

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'SMC' BENCH, KOLKATA**

Before Shri P.M. Jagtap, Accountant Member

**I.T.A. No. 526/KOL/2017
Assessment Year: 2008-2009**

Alok Mittal,.....Appellant
Prop. of Mittal Financial Services,
4/25, Suhatta Mall, City Centre,
Durgapur-713 216
[PAN: AEAPM 1485 P]

-Vs.-

Deputy Commissioner of Income Tax,.....Respondent
Circle-1, Durgapur,
Aayakar Bhawan, City Centre,
Durgapur-713 216

Appearances by:

Shri Arvind Agarwal, Advocate, for the assessee
Shri Sailen Samaddar, Addl. CIT, D.R., for the Department

Date of concluding the hearing : September 26, 2017

Date of pronouncing the order : September 26, 2017

O R D E R

Per Shri P.M. Jagtap, A.M.:

This appeal filed by the assessee is directed against the order of ld. Commissioner of Income Tax (Appeals), Durgapur dated 20.01.2017.

2. The assessee in the present case is an individual, who is carrying on the business as share sub-broker. He also derives income from commission as Insurance Agent and rental income from commercial properties. The return of income for the year under consideration was filed by him on 26.09.2008 declaring total income of Rs.14,84,171/-. In the assessment originally completed under section 143(3) vide order dated 19.11.2010, the total income of the assessee was determined by the Assessing Officer at Rs.15,78,000/-. On the basis of AIR information, the

said assessment was subsequently reopened by the Assessing Officer and a notice under section 148 was issued by him to the assessee after recording the reasons. In pursuance of the said notice, assessment under section 143(3)/147 was completed by the Assessing Officer vide an order dated 29.02.2016 determining the total income of the assessee at Rs.35,93,080/- after making the addition of Rs.20,15,083/- on account of undisclosed income. Against the order passed by the Assessing Officer under section 143(3)/147, an appeal was preferred by the assessee before the Id. CIT(Appeals) and since the submissions made by the assessee in support of his case on the issues raised in the said appeal were not found acceptable by him, the Id. CIT(Appeals) upheld the order of the Assessing Officer passed under section 143(3)/147 and dismissed the appeal of the assessee.

3. Aggrieved by the order of the Id. CIT(Appeals), the assessee has filed this appeal before the Tribunal on the following grounds:-

"1. For that, in view of facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeal), Durgapur erred on facts as well as in law in sustaining the addition of Rs.20,15,083/- made by assessing officer as net undisclosed income on account of deposits in Axis Bank.

2. For that, without prejudice to the above, Ld. Commissioner of Income Tax Appeal), Durgapur erred on facts as well as in law in observing that there was very meagre withdrawal of cash ignoring the fact that total withdrawal of Rs.15,37,800/- was duly appearing in the Bank Statement produced before him and the said figures were also admitted in the Assessment Order.

3. For that, without prejudice to the above, Ld. Commissioner of Income Tax(Appeal), Durgapur erred on facts as well as in law in not considering the submission of the assessee that a sum of Rs.3,12,566.65 paid by A/c payee cheque to Bonzana Portfolio Ltd. against recovery of Rs.5,21,582/- and bank charges of Rs.1223.29 which were also verifiable from the record and were required to be given due benefit while making addition as undisclosed income.

4. For that, without prejudice to the above and in view of facts and circumstances of the case, the Ld. Commissioner of

1. Tax (Appeals),, ought to have deleted at least the addition of Rs.18,51,679.94 in view of material on record”.

4. During the course of appellate proceedings before the Tribunal, the assessee has also raised the following two additional grounds and filed an application seeking admission of the same:-

“1. Because that the Id. DCIT, Circle-1, Durgapur was erred in law as well as in facts in passing of his order u/s 147/143(3) dated 29th February 2016 without supplying copy of the reason recorded to the appellant, and his such order is void ab initio which is passed in violation of the principles laid down by the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd reported in 259 ITR page 19.

2. Because that the Id. DCIT, Circle-1, Durgapur was erred in law as well as in facts in passing of his order u/s 147/143(3) dated 29th February 2016 without issue of the statutory notice u/s 143(2), and as such his reassessment order is not good in law and void ab initio”.

5. As the issues sought to be raised by the assessee in the additional grounds are purely legal in nature and all the facts relevant for adjudication of the same are available on record, the additional grounds as raised by the assessee are admitted by me by relying on the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Limited -vs.- CIT [229 ITR 383 (SC)]. Since the preliminary issues are raised by the assessee in the additional grounds challenging the validity of the assessment made by the Assessing Officer under section 143(3)/147, I now proceed to consider and decide the same first on merit.

6. As regards the preliminary issue raised in the additional ground no. 2, the ld. counsel for the assessee has submitted that no notice was issued by the Assessing Officer under section 143(2) before passing the order under section 143(3)/147 and in the absence of issue of such statutory notice, the assessment made by the Assessing Officer under section

143(3)/147 is bad-in-law and is void *ab initio*. As per the direction of the Tribunal, the ld. D.R. has produced the relevant assessment record which shows that the notice under section 143(2) was not issued by the Assessing Officer to the assessee before framing the assessment under section 143(3)/147 and this position clearly evident from the assessment records is not disputed even by the ld. D.R. He, however, has relied on the provisions of section 292BB introduced in the Statute w.e.f. 1st April, 2008 in support of the revenue's case that the assessee having participated in the assessment proceedings without raising the issue of non-issuance of notice under section 143(2), he is precluded from taking any objection now before the Tribunal about the non-issuance of notice under section 143(2). The provisions of section 292BB relied upon by the ld. D.R. are reproduced hereunder:-

*"292BB: Notice deemed to be valid in certain circumstances
Where an assessee has appeared in any proceeding or cooperative in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is 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-*

- (a) Not served upon him; or*
- (b) Not served upon him in time; or*
- (c) Served upon him in an improper manner.*

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment".

7. As submitted by the ld. Counsel for the assessee, the provisions of section 292BB are applicable where there is a failure to serve the notice and not where there is a failure to issue the notice under section 143(2). He has contended that the issuance of notice under section 143(2) before completing the assessment is a statutory requirement as held by the Hon'ble Supreme Court in the case of Hotel Blue Moon [321 ITR 362] and the failure to issue notice under section 143(2) in compliance with such

statutory requirement is not covered under section 292BB. In support of this contention, he has relied on the decision of the Hon'ble Allahabad High Court in the case of ACIT -vs.- Greater Noida Industrial Development Authority [379 ITR 14], wherein it was held that the deeming fiction under section 292BB of the Act is with regard to "service of notice" and since the initial requirement of "issuance of notice" was not met by the Assessing Officer, the deeming fiction under section 292BB is not applicable. It was held that there was a defect on the part of the Assessing Officer in failing to issue notice under section 143(2) within the specified period and since the said defect was not curable under section 292BB, the order of assessment passed by the Assessing Officer was bad in law. The Id. Counsel for the assessee has also relied on the decision of the Hon'ble Delhi High Court in the case of Principal CIT -vs.- Shri Jay Shiv Shankar Traders Pvt. Limited (I.T.A. No. 519 of 2015 dated 14.10.2015), wherein it was held that the provision of section 292BB would apply in so far as failure of "service" of notice is concerned and not with regard to failure to "issue" notice. It was held that the failure of the Assessing Officer to issue notice under section 143(2) prior to finalizing the reassessment order, therefore, cannot be condoned by referring to section 292BB of the Act" and such failure is fatal to the order of reassessment. The Id. Counsel for the assessee has also placed reliance on the decision of the Hon'ble Kerala High Court in the case of Travancore Diagnostic Pvt. Limited -vs.- DCIT [390 ITR 167 (Kerala)], wherein it was held that if a notice under section 143(2) has not been issued, the Assessing Officer cannot claim the benefit under section 292BB of the Act and in the absence of notice under section 143(2), proceedings of assessment initiated, conducted and completed for the assessment year 2009-10 will have to fail.

8. Keeping in view the legal position emanating from the various judicial pronouncements discussed above and having regard to the facts of the present case, I find merit in the additional ground no. 2 raised by the assessee and allow the same by holding that the assessment made by

the Assessing Officer under section 143(3)/147 without issuance of the statutory notice under section 143(2) is bad in law and the same is liable to be cancelled. I order accordingly.

9. As a result of the decision rendered above on the preliminary issue raised by the assessee in additional ground no. 2 cancelling the assessment made by the Assessing Officer under section 143(3)/147 by holding the same to be bad in law, the issues raised by the assessee in additional Ground No. 1 as well as in the original Grounds No. 1 to 4 have become infructuous. I, therefore, do not consider it necessary to adjudicate upon the same.

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

Order pronounced in the open Court on September 26, 2017.

**Sd/-
(P.M. Jagtap)
Accountant Member**

Kolkata, the 26th day of September, 2017

- Copies to :*
- (1) ***Shri Alok Mittal,
Prop. of Mittal Financial Services,
4/25, Suhatta Mall, City Centre,
Durgapur-713 216***
 - (2) ***Deputy Commissioner of Income Tax,
Circle-1, Durgapur,
Aayakar Bhawan, City Centre,
Durgapur-713 216***
 - (3) ***Commissioner of Income Tax (Appeals), Durgapur;***
 - (4) ***Commissioner of Income Tax ,Kolkata***
 - (5) ***The Departmental Representative***
 - (6) ***Guard File***

By order

***Senior Private Secretary,
Head of Office/DDO
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata***