

आयकर अपीलीय अधीकरण, न्यायपीठ – “A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
 (समक्ष) श्री ए. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. No. 1624/Kol/2014
Assessment Year: 2003-04

Income-tax Officer, Wd-30(3), Kolkata	Vs.	Partha Sarathi Mitra. (PAN: AEMPM0875M)
Appellant		Respondent

Date of Hearing	11.06.2018
Date of Pronouncement	20.06.2018
For the Appellant	Shri Pinaki Mukherjee, Addl. CIT
For the Respondent	Shri Soumitra Choudhury, advocate

ORDER

Per Shri A.T.Varkey, JM

The appeal filed by the revenue is against the order of Ld. CIT(A)-XIV, Kolkata dated 14.03.2014 for AY 2003-04.

2. The first ground of appeal of revenue in this appeal is against the action of Ld. CIT(A) in not appreciating the fact that assessee never raised the issue of *non-service of notice u/s. 148* of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) and therefore, as per sec. 292BB, the assessee could not have raised the issue before the Ld. CIT(A) after participating in the assessment proceedings.

3. We have heard rival submissions and gone through the facts and circumstances of the case. We note from a perusal of page 21 of the Ld. CIT(A)’s order that the Ld. CIT(A) has adjudicated the issue as to whether the assessee was served with sec. 148 notice before re-opening the original assessment which has been passed after scrutiny u/s. 143(3) of the Act and the fact that four years had already elapsed, when the AO was

proposing to reopen the assessment. We note that the Ld. CIT(A) while adjudicating the issue as to whether the assessee was served with sec. 148 notice had called for remand report from the AO who candidly admitted that there was no evidence on record to show that sec. 148 notice was served upon the assessee. Since sec. 148 notice was not served on the assessee, the Ld. CIT(A) has held as under:

“7.1. I have examined the impugned order of assessment and the Witten submission of the learned AR of Appellant (Assessee). I have also gone through the Remand Report of the AO. The learned AR contended that the order sheet evidence service of 148 notice to assessee on 28.03.2008, such service was not reciprocated by signature of assessee in the order sheet of that date. No documentary evidence of service of notice is available with the Department. In the Remand Report dated 28.08.2009 it has been categorically stated that no evidence is available on record regarding service of 148 notice on Remand Report dated 14.01.2013 it has been stated that regarding service of notice status was communicated on 28.08.2009. Remand Reports dated 28.08.2009 and 14.01.2013 evidences that no evidence is available with Department regarding service of 148 notice on 28.03.2008. The order sheet of that date even though states service of 148 notices upon the assessee, but such notings in order sheet was not confirmed by signature of assessee. The noting in order sheet dated 28.03.2008 and the statement of non-availability of evidence of service of 148 notice as stated in Remand Reports dated 28.8.2009 and 14.01.2013 established that 148 notice was not served upon the assessee. Such fact has been corroborated by the claim of the appellant (assessee) that he was in U.S.A during the period from 11.12.2007 - 11.06.2008 for which documentary evidences of Passport/Visa/ other documents were furnished during the course of Appeal proceedings.”

4. The main contention of the Ld. DR was that since the assessee has participated in the reassessment proceedings and has not raised the issue of non-service of 148 notice before the AO during the reassessment proceeding, as per sec. 292BB of the Act the assessee is precluded from raising that the assessee had not been served with the notice. And even if there is non-issue/service of notice, it would be deemed to have been served upon the assessee in time and in proper manner as per the said provision of law. Therefore, according to Ld. DR, the Ld. CIT(A) erred in giving relief to the assessee by taking note that assessee was not served with the notice u/s. 148 of the Act. So, he wants us to reverse the order of Ld. CIT(A) and uphold the order of AO. Countering the said contention of Ld. DR, the Ld. AR drew our attention to the fact that the assessee had in fact objected to notice u/s. 148 of the Act not being served on the assessee vide letter dated 17.12.2008 which we have perused and find that the assessee

had in fact raised the objection of non-service of notice u/s. 148 of the Act before the AO on 17.12.2008 and he objected to the proceedings being carried on without service of notice. We note that the assessment order is dated 28.12.2008 and since the assessee has objected to the fact that the assessee was not served with Sec. 148 notice before the AO during reassessment proceedings, sec. 292BB of the Act cannot come to the rescue of the revenue as per the proviso to sec. 292BB of the Act which reads as under:

“292BB. Notice deemed to be valid in certain circumstances.—Where an assessee has appeared in any proceeding or cooperated 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.”.

Therefore, in the facts and circumstances of the case, we note that sec. 148 notice has not been served upon the assessee which fact could not be controverted by the revenue before us.

5. In the similar circumstances, Hon’ble Supreme Court in the case of CIT Vs. Thayaballi Mulla Jeevaji Kapasi (1967) 66 ITR 147, 150, 151 held that-

“Service of the notice under section 148 after issuing the same within the period of limitation prescribed under section 149 being a condition precedent for the exercise of jurisdiction, if the Assessing Officer was unable to prove that the notice was duly served upon the assessee after issuing the same within the prescribed period, any return filed by the assessee after the expiry of the period will not invest the Assessing Officer with authority to reassess the income of the assessee.”

6. Supreme Court in the case of Y. Nayayana Chetty Vs ITO (1959) 35 ITR 388, 392, paragraph 4 held that:

"The notice prescribed by section 34 cannot be regarded as a mere procedural requirement; it is only if the said notice is served on the assessee as required that the Income-tax officer would be justified in taking proceedings against him. If no notice is issued or if the notice issued is shown to be invalid then the validity of the proceedings

taken by the Income-tax officer without a notice or in pursuance of an invalid notice would be illegal and void. That is the view taken by Bombay and Calcutta High Courts in CIT Vs Ramsukh Motllal (1955) 27 ITR 54 and R K Das and Co Vs CIT (1956) 30 ITR 439 (Calcutta) and we think that the view is right".

7. Madras High Court in the case of Thangam Textiles Vs First ITO (1973) 90 ITR 412,415 Paragraph 7 held that:

"In Y. Narayana Chetty Vs ITO (1959) 35 ITR 388, the Supreme Court held that the service of a requisite notice on the assessee, is a condition precedent to the validity of any reassessment made under section 34 of the Income-tax Act 1922 (which corresponds to section 147 of the Income-tax Act, 1961), and if a valid notice was not issued as required, the proceedings taken by the Income-tax Officer in pursuance of an invalid notice and consequent orders of reassessment passed by him would be void and. inoperative".

8. Therefore, we uphold the order of the Ld. CIT(A) and confirm the same. The other grounds of appeal of revenue are academic and, therefore, do not deserve to be adjudicated. Appeal of revenue is dismissed.

9. In the result, appeal of revenue is dismissed.

Order is pronounced in the open court on 20.06.2018

Sd/-

(A.L. Saini)
Accountant Member

Sd/-

(Aby. T. Varkey)
Judicial Member

Dated : 20th June, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – ITO, Ward-30(3), Kolkata.
2. Respondent – Shri Partha Sarathi Mitra, 220E, Rash Behari Avenue, Kolkayta-700 019.
3. The CIT(A) -XIV, Kolkata (e-mailed)
4. CIT Kolkata.
5. DR, ITAT, Kolkata. (e-mailed)

/True Copy,

By order,

Sr. Pvt. Secretary