The brief particulars of the case are that assessee's assessments originally were computed u/s 143(1) which were later on reopened u/s 147/148 of the IT Act. The assessment orders were reopened in view of searches on S.K. Gupta Group of Companies, who were indulging in providing accommodation entries and from the statements recorded in their cases the revenue had found that assessee had taken accommodation entries and therefore, the cases were reopened. The assessee, in view of, notices u/s 147/148 had written to the Assessing Officer that returns filed originally may be treated as returns filed in response to notice u/s 147/148. The Assessing Officer then completed the reassessment proceeding without issuing notices u/s 143(2) of the IT Act. The ld. CIT (A) also did not consider the contentions of assessee and the matter finally reached Hon'ble Tribunal, which vide its order dated 11th Feb. 2011 disposed of appeals filed by assessee. The matter was remanded back to the office of CIT (A) with the direction to record finding of fact as to whether necessary notices were

issued u/s 143(2) of the Act or not. The relevant paragraph of Hon'ble Tribunal Orders is reproduced below:

> *"14. In both the cases, thus, the return was filed in response to notice u/s 148 on 23rd April, 2009. It has already been mentioned above that if the Assessing Officer want to assess the income of the assessee by way of assessment proceedings, then, the issue of notice u/s 143(2) is mandatory. The relevant observations of the Assessing Officer in the remand report of respective years has already been reproduced. The contention of the assessee vide which it was submitted that the assessment is invalid due to non-issuance of notice u/s 143(2) have been recorded at page 5 of the order of CIT (A). These contentions were raised by the assessee before the CIT (A) and these contentions were also forwarded to Assessing Officer. Therefore, it was necessary for learned CIT (A) to record a finding on that fact that whether or not any notice u/s 143 (2) was issued to the assessee or served upon it. Learned CIT (A) has not recorded such findings. The issuance and service of notice u/s 143(2) will go to the root of the matter as, according to the law explained above, if notice is not issued and served u/s 143 (2), then, it will affect the validity of re-assessment order. In this view of the situation, without going into other grounds, we are of the opinion that these matters requires to go back to the CIT(A) to determine such fact and re-adjudicate the matter again by keeping in view the aforementioned law explained in the above part of this order. We direct accordingly. Since we are restoring these appeals to the file of CIT (A), to adjudicate on the legal issue which affects the very validity of the assessment orders, we do not express any opinion on merits of the addition and other grounds which have been agitated by the assessee in the present appeals as they can be decided only after determination of the legal issue regarding issuance and service of notice u/s 143 (2)."*

4. The ld. CIT (A) vide his order for both these years after being remanded back from Hon'ble Tribunal held that notice u/s 143(2) was not issued however he held against the assessee. The relevant portion of ld. CIT (A) order is reproduced below:

"2.2 In view of directions of Hon'ble ITAT, H' Bench, Delhi, this is finding of the fact that statutory notice u/s. 143(2) of the IT Act was not served by the AO as is evident from the Remand Report, reproduced above. However, issue is covered by the order of Hon'ble Delhi High Court in the case of Madhya Bharat Energy Corpn. Ltd. reported at 2011-TIOL-419-HC-DEL-IT, wherein, in para 11 and 12 of the order Honb'ble Delhi High Court has held as under:

"11. As per explanation 2(b) to Section 147 of the Act, where a return income is furnished, but no assessment has been made and it is noticed by the AO that an assessee had understated the income, it will be deemed to be a case where income chargeable to tax had escaped assessment. In the case of Ranchi Club Vs. CIT, 214 ITR 643 (Patna) = (2003-TIOL-293-HC-PATNA-IT) it was held in a case where only intimation was sent, notice under Section 148 of the Act could be issued in terms of Explanation 2(b) to Section 147 of the Act. The case of Mahanagar Telephone Nigam Ltd. (Supra) confirmed that "So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate to proceed under Section 147 and failure to take steps under section 143 (3) will not render the assessing officer powerless to initiate reassessment proceedings even when intimation under section 143 (1) had been issued."

12. It is noted that the impugned assessment is in response to notice under section 148 of the Act and the Act does not specifically provide that the assessment made under section 147 of the Act will be after issue of the notice under section 143(2) of the Act. In fact, AO has the basic jurisdiction to assess the income in terms of Section 147 and Section148 of the Act where he has reason to believe that the income has escaped assessment. On the submissions of non-issuance of notice under section 143(2) of the Act, we are of the view that the findings of the Tribunal in this regard are not as per the scheme of the provisions of section 147 and 148 of the Act."

2.3 In view of reliance on the above mentioned judgment of the Hon'ble Delhi High Court, it is held that though notice u/s 143(2) of the IT Act was not served by the AO during the course of the assessment proceedings, the action of the AO making assessment u/s 143(3) read with section 147 of the IT Act is found to be fully justified and the appeals are decided against the assessee. The various

case laws relied upon by ld. AR are distinguishable on facts. Appeal is decided accordingly."

5. Dissatisfied with the order of CIT (A), the assessee filed appeal before this Tribunal.

6. At the outside, the ld. AR argued that the issue is covered in favour of assessee by Tribunal order dated 11th Feb. 2011 and took us to pages 203 to 211of paper book and invited our attention to the findings of Hon'ble Tribunal. The ld. AR further submitted that Hon'ble Tribunal had passed the judgment after considering various judgments of Hon'ble Supreme Court and the only issue which was referred back by ITAT to CIT (A) was to record a finding as to whether or not notice u/s 143(2) was issued to the assessee. He further argued that though ld. CIT (A) in Para 2.2 on page 12 has stated that statutory notices u/s 143(2) of the IT Act was not served by the AO, yet going beyond his jurisdiction and relying upon the judgment the case of Madhya Bharat Energy Corp. Ltd. dismissed the appeal of the assessee.

7. The ld. AR further argued that the above said Delhi High Court case stands reviewed by Delhi High Court itself by its order dated 17th Aug. 2011 and secondly this issue was not before CIT (A) as Hon'ble ITAT had already given a finding that 143(2) notice was mandatory and in case the department had any grievance it could have filed appeal before the High Court.

Continuing his arguments, the ld. AR submitted that issuance of notice u/s 143(2) is mandatory in the case of reassessment u/s 147 read with Section 148 and in support he placed reliance on the judgments in the following cases:

a. CIT Vs. Rajeev Sharma, (2011) 336 ITR 678 (Alld.)

b. DIT Vs. Society For Worldwide Inter Bank Financial Telecommunications 323 ITR 249 (Del)

c. CIT Vs. Deep Baruha (2010) 329 ITR 362 (Gauhati)

8. The ld. AR further argued that even if there is any judgment of any High Court other than jurisdictional Delhi High Court which is against the assessee even then the judgment favourable to the assessee will be applicable as was held by Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products Ltd. 88 ITR 192. He further argued that Finance Act 2006 with retrospective effect from the 1st October, 1991 has provided that where return has been furnished u/s 148 during the period commencing on 1st October, 1991 and ending on 1st September, 2005 the reassessment proceedings shall not be invalid because the notice was not served u/s 143(2) before the expiry of time limit for making such assessment. In view of the above amendment. The ld. AR argued that intent of legislature with respect to issue of notice u/s 143(2) is clearly mandatory in nature.

9. The ld. DR on the other hand argued that Section 292BB comes to the rescue of revenue whereby the requirement of issuing notice u/s 143(2) can be dispensed with. In this respect she relied upon the case law of CIT Vs. Panchwati Motors (P) Ltd. 200 taxman 136.

10. The ld AR on the other hand in his rejoinder submitted that Section 292 BB cannot come to the rescue where there is no issue of notice. He further argued that it is not a case of service/ defective service rather it is a case of non-issue of notice, secondly he argued that provisions of Section 292BB are applicable from assessment year 2008-09 as has been held by jurisdictional High Court in the case of CIT Vs. Mani Kakar 2009 18 DTR (Del) 145. Similarly he put reliance on the judgment of Hon'ble Allahabad High Court in the case of CIT Vs. Mukesh Kumar Agrawal 345 ITR 29 wherein it was held that the very foundation of Jurisdiction of Assessing Officer was on issuance of notice u/s 143(2) of the Act. He further argued that in the present case the Tribunal had remanded back the appeal filed to CIT (A) to just verify as to whether notice u/s 143(2) was issued or not.

11. We have heard the rival parties and gone through the material placed on record. We find that Hon'ble Tribunal vide its order dated 11th Feb. 2011 had already adjudicated that issuance of notice u/s 143(2) was mandatory.

The Hon'ble Tribunal had remanded the file to the office of CIT (A) to record a finding of fact as to whether notice u/s 143(2) was issued or not.

12. The ld. CIT (A) has recorded a finding of fact in para 2.2 on page 12 wherein it has been mentioned that notice u/s 143(2) of the IT Act, was not issued.

13. We further observe that ld. CIT (A) has traveled beyond his jurisdiction and has held that though notice u/s 143(2) of the IT Act was not served by the AO during the course of assessment proceeding the action of AO making assessment u/s 143(3) read with Section 147 of IT Act was fully justified.

14. Section 292BB as inserted by Finance Act 2008 reads as under:

292BB where an assessee has appeared in any proceeding or cooperated in any inquiry relating to an assessment or reassessment it shall be deemed that any notice under any provision of this Act which was required to be served upon him has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was:

i. Not served upon him

ii. Not served upon him in time

iii. Served upon him in an improper manner.

15. Provided that nothing contained in this Section was applicable where the assessee has raised such objection before the completion of such assessment or reassessment. The above section was inserted by Finance Act 2008 w.e.f. 1.4.2008 and Hon'ble Delhi High Court in the case of CIT Vs. Mani Kakar 2009 (supra) had held that provisions of Section 292BB are applicable from assessment year 2008-09 and the cases under consideration relates to assessment years 2005-06 and 2006-07. Similarly Hon'ble Delhi High Court in the case of ITO Vs. Nasemen Farms P. Ltd. (2010) 47 DTR 33 has held that provisions of Section 292BB are applicable only from assessment year 2008-09 and also do not apply where there is failure to issue notice as jurisdiction to assess arises only after the notice has been issued. Moreover in the case of Alpine Electronics Asia P. Ltd. Vs. Director General of Income Tax the Hon'ble Delhi High Court in a writ petition no. 7932/2010 dated 24/1/2012 has held that notice u/s 143(2) is mandatory in reassessment proceedings and it is not a procedural requirement. Moreover, the case law relied upon by ld. CIT (A) relating to Hon'ble Delhi High Court has been reviewed by the Hon'ble Court in review Petition No. 441/2011 wherein Hon'ble Court has clarified that question relating to completion of assessment without issuing notice u/s 143(2) was not admitted as question of

law. Therefore, keeping in view the facts and circumstances of the present case and in view of various judicial pronouncements we hold that reassessment proceedings completed in above cases without issuing of necessary notice u/s 143(2) were bad in law and hence were void ab initio. In view of the above the appeals filed by assessee are allowed.

The order is pronounced in the open Court on the day of 16/12/2013

Sd/-

**( DIVA SINGH )**
**JUDICIAL MEMBER**

Sd/-

**(T.S. KAPOOR)**
**ACCOUNTANT MEMBER**

Dated: 16/12/2013
"AK VERMA"

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**
**सहायक पंजीकार,**
**Assistant Registrar,**
आयकर अपीलीय अधिकरण,
**Income-tax Appellate Tribunal**
दिल्ली पीठ, नई दिल्ली
**Delhi Benches, New Delhi.**