

## Pravin Balubhai Zala v. ITO ()

### INCOME TAX ACT, 1961

--**Assessment**--ValidityNotice under section 142(1) by non-jurisdictional AO--The ITO (HQ) CIB, Pune, issued notice under section 142(1) calling for the return of income for assessment year 2005-06 and assessee had filed the acknowledgement receipt of return of income. In response to notice under section 142(1), assessee filed reply on 4-9-2007 stating therein that assessee had filed its return for assessment year 2005-06 on 31-10-2005 vide acknowledgement receipt No. 2302008916 with Ward 3(2), Thane. Copy of the acknowledgement receipt was also enclosed with this reply. This reply was filed on 7-9-2007 with ITO (HQ) CIB, Pune and the return for the subsequent years i.e., assessment year 2006-07 was also filed with Circle 3, Thane on 30-10-2006. **Held:** It is amply proved that the assessee had complied with the notice issued under section 142(1) issued by the ITO (HQ) CIB, Pune; therefore, recording of the facts in the assessment order by the ITO (HQ) CIB, Pune, that assessee had not complied with the requirement of section 142(1), was not correct. Therefore, issuance of notice under section 142(1) itself was without jurisdiction. The ITO (HQ) CIB, Pune, had completed the assessment under section 144 even without issuing statutory notice under section 143(2), which is mandatory for allowing opportunity of being heard to the assessee for completion of assessment under section 143(3) or under section 144. No such notice had been issued; therefore, for this reason also the assessment so completed by the ITO (HQ) CIB, Pune, is null and void; therefore, liable to be quashed. Without having jurisdiction to assess the assessee, the order passed was void *ab initio* and liable to be quashed.

The ITO (HQ) CIB, Pune, on receipt of some information can ask a particular assessee to furnish the details related to such information and to furnish the details of his assessment where a particular assessee is assessed. [Para 6.1] In the present case, the ITO (HQ) CIB, Pune, issued notice under section 142(1) calling for the return of income for assessment year 2005-06 and the assessee had filed the acknowledgement receipt of return of income. In response to notice under section 142(1), the assessee filed reply on 4-9-2007 stating therein that the assessee had filed its return for assessment year 2005-06 on 31-10-2005 vide acknowledgement receipt No. 2302008916 with Ward 3(2), Thane. Copy of the acknowledgement receipt was also enclosed with this reply. This reply was filed on 7-9-2007 with ITO (HQ) CIB, Pune and the return for the subsequent years, i.e., assessment year 2006-07 was also filed with Circle 3, Thane on 30-10-2006. [Para 6.2] From these details, it is amply proved that the assessee has complied with the notice issued under section 142(1) issued by the ITO (HQ) CIB, Pune; therefore, recording of the facts in the assessment order by the ITO (HQ) CIB, Pune, that the assessee has not complied with the requirement of section 142(1), is not correct. Accordingly, the CIT(A) was also not correct in not accepting the contention of the assessee, especially when the copies of these details were filed and the CIT(A) was free to summon the records of the ITO (HQ) CIB, Pune and then should have

taken into consideration and then should have passed a correct order as per provisions of law. The CIT(A) was also wrong in not deciding the legal issue in favour of the assessee, especially when the ITO (HQ) CIB, Pune, is not the AO of the assessee. Without having jurisdiction to assess any person, the order passed was *void ab initio* and liable to be quashed. [Para 6.3] In the present case, the Income Tax Officer (HQ) CIB, Pune, has no jurisdiction, even to issue notice under section 142(1). Of course, he can call for information in respect to filing of return or in respect to PAN, etc., of a particular assessee. After receiving the required information, if the ITO feels it necessary, can send the details to the ITO, who has the jurisdiction over a particular assessee. Therefore, issuance of notice under section 142(1) itself is without jurisdiction. The ITO (HQ) CIB, Pune, has completed the assessment under section 144 even without issuing statutory notice under section 143(2), which is mandatory for allowing opportunity of being heard to the assessee for completion of assessment under section 143(3) or under section 144. No such notice has been issued; therefore, for this reason also the assessment so completed by the ITO (HQ) CIB, Pune, is null and void; therefore, liable to be quashed. [Para 9]

**Income Tax Act, 1961** Section 143

**Income Tax Act, 1961** Section 142(1)

**Income Tax Act, 1961** Section 144

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## **Pravin Balubhai Zala v. ITO**

In the ITAT, Mumbai C Bench R.K. Gupta, J.M. & Pramod Kumar, AM.

IT A No. 788/Mum/2009; 4 December, 2009 Asst. yr. 2005-06

Income Tax Act, 1961, sections 142(1), 143(2) & 144; In favour of: Assessee

**Counsel:** Ravi K. Mulchandani, *for the Assessee* S.K. Singh, *for the Revenue*

ORDER

R.K. Gupta, J.M.

This is an appeal by the assessee against the order of the Commissioner (Appeals) relating to assessment year 2005-06.

2. The assessee has raised a legal issue in ground Nos. 1 to 4 against in confirming the order under section 144 of the Act passed by the assessing officer by not considering and ignoring the reply filed by the assessee in response to the notice under section 142(1) and without issuing any notice under section 143(2) of the Act within the statutory time as prescribed under section 143(2) of the Act. Accordingly, it has been stated that the assessment completed under section 144 is bad in law and needs to be treated and considered as null and void.

**3.** Ground No. 4 is against considering the transfer of property to have taken place in the financial year 2004-05 merely on the basis of the date of development agreement dated 31-3-2005.

**3.1** Briefly stated, the facts in this case are that the Income Tax Officer-(HQ) (CIB), Pune, issued notice under section 142(1) calling for the return of income of assessment year 2005-06. In the notice, it was specifically mentioned that in case you have filed return of income, kindly submit the xerox copy of the same.

**3.2** As per the order of the Income Tax Officer, the assessee did not comply with the notice nor furnished any reply to the notice and as per the order of the assessing officer, another notice under section 142(1) issued to the assessee calling for certain details in respect to sale of property during the financial year 2004-05, the details of acquisition of the property, cost of acquisition of the property with necessary documentary evidence along with a copy of the sale deed were required. The details of capital gains accrued on transfer of the property during the year and details of capital gains tax paid were required to be filed. The details of bank accounts maintained by the assessee during the financial year 2004-05 were also required to be submitted. As per the order of the Income Tax Officer, the notice was duly served on the assessee on 20-11-2007; however, again neither appeared nor any details were furnished; accordingly, the Income Tax Officer-(HQ) CIB taken the cost of acquisition of the property at nil. On the basis of information received, the assessee has sold the property for a consideration of Rs. 1,29,03,846, computed the capital gain on this amount. The assessment was completed under section 144 on 26-12-2007 on a total income of Rs. 1,29,03,846. The assessee preferred appeal before the Commissioner (Appeals). Detailed written submissions were filed.

**3.3** It was submitted that the assessing officer erred in passing order under section 144 of the Act without considering the reply filed by the assessee in response to notice issued under section 142(1) by the assessing officer which is not in accordance with the accepted and well established norms of assessment and therefore, the order under section 144 passed by the assessing officer is bad in law and deserves to be cancelled. It was further submitted that best judgment assessment under section 144 passed merely only by issuing notice under section 142(1) by ignoring the fact that section 142 contains provisions in respect of inquiry before assessment does not empower to make assessment without following the proper procedures as prescribed under section 143 of the Act as no notice under section 143(2) has been issued by the Income Tax Officer within the prescribed time of one year from the date of filing the return. Therefore, the assessment completed under section 144 is bad in law.

**3.4** It was explained that the assessee had filed its return on 31-10-2005 vide acknowledgement receipt No. 2302008916. It was explained that in response to notice under section 142(1), the assessee vide letter dated 4-9-2007 filed acknowledgement receipt of the return. It was further explained that the assessee is assessed to tax and returns have been filed regularly in Ward 3(2), Thane. Therefore, the Income Tax Officer-(HQ) CIB, Pune, has no jurisdiction to pass an assessment that too without complying with the necessary procedure laid down for completing assessment under section 143(3).

**4.** On merit, it was submitted that neither the Income Tax Officer has taken into consideration the cost of acquisition nor the benefit of long-term capital gain has been given; therefore, the assessment passed under section 144 is bad in law and liable to be quashed.

**5.** After considering the submissions and perusing the relevant material on record, the Commissioner (Appeals) was not satisfied with the explanation of the assessee. The Commissioner (Appeals) noted that since the return of income was not filed and the intimation of filing the return for assessment year 2005-06 in Thane was not on assessing officers record, the assessing officer was legally competent to pass assessment order under section 144 of the Income Tax Act. Non-compliance to the statutory notices under section 142(1) empowers the assessing officer to pass an *ex parte* assessment order. Thus, the contention of the assessee was rejected in respect of legal issue.

**5.1** On merit, the Commissioner (Appeals) allowed part relief on account of indexation cost and also allowed the benefit of co-ownership as the assessee was having 50 per cent share in the property. Accordingly, the long-term capital gain was restricted to Rs. 22,41,346. Now, the assessee is in appeal here before the Tribunal.

**5.2** Contentions raised before the Commissioner (Appeals) were reiterated by the learned counsel of the assessee here before the Tribunal. Attention of the Bench was drawn on the written submissions placed in the compilation. Reliance was placed on various case law mentioned in the written submissions. Attention of the Bench was also drawn on the copy of the letter dated 4-9-2007 filed in response to notice under section 142(1) placed at p. 17 of the compilation. Copy of the return filed with Income Tax Officer, Ward (3) (2), Thane, is placed at p. 18 of the compilation; acknowledgement receipt of the return issued by the Income Tax Officer, Ward 3(2), Thane is placed at p. 19 of the compilation; copy of the return for the subsequent year with Income Tax Officer, Ward 3(2), Thane is placed at p. 22 of the compilation and acknowledgement receipt of the same is placed at p. 23 of the compilation. The learned counsel of the assessee stated that the order of the Income Tax Officer-(HQ) CIB, Pune is without jurisdiction and therefore bad in law. On the other hand, the learned departmental Representative placed reliance on the orders of the authorities below.

**6.** After hearing the rival submissions and perusing the relevant material on record, we find that the assessment order passed by the Income Tax Officer-(HQ) CIB is null and void; therefore, liable to be quashed. The Income Tax Officer-(HQ) CIB, Pune, is not an assessing officer having jurisdiction over the assessee. The Income Tax Officer-(HQ) CIB has different functions in different capacity other than the functions of an Income Tax Officer who is having jurisdiction over a particular assessee or other assessee fall under his jurisdiction.

**6.1** As per our information and knowledge and also in our considered view, the Income Tax Officer-(HQ) CIB, Pune, on receipt of some information can ask a particular assessee to furnish the details related to such information and to furnish the details of his assessment where a particular assessee is assessed.

**6.2** In the present case, the Income Tax Officer-(HQ) CIB, Pune, issued notice under section 142(1) calling for the return of income for assessment year 2005-06 and the assessee had filed the acknowledgement receipt of return of income. In response to notice under section 142(1), the assessee filed reply on 4-9-2007 stating therein that the assessee had filed its return for assessment year 2005-06 on 31-10-2005 vide acknowledgement receipt No. 2302008916 with Ward 3(2), Thane. Copy of the acknowledgement receipt was also enclosed with this reply. This reply was filed on 7-9-2007 with Income Tax Officer-(HQ) CIB, Pune. Copy of the same is placed on the compilation at p. 17. Copies of the return for assessment year 2005-06 along with acknowledgement receipt and computation are placed at pp. 18 to 21 of the compilation and the return for the subsequent years i.e., assessment year 2006-07 was

also filed with Circle 3, Thane on 30-10-2006. Copies of the return along with acknowledgement receipt and computation of income are placed at pp. 22 to 25 of the compilation.

**6.3** From these details, it is amply proved that the assessee has complied with the notice issued under section 142(1) issued by the Income Tax Officer-(HQ) CIB, Pune; therefore, recording of the facts in the assessment order by the Income Tax Officer-(HQ) CIB, Pune, that the assessee has not complied with the requirement of section 142(1), is not correct. Accordingly, we hold that the Commissioner (Appeals) was also not correct in not accepting the contention of the assessee, especially when the copies of these details were filed and the Commissioner (Appeals) was free to summon the records of the Income Tax Officer-(HQ) CIB, Pune and then should have taken into consideration and then should have passed a correct order as per provisions of law. The Commissioner (Appeals) was also wrong in not deciding the legal issue in favour of the assessee, especially when the Income Tax Officer-(HQ) CIB, Pune, is not the assessing officer of the assessee. Without having jurisdiction to assess any person, the order passed was void *ab initio* and liable to be quashed.

**7.** The apex court in the case of *Raza Textiles Ltd. v. ITO (1973) 87 ITR 539 (SC)* has held that; no authority, much less a *quasi* judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. It is further held that it is incomprehensible to think that a *quasi* judicial authority like the Income Tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen.

**8.** The CBDT, though on a later stage, issued instructions on utilization of information in the annual information returns (AIRs). As per this information, AIR information with PAN where there is no information of return filed is to identify the non-filers, CIT(CO)/CIT (in-charge) of each RCC/CC will run the application in the AIR module to generate the list of individual cases or persons who are non-filers and shall intimate the list of non-filers to the concerned assessing officers in respect of these cases. It is further clarified that on the basis of information received by the cadre, information will be transferred to the jurisdictional assessing officer who shall deal with these cases. Thereafter, the assessing officer will issue notice under section 142(1) on such assessee. If these assessees have not filed their returns earlier for the relevant assessment year then the concerned assessing officer will ask to file the returns and if they have filed the return then as per procedure laid down for completion of assessment under section 143(3), statutory notice under section 142(1) or 143(2) will be issued.

**9.** In the present case, the Income Tax Officer-(HQ) CIB, Pune, has no jurisdiction, even to issue notice under section 142(1). Of course, he can call for information in respect to filing of return or in respect to PAN etc., of a particular assessee. After receiving the required information, if the Income Tax Officer feels it necessary, can send the details to the Income Tax Officer, who has the jurisdiction over a particular assessee. Therefore, in our considered view, issuance of notice under section 142(1) itself is without jurisdiction. The Income Tax Officer-(HQ) CIB, Pune, has completed the assessment under section 144 even without issuing statutory notice under section 143(2), which is mandatory for allowing opportunity of being heard to the assessee for completion of assessment under section 143(3) or under section 144. No such notice has been issued; therefore, for this reason also the assessment so completed by the Income Tax Officer-(HQ) CIB, Pune, is null and void; therefore, liable to be quashed.

**10.** It is a matter of fact that the areas of jurisdiction of the assessing officer are earmarked and as per area earmarked, the assessee who belongs to that area files their return with their respective Income Tax Officers. As no area has been earmarked to the Income Tax Officer-(HQ) CIB, Pune, for completion of assessment, therefore, the Income Tax Officer-(HQ) CIB, Pune, is not having jurisdiction to pass any assessment order. In view of these facts and circumstances, we hold that the order passed under section 144 is bad in law and therefore, we quash the assessment.

**11.** Since we have allowed the legal issue in favour of the assessee, therefore, the issue on merit has become academic in nature which does not require any adjudication upon at this point of time.

**12.** In the result, the appeal filed by the assessee is allowed.