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

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**ITA 951/2015**

**RAJEEV BOOBNA**

..... Appellant

Through: Mr Arvind Kumar and Mr Harshvardhan  
Sharma, Advocates.

versus

**PRINCIPAL COMMISSIONER OF INCOME  
TAX-17**

..... Respondent

Through: Mr P. Roy Chaudhuri, Senior Standing  
Counsel and Ms Lakshmi Gurung, Junior Standing  
Counsel.

**CORAM:**

**JUSTICE S.MURALIDHAR**

**JUSTICE VIBHU BAKHRU**

**ORDER**

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**24.02.2016**

**1. Admit.**

2. The following question of law is framed for consideration:

With the CIT(A) having returned a finding that the notice issued under Section 142(1) of the Income Tax Act, 1961 by the Assessing Officer (AO) on 5<sup>th</sup> November, 2007 was time barred and that finding having become final, was the ITAT justified in remanding the matter to the AO for a fresh determination?

3. The present appeal filed by the Assessee under Section 260A of the

Income Tax Act, 1961 ('Act') is directed against the order dated 6<sup>th</sup> November, 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.2851/2011 for the Assessment Year ('AY') 2005-06.

4. The Assessee states that in the relevant AY 2005-06 he was engaged in the business of purchase and sale of mobile phones. He filed a return of income on 31<sup>st</sup> October, 2005 for the AY 2005-06 declaring a total income of Rs.93,749/-. The return was filed with the jurisdictional ITO Ward 31(4), New Delhi. It is stated that an ex parte assessment order under Section 144 of the Act was passed by the ITO Ward 41(4) on 31<sup>st</sup> December, 2007. In the said assessment order, it was recorded that the case information had been received from the office of the Chief Commissioner through the CIT (CIB) that the Assessee had made deposits and investments of Rs.38,64,940/- in UTI Bank Limited and that the Assessee had not furnished his PAN at the time of making such investment.

5. In the assessment order, it was mentioned that a notice under Section 142(1) of the Act dated 5<sup>th</sup> November, 2007 had been issued to the Assessee through Speed Post. The said notice was not received back by the AO undelivered and was not replied to by the Assessee. It is stated that another notice under Section 142(1) dated 7<sup>th</sup> December 2007 was issued to the Assessee asking him to show cause why the amount of investment made with the UTI Bank Ltd. should not be assessed as undisclosed income for the AY 2005-06. This notice too was not returned unserved. The AO, therefore, presumed that the Assessee had been served, was not interested in pursuing the case and had no reply to offer. Resultantly, the entire amount of

Rs.38,64,940/- was added to the disclosed income of the Assessee by an order dated 31<sup>st</sup> December 2007.

6. Among the grounds urged by the Assessee before the Commissioner of Income Tax (Appeals) [CIT(A)] was that there was no proper service of notice purportedly issued by the AO under Section 142(1) of the Act on either of the two occasions on the Assessee. Another specific ground urged before the CIT(A) during the hearing of the appeal was that the notices issued under Section 142(1) were time barred since they were issued after the end of the AY in question.

7. In the order dated 1<sup>st</sup> March 2011 the CIT(A), while allowing the appeal of the Assessee, rendered the following findings specific to the above grounds:

“6. **Determination**

I have considered the submission of the appellant and finding in assessment order and the material placed on record. I have gone through the various judicial pronouncement cited by the A/R in the submission. A copy of the written submission along with paper book containing the additional evidences filed by the appellant was sent to the AO for his comment on the same. In his reply to the same, the AO has commented that there was a valid service of notice. However, the AO failed to adduce any cogent evidence of service of notice issued under section 142(1) of the Income Tax Act, 1961 before the end of the assessment year as the appellant has filed his return of income for the assessment year under consideration within the time allowed by the Act. The appellant has filed an affidavit regarding non service of notice which has been placed on record. The AO has failed to adduce any cogent evidence to challenge the validity of the affidavit of the appellant except simply stating that the

appellant did not attend the proceedings even though he received all the statutory notices to him from time to time due to the fact that no notice was returned back undelivered.

The AO also failed to adduce any cogent evidence of service of notice issued under section 144 of the Income Tax Act, 1961 to the appellant before framing assessment under section 144. In view of the facts stated above and after examining the additional evidences filed by the appellant, perusal of the remand report of the AO and reply of the appellant to the remand report of the AO, I am of the opinion that the assessment framed under section 144 of the Income Tax Act, 1961 in the case of the appellant is bad in law as no notice under section 142(1)/144 of the Income Tax Act, 1961 was served to the appellant in the manner prescribed under section 282 of the Income Tax Act, 1961. The AO failed to adduce any cogent evidence in respect of proper service of notice under section 142(1)/144 of the Income Tax Act, 1961 and merely repeatedly submitted in the remand report that the notices were duly served as the notices were never returned undelivered. It is settled law that whenever as assessee challenged the validity of the assessment proceedings on the ground of non-service of notice, the AO should produce documentary evidence about proper service of notice which he failed to do. Further since notice under section 142(1) of the Income Tax Act, 1961 was issued by the learned assessing officer only on 05.11.2007 requiring the appellant to file true and correct return of income of appellant for the assessment year 2005-06 is time-barred, assessment made on the basis of such invalid notice and also un-served notices is bad in law, hence the assessment framed under section 144 is hereby quashed. This ground of appeal is allowed to the appellant.”

8. When the Revenue filed an appeal before the ITAT against the aforementioned order, there was no specific ground raised by it challenging the above finding of the CIT(A) that the notices under Section 142(1) of the

Act issued by the AO were time barred. The impugned order of the ITAT sets out the grounds raised by the Revenue in its appeal as under:

“1. On the facts and circumstances of the case, the Ld. CIT(A) had erred in deleting the addition made to the extent of Rs.37,10,343/- out of Rs.38,64,940/- on account of cash deposited in bank.

2. On the facts and circumstances of the case, the Ld. CIT(A) had erred in deleting the addition by ignoring and overlooking the facts as mentioned in the Remand Report submitted by the A.O./before the Ld. CIT(A).

3. On the facts and circumstances of the cases, the decision of the Ld. CIT(A) regarding additional evidence/plea furnished by the assessee without giving opportunity to the A.O. to make further enquiry was not acceptable. The theory of peak credit is not acceptable. (Jhamatmal Takhatmal Kirana Merchants v. CIT (MP) 152 CTR 311).

4. On the facts and circumstances of the case, the Ld. CIT(A) had erred that the notice u/s 142(1) sent by A.O. was un-served and assessment completed u/s 144 without valid service of notice u/s 142(1) of the I.T Act, 1961 hence the assessment is bad in law and void ab initio is liable to be quashed.”

9. Therefore, none of the above grounds urged by the Revenue challenged the finding of the CIT(A) that the notices under Section 142(1) of the Act were time barred.

10. While dealing with the above grounds, the ITAT disbelieved the CIT(A) that the notice under Section 142(1) was not served on the Assessee. For determination of the other issues on merits, the ITAT, by the impugned

order, remanded the matter to the AO for a fresh determination.

11. Before this Court, learned counsel for the Appellant referred to the decision of the Special Bench of the ITAT in *Motorola Inc. v. Deputy Commissioner of Income-tax (2005) 95 ITD 269(Delhi) (SB)* in which it was held that although there was no time prescribed under Section 142(1) of the Act for issuing notice, a notice calling for a return could not be issued at any time “at the whims and fancies of the Assessing Officer”. Having examined the scheme of the Act, the Special Bench of the ITAT held in para 37.1 of the said decision as under:

“37.1. It is clear from the section that the starting point for issue of notice under Section 148 relating to escapement of income is to be counted from the end of the relevant assessment year. It would only be logical to infer that income escapes assessment at the end of the assessment year and therefore, the period of limitation to issue notice under Section 148 is to be taken from that point of time. Thus this section fully supports the contention that at the end of the assessment year income would escape assessment and notice under Section 148 will have to be issued. If that is the case, there can be no question of calling for a return under Clause (i) of Sub-section (1) of Section 142 after the end of the assessment year without issuing notice under Section 148. The position in the case of escaped assessment is totally different and the same is required to be tackled under Section 148 of the Income-tax Act. It is therefore clear that a notice after the end of assessment year cannot be issued under Section 142(1)(i) of Income-tax Act. All the provisions are required to be read together and given a harmonious construction. This is well settled law.”

12. Ultimately, the Special Bench of the ITAT in *Motorola Inc. v. Deputy*

*Commissioner of Income-tax (supra)* concluded that a notice under Section 142(1)(i) of the Act cannot be issued after the end of the relevant assessment year. The submission of the learned counsel for the Assessee that the above decision of the Special Bench of the ITAT in *Motorola Inc. (surpa)* has been accepted by the Revenue, since no appeal against the said decision was filed by it, has not been countered by the learned counsel for the Revenue. Although the said decision is not binding on this Court, the fact remains that as far as the ITAT was concerned, even if the Revenue had raised a specific ground challenging the findings of the CIT(A), the ITAT would have been bound by the above decision of the Special Bench of the ITAT in *Motorola Inc. (supra)*.

13. With the Revenue not having challenged the above finding of the CIT(A) that the notices under Section 142(1) of the Act issued to the Appellant Assessee were time barred, the said finding attained finality. Since the assessment order was based only on the premise that the Assessee offered no explanation to the notices under Section 142(1) of the Act, resulting in the making of the addition by the AO, the assessment order extent has to be held to be bad in law.

14. Accordingly, the impugned order of the ITAT dated 6<sup>th</sup> November, 2015 is set aside. The order of the CIT(A) on the above aspect is hereby affirmed. Consequently, the additions made by the assessment order dated 31st December 2007 are deleted. The question framed is answered in favour of the Assessee and against the Revenue.

15. It is, however, clarified that this judgment should not be taken to be an affirmation by the Court of the decision of the Special Bench of the ITAT in *Motorola Inc. (supra)*. That question is left open for consideration in an appropriate case as and when the issue is raised.

16. The appeal is disposed of in the above terms.

**S.MURALIDHAR, J**

**VIBHU BAKHRU, J**

**FEBRUARY 24, 2016**  
**MK**