

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

**BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
&
SHRI K.N. CHARY, JUDICIAL MEMBER**

**ITA No.-8774/Del/2019
(Assessment Year: 2010-11)**

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| M/s Dart Infrabuild (P) Ltd. (Earlier known as Kiwi Infrabuild P. Ltd.) E-1, South Extension, Part-II, North Delhi. PAN No. AACCK8924G | vs ITO Ward 14(3), New Delhi. |
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| Assessee by | Shri Salil Aggarwal, Adv. & Shri Shailesh Gupta, CA |
| Revenue by | Ms. Nidhi Srivastava, CIT DR |

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| Date of Hearing | 14.08.2020 |
| Date of Pronouncement | 25 .08.2020 |

ORDER

PER K. NARSIMHA CHARY, J.M.

Aggrieved by the order dated 28/3/2016 passed by the learned Commissioner of Income Tax (Appeals)-36 ("Ld. CIT(A)") in the case of M/s Kiwi Infrabuild Pvt. Ltd. ("the assessee"), for the assessment year 2010-11, the assessee preferred this appeal challenging the

completion of assessment under section 147/144 of the Income Tax Act, 1961 ("the Act") on the grounds of improper service of notice under section 148 of the Act and also non-issuance of notice under section 143(2) of the Act.

2. Briefly stated facts are that the assessee is a company. Its case was selected under scrutiny for the assessment year 2011-12 for the reason that the assessee had received large share premium. During the course of scrutiny proceedings for such year, it was submitted on behalf of the assessee that the share premium was received during the financial year 2009-10 relevant to the assessment year 2010-11 and, therefore, does not belong to the assessment year 2011-12. Assessee also placed evidences in that respect. On verification of record it was found that the assessee company did not file any return of income for the assessment year 2010-11.

3. Notices under section 148 and 142(1) of the Act, were therefore, issued. On 29/12/2015, a letter was filed on behalf of the assessee along with the acknowledgement of return of income for the assessment year 2010-11 dated 4/12/2015, declaring nil income. Assessee requested for reasons recorded and the same are furnished. Subsequently, by way of letter dated 7/3/2016 the assessee requested for the approval of the JCIT for the opening of the case. Assessing officer observed that in this case, the provisions of section 151(1) of the Act were not applicable, as the case falls within 4 years, and there was no need to take any prior permission from the

JCIT. Assessee challenged before the, learned Assessing Officer, that the assessment proceedings initiated under section 147 of the Act are illegal and void as no permission as per provisions of section 151 of the Act were taken before issuing of notice.

4. Learned Assessing Officer did not accept the contention of the assessee and proceeded with the assessment proceedings. It was noticed that the assessee engaged in raising capital by way of share capital and premium on share capital during the year under consideration and the assessee received the share capital to the tune of Rs. 8, 50, 000/- and share premium of Rs. 24, 19, 0, 0, 000/-. Such an amount received during the year was shown as invested in equity shares of unquoted companies and loans and advances given. According to the learned Assessing Officer no details of the same are furnished nor any bank statements were filed to justify that the same are received through banking channels. Learned Assessing Officer, therefore, reached a conclusion that the assessee failed to prove the identity, genuineness, and creditworthiness of the parties. He accordingly added the amount of Rs. 25, 07, 50, 000/- to the income of the assessee under section 68 of the Act, besides initiating proceedings under section 271(1)(c) of the Act. Learned Assessing Officer also made an addition to the tune of Rs. 6, 25, 825/- under section 14A of the Act.

5. Challenging the completion of assessment without complying with the requirement of service of notice under section 148 of the

Act, assessee preferred appeal before the Ld. CIT(A). It was also submitted before the Ld. CIT(A) that the assessment proceedings initiated a section 147 of the Act were illegal and void for want of obtaining permission in terms of provisions of section 151 of the Act before issuing notice. Ld. CIT(A) did not accept the contentions raised on behalf of the assessee stating that the assessee company was using the tactics of gaining time so that the department would not get enough time to unearth the real practices adopted by the assessee company for building capital. Observing that the company did not file the requisite details of the parties from whom the share capital and share premium was received during the year under consideration, namely, name and address, bank account statement depicting the source and transaction with the assessee, confirmations, IT particulars and balance sheet with annexure to prove the identity, genuineness, and creditworthiness of the parties from whom such share capital, including share premium was received, Ld. CIT(A) held that the assessee company failed to discharge the owners and as in many cases share capital/share premium was not received through banking channels and was received through book entry by increasing the share capital and share premium and correspondingly increasing the loan and share capital of other companies and, therefore, addition of Rs. 25,07,50,000/- made under 68 of the Act was justifiable. So also, Ld. CIT(A) upheld the addition made under section 14A of the Act. Consequently, Ld. CIT(A) dismissed the appeal of the assessee.

6. Aggrieved by the findings of the Ld. CIT(A), assessee preferred this appeal initially challenging the assessment order passed under section 147/144 of the Act on the ground that it was bad under law for non-compliance with the requirement under section 148 of the Act in respect of proper service of notice, and also the observations of the Ld. CIT(A) that the assessee was not interested in prosecuting the appeal. Subsequently assessee filed additional grounds of appeal, pleading that no notice under section 143(2) of the Act was issued and therefore, the assessment cannot be sustained. Assessee placed reliance on the edition of the Hon'ble Apex Court in the case of NTPC Ltd vs. CIT (1998) 229 ITR 383 for the principle that the Tribunal has wide powers in admitting the additional ground, since the purpose of assessment before the taxing authorities is to assess correctly the, tax liability of an assessee in accordance with law.

7. Having gone through the record and in view of the fact that the decision on the additional ground does not require any further investigation of fact and could be decided based in on the material available on record, while respectfully following the decision of the Hon'ble Apex Court in the case of NTPC (supra), we admit the additional ground and proceed to decide the matter.

8. Insofar as the challenge to the notice under section 148 of the Act is concerned, Ld. AR argued that the notice dated 30/3/2015 under section 148 of the Act was issued by the learned Assessing Officer at the old address of the assessee company and that too

through affixture. He submitted that by 14/3/2014 itself the assessee had duly intimated the learned Assessing Officer regarding the change of address which is prior to the issuance of the alleged notice and section 148 of the Act, and thus the notice issued at the old address was invalid on this ground. It is further submitted that an intimation under section 143(1) of the Act for the assessment year 2013-14 was issued on 7/3/2014 by the Revenue at the new address of the assessee and it shows that the Revenue was aware of the change of address of the assessee. He further submitted that the learned Assessing Officer had provided the assessee company with a copy of the snapshot of MCA record showing new address of the assessee as is available in assessment file. Basing on all these things, Id. AR submitted that the new address of the assessee is available with the assessing officer long prior to the issuance of the notice under section 148 of the Act and therefore, issuance of the notice under section 148 of the Act to the old address is not proper. He further submitted that the record does not spell out any reasons for the learned Assessing Officer to resort to serve the notice under section 148 of the Act through affixture.

9. In respect of the additional ground relating to the non-issuance of notice under section 143(2) of the Act, it is the submission on behalf of the assessee that no notice was issued under section 143(2) of the Act and therefore, the assessment made without issuing notice under section 143(2) of the Act is bad under law. He submitted that

by way of reply dated 29/12/2015 assessee submitted before the assessing officer that the assessee had already furnished the return of income on 4/12/2015 in response to the notice issued and section 148 of the Act, but in spite of the said fact, learned Assessing Officer never issued in a notice under section 143(2) of the Act, nor any discussion was made in the assessment order. Ld. AR submitted that in view of the decisions of the Hon'ble Supreme Court in the case of CIT vs. Laxman Dass Khandelwal 417 ITR 325 and of Hon'ble Delhi High Court in the cases of PCIT vs. Silver line 383 ITR 455, CIT vs. Delhi Kalyan Samiti in ITA No. 696/2015, PCIT vs. Atlanta capital private limited in ITA No. 665/2015, PCIT vs. Shri Shawshankar traders 383 ITR 448 and PCIT vs. Paramount Biotech industries Ltd 398 ITR 701, any such assessment so framed without issuance of notice under section 143(2) of the Act is illegal and without jurisdiction.

10. Per contra, it is the submission of the Ld. DR that the affixture of notice under section 148 of the Act was done at the last known address of the assessee because the new address of the assessee was furnished by the assessee by way of letter along with copy of form number 18 in respect of change of address only on 18/3/2016, which was subsequent to the issuance of notice under section 148 of the Act. She further submitted that it could be seen from the record that the letter dated 14/3/2014 regarding change of address of the assessee was addressed to the ITO, Ward number 5 (3), New Delhi. Basing on this Ld. DR submitted that as on the date of issue of notice

under section 148 of the Act, the last known address of the assessee as per PAN database and return of income filed by the assessee for the assessment year 2013-14 and, therefore, there was no infirmity in the issue and service of notice under section 148 of the Act. Ld. DR place reliance on the decision of the Hon'ble Apex Court in the case of PCIT vs. M/s I-Ven interactive Ltd, Mumbai, in civil appeal number 8132 of 2019, wherein it was held that when no application is made by the assessee to change the address in the PAN database and old address continues in the same, learned Assessing Officer was justified in sending the notice at the address as per the PAN database; and that the notice has to be "issued" within the prescribed time and, therefore, a notice sent to the wrong address of the assessee due to non-updating of the new address in PAN database is not bad in law. She further submitted that notice was sent to the email address of the assessee, and, therefore, it cannot be said that there is no proper service of notice under section 148 of the Act.

11. It is further argued by the Ld. DR that as per notice dated 30/3/2015 under section 148 of the Act issued and served upon the assessee, the assessee was directed to file the return of income within 30 days, whereas the assessee failed to file the return of income for the assessment year 2010-11 within such a specified time and, therefore, the necessity of issue notice under section 143(2) of the Act does not arise in the case of failure of the assessee to comply with the directions given in notice under section 148 of the Act. On

this premise, Ld. DR submitted that the learned Assessing Officer was justified in passing the order and section 144 read with section 147 of the Act on 28/3/2016.

12. Ld. DR further submitted that there was a recovery survey conducted on the assessee on 6/3/2020 on the addresses given by the assessee at both the places, but it was found that no such company exists at the above-mentioned addresses. For all these reasons, Ld. DR submitted that the orders of the authorities below do not suffer any legality regularity and there is no need to interfere with the same.

13. We have gone through the record, in the light of the submissions made on either side. It is an admitted fact that the notice under section 148 of the Act was issued by the learned Assessing Officer on 30/3/2015 and claimed to have served the same by way of a fixture at the old address. Revenue pleads that it was only subsequent to the issuance of notice under section 148 of the Act the assessee furnish the new address vide letter dated 18/3/2016; whereas the contention of the assessee is that as on 30/3/2015 they have already communicated the change of address to the assessing officer, and this fact is borne on record. Assessee places reliance on the intimation under section 143(1) of the Act for the assessment year 2013-14 issued on 7/3/2014 at a new address which is to be found on the snapshot of MCA record, which was furnished by the learned Assessing Officer himself.

14. Copy of the intimation under section 143(1) of the Act dated 7/3/2014 for the assessment year 2013-14 is furnished at page number 1 to 4 of the paper book. It clearly establishes that as on 7/3/2014, the database of the Department is updated showing the new address of the assessee. Further, the snapshot of the MCA record also corroborates the same. On the face of these two documents, it cannot be said that the Department issued the notice under section 148 to the last known address. As a matter of fact, the last known address is the present address of the assessee as revealed by the official records of the Revenue. Further, the email address of the assessee as could be found from the snapshot of the MCA is different from the email address to which the Revenue claims to have issued the notice under section 148 of the Act.

15. Ld. DR argued that the letter dated 14/3/2014 by the assessee before the learned Assessing Officer along with form 18 was filed only during the course of free assessment proceedings, i.e., on 18/3/2016, does not seem to hold any water because the intimation under section 143(1) of the Act dated 7/3/2014 for the assessment year 2013-14 was issued to the new address of the assessee, and if the Department does not know the new address earlier and came to know of the new address of the assessee for the 1st time only through the letter dated 14/3/2014 filed before the, learned Assessing Officer only on 18/3/2016, it would not have been possible. This fact does not admit of any doubt as to the availability of the new address of the

assessee with the learned Assessing Officer, at least by 7/3/2014, which is prior to the date of issuance of notice under section 148 of the Act in this matter on 30/3/2015.

16. Ld. AR submitted that the department claims to have serve the notice under section 148 of the Act to the email ID rajkumar@mail.com and the assessee never used such an email ID and therefore, service to such a mail cannot be attributed to the notice of the assessee. Ld. AR submitted that the email ID available with the Department has been sagarpnnp@hotmail.com. There is no material available on record to show that the assessee had ever used the email ID rajkumar@mail.com. On the other hand, the snapshot of the MCA record available with the learned Assessing Officer, copy of which is filed at page 7 of the paper book, clearly shows that the email ID of the assessee is sagarpnnp@hotmail.com. It is, therefore, difficult for us to hold that there is any proper service of notice under section 148 of the Act on the assessee. Further, there is no denial of the fact pleaded by the assessee that the assessee was being assessed by the ITO, Ward No. 5 (3) till the assessment year 2013-14 and the return of income for the assessment year 2013-14 was also filed before the, Ward number 5 (3).

17. The other circumstance that is brought to our notice by the Ld. AR and on verification of the order sheet entries made by the learned Assessing Officer what we found is that the order sheet entries do not contain any entry regarding the issuance of notice under section

148 on 30/3/2015, nor about the service thereof, in as much as subsequent to the entry regarding the recording of reasons on 20/3/2015, the next entry is dated 3/6/2015 and the order sheet silent as to the proceedings that it took place on 30/3/2015. Further, under order V, rule 17 of the code of civil procedure, the affixation can be done only when the assessee or his agent refuses to sign the acknowledgement or could not be found; whereas in this matter is not the case of the Revenue that the assessee is not traceable or anyone representing the assessee refused to receive the notice or to sign the acknowledgement thereof. In the circumstances we are of the considered opinion that the decision of the Hon'ble Apex Court in the case of M/s I-Ven interactive Ltd 418 ITR 662 has no application to the facts of the case.

18 Though the Ld. AR submitted that a recovery survey was conducted on the assessee on 6/3/2020 on the two addresses of the assessee, namely, Mahajan house, E-1, South extension, part 2, New Delhi and building. Number 598, Chattarpur Pahari, Delhi-110074 and during the course of such survey, the assessee company does not exist at such addresses, we are in agreement with the Ld. AR that such a fact is irrelevant insofar as the impugned assessment year is concerned, and shall not relate back to validate the argument that the assessee does not exist in any of the addresses given by them and therefore, the learned Assessing Officer is justified in resorting to the

service of notice under section 148 of the Act, by way of affixture at the last known address.

19. Now coming to the service of notice under section 142 of the Act is concerned, Revenue admits that no such notice was issued and on the other hand, the plea taken on behalf of the Revenue is that in the notice under section 148 of the Act the assessee was directed to file the return of income within 30 days, which expires by 30/4/2015, whereas the assessee filed the return of income on 4/12/2015 which is clearly beyond the time given by the learned Assessing Officer to the assessee in the notice under section 148 of the Act, and therefore, the return file by the assessee violation of the conditions prescribed in the notice under section 148 of the Act and is an invalid return entitling the learned Assessing Officer not to issue notice under section 142 of the Act. On this premise, Ld. DR justified the assessment order passed under section 144 read with section 147 of the Act.

20. By way of additional ground, it is pleaded on behalf of the assessee that in the reply filed before the learned Assessing Officer on 29/12/2015 in response to the notice issued under section 142 (1) of the Act, it was submitted that the return of income was filed on 4/12/2015 in the proceedings initiated under section 148 of the Act, and, therefore, if the assessing officer proposes to proceed with the assessment proceedings, it is incumbent upon him to issue notice under section 143(2) of the Act. Further, it is not the case of the

learned Assessing Officer, as could be seen from the assessment order, that the return of income filed on 4/12/2015 had to be treated as invalid. On the other hand, learned Assessing Officer took cognizance of the return of income so filed by the assessee and proceeded to complete the assessment with the additions in question. Arguments of Ld. DR on this aspect is not supported by the assessment order.

21. The argument that in cases where the assessee failed to file the return of income for the relevant assessment year within the time prescribed in the notice issued under section 148 of the Act, the said return would be invalid one and has to be ignored by the learned Assessing Officer, in which case, no notice under section 143(2) of the Act is required to be issued to the assessee and the assessment framed under section 144 of the Act would be valid - was considered by the Hon'ble jurisdictional High Court in the case of CIT vs. Delhi Kalyan Samiti (supra). In that case, the Hon'ble Court held that,

"9. It is now well established that if the AO does not accept the return filed by the Assessee on its face and he is required to issue a notice under Section 143(2) of the Act and provide an opportunity to the Assessee to produce the necessary material in support of his return. Mr Shivpuri had argued that a notice under Section 143(2) was required to be issued only in cases where the AO considers it necessary or expedient to do so and in cases where the Assessee had not filed its response to the notice under Section 142(1) it was not necessary for the AO to issue such notice under Section 143(2). In our view, this contention is bereft of any merits and completely ignores the scheme of the machinery provisions for assessment under the Act. It is now well settled by a number of decisions (See:

Pr. CIT Silver Line and 283 CTR 148 (Del), ACIT v. Hotel Blue Moon: 321 ITR 362 (SC) and CIT v. PawanGupta: 318 ITR 322 (Del)) that whenever the return filed by an Assessee is not accepted at its face, it is mandatory for the AO has to issue a notice under Section 143(2) of the Act for proceeding further. It is thus not open for the AO to not issue a notice under Section 143(2) of the Act and proceed directly under Section 144 of the Act by rejecting the return filed by the Assessee.”

22. Further, while placing reliance on the decision of the Hon'ble apex court in the case of Asstt CIT v. Hotel Blue Moon [2010] 321 ITR 362 and also of the Hon'ble Delhi High Court in the case of Pr. CITv. Shrijai Shiv Shankar Traders (P.) Ltd. IT Appeal No. 519 of 2015, dated 14-10- 2015, and while referring to the provisions under section 148 and 139 (4) of the Act, the Kolkata Bench of the Tribunal dealt with this issue in detail in ITO vs. Pinnacle Commodities Private Limited in ITA No., 1901 /Kol/2018 and held that when the assessee had filed return of income, the AO in order to successfully usurp the jurisdiction to frame assessment had to issue notice u/s. 143(2) which was a jurisdictional notice and mandatory for framing of assessment order u/s. 143(3) or u/s. 144 of the Act as discussed.

23. It is, therefore, clear that a conjointly reading of section 148 (1) of the Act with section 139 (4) of the Act and section 144 of the Act makes it abundantly clear that pursuant to the notice under section 148 of the Act, if an assessee files a belated return or letter reiterating his earlier written then the learned Assessing Officer is bound to issue notice under section 143(2) of the Act if he frames the reassessment under section 144/143(3) of the Act. In the case on hand, there is no

denial of the fact that by letter dated 29/12/2015, in response to the notice dated 12/6/2016 under section 142 (1) of the Act issue to the assessee, the assessee submitted before the, learned Assessing Officer that the return of income filed on 4/12/2015 was in response to the notice issued and section 148 of the Act. When once the assessee submitted so that in response to the notice under section 148 of the Act the return dated 4/12/2015 was filed, it is incumbent upon the learned Assessing Officer, if at all, he proceeds to frame the assessment under section 144/143(3) of the Act, to issue notice under section 143(2) of the Act, without which, in the assessment framed would not be legal.

24. For the reasons recorded in the preceding paragraphs, we find it difficult to uphold the impugned orders on both the counts, namely, improper service of notice under section 148 of the Act and also for want of service of notice under section 143(2) of the Act. It follows that the assessment order dated 28/3/2016 under section 147/144 of the Act cannot be sustained. We, therefore, quash the same.

25. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 25th August, 2020

Sd/-

(G.S. PANNU)

VICE PRESIDENT

Dated: 25.08.2020 / *Kavita Arora

Sd/-

(K. NARSIMHA CHARY)

JUDICIAL MEMBER

Copy forwarded to:

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

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ASSISTANT REGISTRAR
ITAT NEW DELHI

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| Date of dictation | 21.08.2020 |
| Date on which the typed draft is placed before the dictating Member | 21.08.2020 |
| Date on which the typed draft is placed before the Other Member | |
| Date on which the approved draft comes to the Sr. PS/PS | |
| Date on which the fair order is placed before the Dictating Member for pronouncement | |
| Date on which the fair order comes back to the Sr. PS/PS | |
| Date on which the final order is uploaded on the website of ITAT | |
| Date on which the file goes to the Bench Clerk | |
| Date on which the file goes to the Head Clerk | |
| The date on which the file goes to the Assistant Registrar for signature on the order | |
| Date of dispatch of the Order | |