

**IN THE INCOME TAX APPELLATE TRIBUNAL
PATNA BENCH, PATNA**

Before Sh. N. K. Saini, AM and Sh. Sudhanshu Srivastava, JM

IT No.64/Pat./2016, Asst. Year :1996-97.

DCIT, Central Circle-2, Patna	Vs	M/s Jagdamba Poly Board Industries Ltd. Patna.
(APPELLANT)		(RESPONDENT)
PAN No.		

Assessee by : Shri A.K. Rastogi, Shri Rakesh Kumar, Adv.

Revenue by : Shri Kausik Kr. Das, Sr. S.C.

Date of Hearing : 13.03.2018

Date of Pronouncement : 15 .03.2018

ORDER

Per Sudhanshu Srivastava, JM:

This appeal has been preferred by the revenue against order dated 30.03.2016, passed by the Ld. CIT (Appeals)-3, Patna for assessment year 1996-97.

2. The brief facts of the case are that a search & seizure action u/s132 of the Income-tax Act, 1961(hereinafter referred to as "the Act") was conducted in the case of the assessee on 11.03.1999. Assessment for the captioned year was re-opened u/s 147 of the Act and the assessment was completed at an income of Rs.61,44,717/- as against the

net profit of Rs.2,59,299/- as reflected in the profit loss account.

2.1 The assessee preferred an appeal before the First Appellate Authority challenging the re-assessment on merits as well as challenging the validity of assessment proceedings on the ground of non-issuance of notice u/s143(2) of the Act.

2.2 The Ld. CIT (A) required the AO to submit a remand report informing him about the factual position of issuance of notice u/s 143(2) of the Act. The AO responded that since the assessee had not filed the return in response to the notice u/s 148 of the Act, there was no requirement for the AO to issue the notice u/s 143(2). The Ld. CIT (A) went on to hold that in absence of issuance of notice u/s 143(2), the assessment passed u/s 147 of the Act was invalid and void *ab initio*.

2.3 Now the Department has approached the ITAT and has challenged the action of the Ld. CIT (A) in holding the assessment as void *ab initio*.

3. The Ld. Sr. DR submitted that the Ld. CIT (A) had misapplied the ratio of the judgment of the Hon'ble Gujarat High Court in the case of CIT vs. Sukhini P. Modi reported in 367 ITR 682 (Guj) as here the assessee had not filed the return required to be filed u/s 148 of the Act. It was also submitted that since the return was not filed, the issuance of notice u/s 143(2) of the Act was not required. It was also submitted that since the assessee had participated in the assessment proceedings, in view of the provisions of section 292 BB of the Act, the issue of non-issuance of notice u/s 143(2) was only a procedural lapse which was curable.

4. In response, the Ld. AR submitted that a photocopy of the original return had been filed under protest in response to the notice issued u/s 148 and the Ld. CIT (A) had duly noted this fact and, therefore, the contention of the Department that no return had been filed was incorrect. The Ld. AR also placed reliance on a number of judicial precedents to support his contention that non-service of jurisdictional notice cannot be cured

by section 292BB of the Act. Reliance was placed in this regard on the judgment of the Hon'ble Kerala High Court in the case of Travancore Diagnostic P. Ltd. vs. ACIT reported in 390 ITR 167 (Ker).

5. We have heard the rival submissions and have also perused the material on record. It is seen that that a photocopy of the original return had been filed under protest in response to the notice issued u/s 148 and the Ld. CIT (A) had duly noted this fact and, therefore, the contention of the Department that no return had been filed is incorrect. Further, it is undisputed that the statutory notice required to have been issued u/s 143(2) of the Act was not issued in this case and the AO has accepted the same by observing that the same was not required as the assessee had not filed the return in response to notice u/s 148.

5.1 As far as the department contention regarding non issuance of notice u/s143 (2) being a curable defect is concerned, we are afraid that we do not agree with this contention. We find that the Hon'ble Kerala High Court Travancore Diagnostics P. Ltd. vs. ACIT has dealt with an

identical issue and the relevant paragraphs are 32,33 and 34 which are being reproduced here for ready reference:

“It is virtually admitted by the Revenue that no notice under section 143(2) had been issued. In Blue Moon (supra), the Hon’ble Supreme Court has already settled the position of law the omission on the part of the Assessing Officer under section 143(2) cannot be a procedural irregularity and that the same is not curable and that therefore, the requirement of notice under section 143(2) cannot be dispensed with. This emphatic statement of law, in the absence of issuance of a notice under section 143(2) by the Revenue, would, therefore, inure to the benefit of the assessee, even though as noticed above, we are not impressed by the contention that he was not aware of the proceedings under section 143 for the assessment year 2009-10. However, when the statute makes it imperative that notice under section 143(2) is to be issued, the omission or failure would then hit at the root of the jurisdiction applying the principles enunciated in Anisminic Ltd. V. Foreign Compensation Commission [1969] 2AC 147 (HL), which has been approved by the Hon’ble Supreme Court in several judgments.

The extended question then is whether even if the assessee is deemed to have participated in the proceedings under section 143, even without the assessing Officer having issued the mandatory notice, would the Revenue be entitled to the benefit provided under section 292 BB of the Act. Section 292 BB creates an estoppel against the assessee in claiming that not notice has been served on him, if he has participated in the proceedings. However, the said section does not in any manner grant any privilege to the Assessing Officer in dispensing with the issuance of a notice under section 143(2) of the Act. Since the jurisdiction under section 143 is

founded on the issuance of notice under section 143(2), the Assessing Officer could have assumed jurisdiction only after issuing a notice under section 143(2). Even the participation of the assessee would not provide the benefit under section 292BB to the Revenue. The requirement that a notice be issued is mandatory and the Assessing Officer has no other option but to issue the notice before commencing the jurisdiction. Here, we draw support from the judgment of the Hon'ble Supreme court in Asstt. CIT v. Greater Noida Industrial Development Authority [2015] 379 ITR 14 (All), wherein it was held as under (page22):

“Section 148 (1) provides for service of notice as a condition precedent to making the order of assessment. Once a notice is issued within the period of limitation, jurisdiction becomes vested in the Income-tax Officer to proceed to reassess. The mandate of section 148(1) is that reassessment shall not be made until there has been service. The requirement of issue of notice is satisfied when a notice is actually issued.”

The only benefit that section 292BB obtains to the Assessing Officer is that after the issuance of such notice the assessee appears and participates in the proceedings, then he shall not be heard, subject to the proviso to the said section, that he had not been properly served with notice. We have no hesitation in holding that the Assessing Officer can claim and avail of the benefit under section 292BB and the assessee will be burdened by the rigour of estoppels contained therein only after a notice under section 143(2) had been validly issued. When it is virtually admitted that no such notice had been issued, the Assessing Officer loses even the authority to enter into the jurisdiction under section 143 and the participation or otherwise of the assessee would be of no avail. It is here that the words of Rowlat, J. vide supra in paragraph 5 of this judgment assumes

climacteric importance because in taxation nothing is to be intended and nothing can be presumed. If a notice under section 143(2) has not been issued, the Assessing Officer cannot claim the benefit under section 292BB and the claim that the earlier notice extracted in paragraph 29 of the judgment was intended to be the notice issued under section 143(2) and that substantial compliance under section 143(2) must be inferred, cannot be countenanced.”

5.2 Accordingly, we find no reason to interfere with the findings of the Ld. CIT (A) and we uphold the same.

6. In the result, the appeal of the Department stands dismissed.

(Order Pronounced in the Court on 15/03/2018)

Sd/-
(N.K. Saini)
ACCOUNTANT MEMBER

Dated: 15 /03/2018
s.sinha*

Sd/-
(Sudhanshu Srivastava)
JUDICIAL MEMBER

Copy forwarded to:

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

ASSISTANT REGISTRAR