IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH KOLKATA

BEFORE SHRI S.S.GODARA, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.1346/Kol/2016

(निर्धारणवर्ष / Assessment Year:2012-13)

DCIT, Circle-5(1), Kolkata	**Vs.**	**M/s Proficient Commodities Pvt. Ltd.** **1/1, Raja Rajendra Lal Mitra Road, DF-3E, Shree Krishna Garden, Kolkata-700085.**
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AADCP 7843 A**		
(Appellant)	**..**	**(Respondent)**

C.O. No. 36/Kol/2019

(Arising out ofआयकरअपीलसं./ITA No.1346/Kol/2016)

(निर्धारणवर्ष / Assessment Year:2012-13)

M/s Proficient Commodities Pvt. Ltd. **1/1, Raja Rajendra Lal Mitra Road, DF-3E, Shree Krishna Garden, Kolkata-700085.**	**Vs.**	**DCIT, Circle-5(1), Kolkata**
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AADCP 7843 A**		
(Cross Objector)	**..**	**(Respondent)**

Appellant by :Shri Ram Bilash Meena, CIT DR
Respondent by :Shri Somnath Ghosh, Advocate

सुनवाईकीतारीख/ **Date of Hearing** **: 24/12/2019**

घोषणाकीतारीख/**Date of Pronouncement** **: 18/03/2020**

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned appeal filed by the Revenue and the cross objection filed by the assessee , pertaining to assessment year 2012-13, are directed against the common order passed by the Commissioner of Income Tax (Appeal)-4, Kolkata, in appeal no. 469/CIT(A)-4/Circle-10(2)/Kol/15-16, which in turn arise out of an assessment order passed by the Assessing Officer u/s143(3) of the Income Tax Act, 1961 (in short the 'Act') dated 28/03/2015.

2. The grounds of appeal raised by the revenue are as follows:

1. Whether on the facts and in the circumstances of the case the Ld. CIT(A) has erred in deleting the addition of Rs. 7,18,90,315/- being loss in National Multi Commodity Exchange (NMCE) when the disallowance was based on the information received from the Forward Markets Commissions(FMC) through I&CI wing that the assessee company had taken accommodation entries in form of bogus losses through NMCE and the same was independently adjudicated.

2. Whether on the facts and in the circumstances of the case the Ld. CIT(A) has erred in deleting the addition of Rs. 3,00,00,000/- as unexplained cash credit arising out of bogus share capital introduction. The order passed by the Ld. CIT(A) is not based on correct facts and is oblivious to the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company recently unearthed by the revenue.

3. Whether the order passed by the Ld. CIT(A) may be reversed or at least set aside to decide the case de novo to overcome the rule of audi alteram partem as held by him to be violated.

4. That the appellant craves for leave to add, or modify any of the grounds of appeal before or at the time of hearing of the appeal.

3. The cross objection raised by the assessee are as follows:

1. For that in the facts and circumstances of the instant case, the ld. CIT(A)-4, Kolkata acted unlawfully in not appreciating that the conditions precedent for issuance of notice u/s 143(2) of the Act was not complied with and/ or fulfilled for the ld. ITO, Ward-5(2), Kolkata and the assessment order framed u/s 143(3) of the Act by the Deputy Commissioner of Income

Tax, Circle-10(2), Kolkata is absolutely is ab initio void, ultra vires and null in law.

2. For that on a true and proper interpretation of the scope and ambit of the provisions of Section 143(2) of the Act, the ld. CIT(A)-4, Kolkata was absolutely in error in upholding the action of the ld. Deputy commissioner of Income Tax, Circle-10(2), Kolkata of not issuing such notice while framing the assessment order u/s 143(3) of the Act and the purported conclusion reached on that behalf is completely unfounded, unlawful and untenable in law.

3. For that the spurious action of the ld. CIT(A)-4, Kolkata in upholding the assessment order framed u/s 143(3) of the Act by the ld. Deputy Commissioner of Income Tax, Circle-10(2), Kolkata without any proper jurisdiction to proceed on the assessment proceedings is invalid for want of jurisdiction as the pre-conditions for initiation of the proceedings as stipulated therein are not fulfilled in the circumstances of the case.

4. First, we shall deal with cross objections raised by the assessee.

5. The cross objection filed by the assessee are barred by limitation by 600 days. The assessee filed a petition for condonation of delay requesting the Bench to condone the delay. The reasons given in the petition are as follows:

"3. That your appellant had filed the instant appeal disputing the said appellate order. However, no intimation of filing such appeal was received by your respondent at that time. It was only when the appeal was posted for hearing on 01/01/2018, the respondent was appraised of such appeal is pending against it.

4. That your respondent submits that the ground raised in the instant cross objection is a legal ground which harps the jurisdiction of the Ld. Deputy Commissioner of Income Tax, Circle-10(2), Kolkata in framing the assessment order u/s 143(3) of the Act. It was the bonafide belief of your respondent that issue can be raised by virtue of Rule 27 of the Income Tax Rules, 1962. However, on consultation with Shri Somnath Ghosh, Advocate it was considered that such ground can only be raised for adjudication by way of filing an cross objections and not otherwise. Such view was vetted by a Senior Advocate also. Accordingly the instant cross objection was filing on 23.09.2019 involving a delay of 600 days."

We have heard both the parties on this preliminary issue and having regard to the reasons given in the petition for condonation of delay, as mentioned above, we condone the delay and admit the cross objection of the assessee for hearing.

6. At the outset itself, the ld. Counsel for the assessee submitted that assessment was framed u/s 143(3) of the Act dated 28.03.2015 by the Deputy Commissioner of Income Tax, Circle-10(2), Kolkata. However, notice of scrutiny u/s 143(2) was issued by the ITO, Ward-5(2), Kolkata who does not have jurisdiction to issue scrutiny notice to the assessee company under consideration. The notice issued by non-jurisdictional ITO, Ward-5(2) is reproduced below:

Notice under Section 143(2), of the Income Tax Act, 1961
Office of the ITO, WD 5(2)

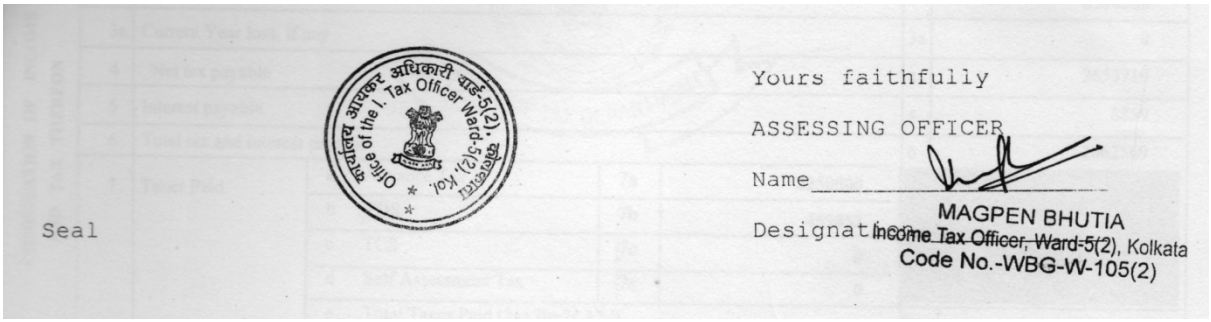
PAN No. : AADCP7843A *Dated: 08/08/2013*

To
M/S PROFICIENT COMMODITIES PRIVATE LIMITED
1 R. N. MUKHERJEE RD
4TH FLR ROOM NO 20
KOLKATA
WEST BENGAL 700001

Sir / Madam,

There are certain points in connection with the return of income submitted by you on 28thSeptember, 2012 for the assessment year 2012-13 on which I would like some further information.

2. You are humbly required to attend my office on 03rd October, 2013 at 12:00 PM either in person or by a representative duly authorized in writing in this behalf or produce or cause there to be produced at the said time any documents, accounts and any other evidence on which you may rely in support of the return filed by you.



Therefore, ld. Counsel for the assessee prayed the Bench that the assessment framed by the Assessing Officer u/s 143(3) of the Act dated 28.03.2015 is without assuming proper jurisdiction and hence it should be treated null and void in the eye of law. On the other hand, ld. D.R. for the revenue

submitted that the assessment was framed by the appropriate authority i.e. Deputy Commissioner of Income Tax, Circle-10(2), Kolkata, therefore the order u/s 143(3) is made by the correct and appropriate authority and hence it should not be rejected. The ld. D.R. for the revenue also drew our attention to the last page of the assessment order which is reproduced below :

Add:			
(i) Donation	820600		
(ii)Depreciation as per Companies Act	6210580		
(iii) Disallowable u/s 36 of I.T. Act	586953	7618133	16814956
Less:			
(i) Depreciation as per I.T. Act		7816592	**8998364**
Added Back			
(i) Loss in National Multi Commodity Exchange	71890315		
(as discussed in para 3 above)			
(ii) Share Capital	30000000	101890315	**110888679**
(as discussed in para 4 above)			
Total Income			**110888679**
Rounded off u/s 288A of I.T. Act			**110888680**
Tax @ 30% (A)			**33266604**

Computation of Book Profit u/s 115JB

Net profit as per P&L a/c	9196823
Book Profit	9196823
Tax @ 18.5 % (B)	**1701412**

5.1 Since, tax on total income (A) is higher than the tax computed on Book Profit u/s 115JB (B), the assessee is required to pay tax at normal rates.

6. Assessed u/s.143(3) of the Income-tax Act, 1961 at total income of Rs. **110888680 /-** as above. Credit for prepaid taxes has been given as per evidence on record/OLTAS. **Penalty proceeding in terms of Section 271(1) (c) of the I. T. Act'61 is being initiated separately for furnishing inaccurate particulars of income** The I-T computation form enclosed herewith as an integral part of this order. Notice of demand, penalty notice and copy of the order are being issued to the assessee company.

(Manoj Kumar Singh)
Deputy Commissioner of Income-Tax
Circle – 10(2), Kolkata

मनोज कुमार सिंह
MANOJ KUMAR
उप आयकर आयुक्त
Deputy Commissioner of Income Tax
सर्कल–10(2),कोलकाता/ Circle-10(2), Kolkata

Therefore, ld. D.R. argued that although notice u/s 143(2) was issued by Income Tax Officer, Ward-5(2), Kolkata, who does not have jurisdiction to issue notice u/s 143(2) of the Act, but the assessment u/s 143(3) was framed by the correct and appropriate authority i.e. Deputy Commissioner of Income Tax, Circle-10(2), Kolkata. Hence ld. D.R. stated before the Bench that assessment u/s 143(3) was framed by the correct and appropriate authority i.e. DCIT, Circle-10(2), Kolkata, who has proper jurisdiction over the assessee therefore assessment order framed u/s 143(3) should not be rejected.

7. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld CIT(A) and other materials available on record. The ld. D.R. submits before us that assessee has raised first time, the jurisdictional issue which was not there before the lower authorities therefore it should not be entertained by the Tribunal. Per contra, ld. Counsel submits before us that the assessee has every right to raise technical issue which goes to the root of the jurisdiction. We note that technical issue raised by the assessee is a pure question of law relating to jurisdiction, which goes to the root of the jurisdiction exercised hence assessee can raise the said issue for the first time before the Tribunal. As noted above, the scrutiny notice u/s 143(2) was issued by the Income Tax Officer, Ward-5(2), Kolkata, who does not have jurisdiction to issue notice on assessee company under consideration. The assessment order u/s 143(3) dated 28.03.2015 was framed by the Deputy Commissioner of Income Tax, Circle-10(2), Kolkata who did not get the jurisdiction under the Act to frame assessment, as the notice u/s 143(2) was not issued by him. It is settled law that servicing of notice u/s 143(2) of the Act is a *sine qua non* for an assessment to be made u/s 143(3) of the Act. Since the notice u/s 143(2) was not issued by the authority having jurisdiction on the assessee company. Therefore, assessment order framed by the Deputy Commissioner of income Tax, Circle-10(2), Kolkata is not valid in the eye of law, for that we rely on the judgment of the Hon'ble Calcutta High court in the case of West Bengal

State Electricity Board reported in 278 ITR 218 (Cal) wherein it was held as follows:

> *"The points raised :*
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> *In exercise of the powers conferred under s. 120(2) of the IT Act, 1961 (IT Act), the jurisdiction in relation to Chapter XVII-B except s. 195 and those relating to s. 221 were conferred on newly created wards in a newly created income-tax range. Based on this creation of jurisdiction, two points in this case have since been raised by Dr. Pal, appearing on behalf of the assessee, since opposed by Mr. Agarwal for the Department.*
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> *1.1 The first point that has been raised is with regard to the charging of interest under s. 201(1A) on the amount defaulted. Dr. Pal contended that interest payable in terms of ss. 234A, 234B and 234C where the statute used the expression 'liable to pay interest' alike s. 201(1A), was held to be discretionary by a circular issued by the Board on 23rd May, 1996, since published in (1997) 225 ITR (St) 101. At the same time, an order passed under s. 201 is appealable under s. 246. Therefore, this liability to pay interest contemplated under s. 201(1A) was never meant to be mandatory by the legislature.*
>
> *1.2 The second point that has been raised is that the officer who had passed the order had no jurisdiction and as such the order passed is a nullity and cannot be enforced so far as the asst. yrs. 1983-84, 1984-85, 1986-87 and 1987-88 are concerned. So far as the assessment year 1985-86 is concerned, the same was passed without giving opportunity and, therefore, cannot be sustained on account of infraction of the principles of audi alteram partem when such order visits the assessee with penal/civil consequences.*
>
> *The points opposed :*
>
> *2. Mr. Agarwal, on the other hand, contended that the provisions relating to ss. 234A, 234B and 234C fixing liability to pay interest are dependent on and have to be interpreted in the context in which such interest is chargeable. According to him, these are simple defaults on the part of the assessee and the interest that is chargeable in effect is coercive measure to compel the assessee to adhere to the time schedule. The question of payment of interest would arise in all these cases only when the assessment is complete and it is found that any amount of tax becomes payable or the tax payable is in excess of amount which has been paid by way of advance tax, if paid. Therefore, the question is dependent on the determination of the liability. This interest would not be payable if no amount is found to be due on account of tax payable. Thus, in such circumstances, in one contingencies of the situation, the interest would become payable and in another contingencies it would not. It was rightly laid down by the Board to be discretionary. But this cannot be equated with a situation when the interest is compensatory in nature and payable on an amount which is not the income of the assessee but of someone else from which the assessee was liable to deduct the tax payable by such assessee and the default to deduct or to pay would start from the date it becomes deductible since this amount was payable to the treasury, simultaneously with the payment of the amounts to the third party assessee*

concerned. Therefore, according to him, the liability occurring in s. 201(1A) as has been engrafted in the enactment cannot be said to be discretionary.

2.1 He then contended that the jurisdiction though conferred on the specially created ward w.e.f. 8th May, 1989, but the same was not retrospective in operation. According to him, there cannot be any retrospective operation of a legislation conferring jurisdiction. By reason of such legislation neither the jurisdiction, which was already there, could be taken away with retrospective effect nor the jurisdiction could be created with retrospective effect. Therefore, the default having been committed before 8th May, 1989, the jurisdiction remains with the officer before whom the return was submitted and it could not be taken away by the said circular or by creation of separate ward. According to him, the pending cases could not be transferred except by express provisions in the statute.

2.2 Mr. Agarwal has also pointed out that this question of jurisdiction was taken for the first time before the learned Tribunal and was never taken either before the AO or the CIT(A). Therefore, this point can no more be agitated.

2.3 Mr. Agarwal has referred to several decisions to support his contention with regard to the mandatory nature of the liability to pay interest under s. 201(1A) as well as in relation to the question of jurisdiction. We shall be referring to those decisions at appropriate stage.

Points replied :

3. In reply, Dr. Pal referred to the decision in National Thermal Power Corpn. Ltd. vs. CIT (1999) 157 CTR (SC) 249 : (1998) 229 ITR 383 (SC) in order to contend that a point of law can be agitated even at the appellate stage though not raised earlier if it involves question of law arising from the facts found by the authorities. He also sought to distinguish the decisions cited by Mr. Agarwal.

Points of law : If can be raised in appeal for the first time :

4. After having heard the learned counsel for the parties, admittedly, it appears that this point of jurisdiction was taken before the learned Tribunal for the first time. At the same time, it is also apparent from the records that for the purpose of deciding the question, no amount of facts need be gone into. It can be decided on the basis of the facts already found by the authority concerned and the question is a pure question of law relating to jurisdiction, which goes to the root of the jurisdiction exercised. In case an order is passed without jurisdiction, the same is a nullity. Jurisdiction can never be conferred by agreement or by default or acquiescence, as was held by the apex Court in National Thermal Power Corpn. Ltd. (supra). Therefore, a question of law arising out of facts found by the authorities and which goes to the root of the jurisdiction can be raised for the first time before the learned Tribunal.

The second point : The jurisdiction : The order : Whether a nullity :

6. So far as the second question is concerned, the same does not seem to pose any difficulty. As pointed out by Dr. Pal, it is an admitted proposition that no jurisdiction can be conferred by default or by agreement and a decision without jurisdiction is a nullity. This defect of jurisdiction can be pecuniary or territorial

and is incurable as was held in Kiran Singh vs. Chaman Paswari AIR 1954 SC 340 (para 6). The Court passing a decree without jurisdiction is a defect, which cannot be cured and the decree passed is a nullity. It was so held in Balvant N. Viswamitra vs. Yadav Sadhasiv Mule (2004) 8 SCC 706 and in CIT vs. Pearl Mechanical Engineering & Foundry Works (P) Ltd. (2004) 188 CTR (SC) 289 : (2004) 267 ITR 1 (SC).

6.1 In order to appreciate the situation in the present case, we may quote the notification in Annex. 'E' dt. 10th April, 1989 at pp. 117-118 :

"Notification No. S.O. 1436, dt. 10th April, 1989.

In exercise of the powers conferred under sub-ss. (1) and (2) of s. 120 of the IT Act, 1961, and all other powers enabling me in this behalf, I, the Chief CIT (Admn.), Calcutta, hereby create a new Range viz., Range 21, under the jurisdiction and administrative control of the CIT, West Bengal-VII, Calcutta. I also create six new wards under the administrative control and jurisdiction of Range 21, as detailed in column (2) of the Schedule annexed hereto. A Dy. CIT will be posted at Range 21 and he will be known as the Dy. CIT, Range 21, Calcutta. An ITO, posted at a ward under Range 21 will be known as ITO (tax deducted at source), the jurisdiction assigned to each ward is mentioned in column (3).

2. The notification will come into effect from 8th May, 1989 and is issued with the concurrence of the Chief CIT (Technical), Calcutta.

Schedule

New Range under CIT, West Bengal-VII, Calcutta.	*New Wards created under Range 21*	*Jurisdiction*
(1)	*(2)*	*(3)*
Dy. CIT, Range 21, Calcutta.	*ITO (tax deducted at source), Ward-21(1)*	*All matters relating to all the sections in Chapter XVII-B except s. 195 and also relating to s. 221 of the IT Act, 1961, for the assessment deemed to be in default in respect of the tax under sub-s. (1) of s. 201 of the said Act, in respect of all the assessees who are or would come under the jurisdiction of CIT, West Bengal-I (excepting mofussil districts under his jurisdiction) and West Bengal-VII, Calcutta."*

6.2 It appears that the subject jurisdiction was created under s. 120. Sec. 120, sub-s. (1) prescribes that the Board may confer such jurisdiction to such officer as it may deem fit. It may also delegate the power under s. 120(1) to some other officers in terms of sub-s. (2) thereof by reason whereof the officer so authorised can confer jurisdiction which has since been done in the present case. Once a particular jurisdiction is created, the same must be prospective and cannot be retrospective and it has to be interpreted having regard to the manner in which it has been sought to be created. From the said creation, it appears that all matters

relating to all sections in Chapter XVII-B, except ss. 195 and 221, in respect of all the assessees who were or would come under the jurisdiction of a particular officer at the time of creation or thereafter were vested to the jurisdiction of the officer of the ward newly created. The expression 'who are' or 'would come' include all assessees whose cases are pending or who would have come or used to come would also come under the new jurisdiction apart from those who are within such jurisdiction. The expression is clear enough to mean that this jurisdiction was prospective but all matters would be prospectively dealt with from the stage as it stood on the particular date namely, 8th May, 1989.

6.3 The creation of new range and ward does not appear to be retrospective. It also does not provide that the matters pending would be transmitted to the newly created range or pending proceedings would stand transferred with the creation of the new jurisdiction. Unless there are express provisions in the statute, there is no scope of effecting transfer of pending proceedings to the newly created jurisdiction.

6.4 However, Mr. Agarwal sought to rely upon the decision in SaitBansilal&RangisettiVeeranna vs. CIT (1972) 83 ITR 750 (AP) to contend that unless the statute contains words, whether expressly or by necessary implication, ousting the jurisdiction of the ITO once vested in him, the jurisdiction cannot be taken away. Nothing but express words in the section can take away the jurisdiction of an officer. That a presumption exists in law in favour of the continuance of jurisdiction or power once vested in an officer until ousted by express words. The ratio decided in this decision is not in dispute. By reason of creation of new range, the jurisdiction is conferred on the newly created wards, which implies that this jurisdiction cannot be exercised by the officer in whom such jurisdiction remains vested. It ceases from the date when the new range came into effect, namely, 8th May, 1989, but it cannot have retrospective effect of taking away the jurisdiction vested in the ITO pursuant to which a proceeding was already initiated and pending in the absence of any provision of transmission or transfer of such proceeding to the newly created range. In the present case, however, this is no more germane, since all the proceedings, except the proceedings in respect of the asst. yr. 1985-86, were initiated after 8th May, 1989. Therefore, this decision does not help Mr. Agarwal in his submission.

6.5 He further relied on the decision in CIT vs. Eastern Development Corpn. (1982) 135 ITR 516 (Cal). In this case, it was held that the amendment would not take away the jurisdiction in respect of proceedings pending before the officer and since it did not provide for transfer of such proceedings to the officer on whom the jurisdiction was created. On the same principle, this decision also does not help Mr. Agarwal to support his contention. He then relied on CIT vs. DhadiSahu (1992) 108 CTR (SC) 444 : (1993) 199 ITR 610 (SC). In this case, it was held that by reason of amendment, the jurisdiction of the officer before whom the proceeding was pending did not cease to lose jurisdiction since the said officer was within his jurisdiction when the proceeding was initiated. Therefore, this decision also does not help us in the context with which we are dealing. Mr. Agarwal then relied upon Lt. Col. Paramjit Singh vs. CIT (1996) 135 CTR (P&H) 8 : (1996) 220 ITR 446 (P&H). This is also a case where the proceeding was initiated by the officer when it had jurisdiction and it would continue to have the jurisdiction in the absence of any provision for transfer since there was no order of transfer, therefore, the officer before whom the proceeding was initiated would

continue to exercise jurisdiction. This decision also on the same analogy does not help Mr. Agarwal.

The principle applied : Asst. yrs. 1983-84, 1984-85, 1986-87 and 1987-88:

7. In this case, so far as the assessment relating to the financial years 1982-83, 1983-84,1985-86 and 1986-87 corresponding to asst. yrs. 1983-84, 1984-85, 1986-87 and 1987-88 were all initiated as against the assessee, admittedly, after 8th May, 1989. Therefore, the AO having territorial jurisdiction in respect of the regular assessment of the assessee could not assume jurisdiction after 8th May, 1989 in respect of matters covered under Chapter XVII-B. Thus, the orders in relation to those assessment years involved in the appeal except the asst. yr. 1985-86 corresponding to financial year 1984-85 cannot be sustained being without jurisdiction and a nullity."

8. We note that CBDT has issued instruction no. 01/2011 wherein the CBDT has declared the monetary limits for assigning the cases for the purpose of scrutiny to the Income tax Officer, Deputy Commissioner and Assistant Commissioner which is reproduced below:

SECTION 119 OF THE INCOME-TAX ACT, 1961 - INCOME-TAX AUTHORITIES - INSTRUCTIONS TO SUBORDINATE AUTHORITIES

INSTRUCTION NO. 1/2011 [F. NO. 187/12/2010-IT(A-I)], DATED 31-1-2011

References have been received by the Board from a large number of taxpayers, especially from mofussil areas, that the existing monetary limits for assigning cases to ITOs and DCs/ACs is causing hardship to the taxpayers, as it results in transfer of their cases to a DC/AC who is located in a different station, which increases their cost of compliance. The Board had considered the matter and is of the opinion that the existing limits need to be revised to remove the abovementioned hardship.

An increase in the monetary limits is also considered desirable in view of the increase in the scale of trade and industry since 2001, when the present income limits were introduced. It has therefore been decided to increase the monetary limits as under:

	Income Declared (Mofussil areas)		*Income Declared (Metro cities)*	
	ITOs	*ACs/DCs*	*ITOs*	*DCs/ACs*
Corporate returns	Upto Rs. 20 lacs	Above Rs. 20 lacs	Upto Rs. 30 lacs	Above Rs. 30 lacs
Non-corporate returns	Upto Rs. 15 lacs	Above Rs. 15 lacs	Upto Rs. 20 lacs	Above Rs. 20 lacs

Metro charges for the purpose of above instructions shall be Ahmedabad, Bangalore, Chennai, Delhi, Kolkata,Hyderabad, Mumbai and Pune.

The above instructions are issued in supersession of the earlier instructions and shall be applicable with effect from 1-4-2011.

We note that assessee's monetary limit falls above Rs. 30 lacs therefore the statutory notice u/s 143(2) should have been issued by the Deputy Commissioner / Assistant Commissioner. However, in the instant case, scrutiny notice was issued

by the ITO, Ward-5(2), Kolkata which is without jurisdiction and consequently the assessment framed by the Deputy Commissioner of Income Tax (DCIT, Circle-10(2), Kolkata) becomes void since the notice u/s 143(2) of the Act was not issued by the Deputy Commissioner of Income Tax as specified in the CBDT Instruction no. 01/2011 noted above.

9. On identical facts the Co-ordinate Bench of ITAT, Kolkata in the case of Krishnendu Chowdhury vs. ITO reported in (2017) 78 Taxmann.com 89 (Kol-Trib) order dated 18.11.2016 held as follows:

> *"**8.** We have heard rival submissions and gone through facts and circumstances of the case. We have also perused the assessment records. The crux of the issue in the case is that the notice under section 143(2) of the Act was not issued by the ITO in terms of the instruction No. 1/2011 [F.No. 187/12/2010-IT(A-I)], dated 31.1.2011. As per the instruction the notice was to be issued by the ITO but the notice was issued by the ACIT. Therefore in view of above the notice issued by the ACIT is invalid and consequently the assessment framed by the ITO becomes void. Now the issue before us arises so as to whether the notice issued by the ACIT u/s. 143(2) of the Act is without jurisdiction in terms of the aforesaid instruction. In this connection we consider it fit to incorporate the relevant portion of Instruction No. 1/2011 dated 31.1.2004 of the CBDT Circular in respect of issuance of notice to non-corporate assesses which reads as under :—*
>
> *'**INSTRUCTION NO. 1/2011 [F.No. 187/12/2010-IT(A-I)] , DATED 31-1-2011***
>
> *Reference have been received by the Board from a large number of taxpayers, especially from mofussil areas, that the existing monetary limits for assigning cases to ITOs and DCs/ACs is causing hardship o the taxpayers, as it results in transfer of their cases to a DC/AC who is located in a different station, which increases their cost of compliance. The Board had considered the matter and is of the opinion that the existing limits need to be revised to remove the abovementioned hardship.*
>
> *An increase in the monetary limits is also considered desirable in view of the increase in the scale of trade and industry since 2001, when the present income limits were introduced. It has therefore been decided to increase the monetary limits as under:*

	Income Declared (Mofussil areas)	
	ITOs	*ACs/DCs*
Corporate returns	*Upto Rs. 20 lacs*	*Above Rs. 20 lacs*
Non-corporate returns	*Upto Rs. 10 lacs*	*Above Rs. 15 lacs*

Metro charges for the purpose of above instructions shall be Ahmedabad, Banagalore, Chennai, Delhi, Kolkata, Hyderabad, Mumbai and Pune.

The above instructions are issued in supersession of the earlier instructions and shall be applicable with effect from 1-4-2011.

-See more at: http://taxguru.in/income-tax/section-119-of-the-income-tax-act-1961-instructions-too-subordinate-authorities-instdructions-regarding-inc-limits-for-assigning-cases-to-deputy-commissionersassistnt-commissionersitos.html#sthash.U17d65534.dpuf"

The notice u/s. 143(2) and order sheet entries which were referred by the ld. counsel for assessee are placed at Annexure no. 2 & 5 of the paper book respectively. Admittedly the notice u/s. 143(2) in the instant case was issued by the ld. ACIT to initiate the assessment proceedings which was later transferred to ITO. However, the ITO did not further issue any notice u/s. 143(2) of the Act. Therefore, ITO assumed the charge without issuing notice and consequently completed assessment u/s. 143(3) of the Act without jurisdiction. In similar facts and circumstances, the Co-ordinate Bench of this Tribunal has decided the issue in favour of assessee in the case of Ajanta Financial Services (P.) Ltd. v. ITO in ITA No. 1426/Kol/2011. We consider it fit to incorporate the relevant portion of the Tribunal order which is as under :—

'5. We find that the Hon'ble Chhatishgarh High Court in the case of DCIT v. Sunita Finlease Ltd.(2011) 330 ITR 491 (Chh) has considered the same Instruction No. 9/2004 dated 20.09.2004 which are applicable in the present case also and quash the selection of scrutiny and completion of assessment by holding as invalid. Hon'ble Chattishgarh High Court in Sunita Finlease Ltd.'s case (supra) has considered section 119 of the Act by stating that Section 119 of the Act, empowers the Central Board of Direct Taxes to issue orders, instructions or directions for the proper administration of the Act or for such other purposes specified in sub-section (2) of the section. Hon'ble High Court further held that such an order, instruction or direction cannot override the provisions of the Act. Direction by issuing instructions to the officers for the process of selection of cases for scrutiny for returns for a particular financial year and allowing time of three months for completion of the same cannot be considered to override or detract from the provisions of the Act. It only directs that the above exercise should be completed within three months of the date of filing of return by the assessee, which amounts to an assurance to the assessee that the return filed by him can be scrutinized by the Assessing Officer within three months of filing of the return. The Hon'ble High Court, dismissing the appeal held that Instruction No. 9 of 2004 dated September 20, 2004, was applicable in the present case, in view of the specific stipulation in the circular that "for returns filed during the current financial year 2004-05, the selection of cases for scrutiny will have to be completed within three months of the date of filing the returns" and considering that the return had 5 ITA 1426/K/2011 Ajanta Financial Services Pvt. Ltd.

A.Y. 03-04 admittedly, been filed by the assessee on October 29, 2004, i.e., during the current financial year 2004-05. The selection for scrutiny of the assessee's case and completion of the assessment was not valid.

6. We find that the Hon'ble Chhatishgarh High Court in Sunita Finlease Ltd.'s case (supra) has also considered the decision of Hon'ble Supreme Court in the case of UCO Bank (1999) 237 ITR 889 and quoted from page 896 as under:

"Such instructions may be by way of relaxation of any of the provisions of the sections specified there or otherwise. The Board thus has power, inter alia, to tone down the rigour of the law and ensure a fair enforcement of its provisions, by issuing circulars in exercise of its statutory powers under section 119 of the Income-tax Act, which are binding on the authorities in the administration of the Act. Under section 119(2) (a), however, the circulars as contemplated therein cannot be adverse to the assessee. Thus, the authority which wields the power for its own advantage under the Act is given the right to forgo the advantage when required to wield it in a manner it considers just by relaxing the rigour of the law or in other permissible manners as laid down in section 119. The power is given for the purpose of just, proper and efficient management of the work of assessment and in public interest. It is a beneficial power given to the Board for proper administration of fiscal law so that undue hardship may not be caused to the assessee and the fiscal laws may be correctly applied. Hard cases which can be properly categorized as belonging to a class, can thus be given the benefit of relaxation of law by issuing circulars binding on the taxing authorities."

The facts and circumstances in the present case are that the selection of scrutiny in this case is also completed beyond the prescribed period as prescribed in Instruction No. 9/2004 dated 20.09.2004. The assessee's case was selected for scrutiny first time on 18.10.2004, as per copy of order sheet entry, and notice was issued fixing the hearing on 18.10.2004 itself. As per Instruction No. 9/2004 dated 20.09.2004, the process of selection of cases for scrutiny for returns filed up to 31.03.2004, in the present case assessee filed its return of income on 01.12.2003 must be completed by 15.10.2004. The factual position as noted by CIT (A) in his appellate order that notice u/s. 143(2) is dated 10.10.2004, is not supported by Ld. Sr. DR at the time of hearing rather assessee contested that this finding of fact is erroneous and actual case was selected by issuing notice as on 18.10.2004. Even the basis of recording this fact is only from the assessment order wherein it is mentioned that notice u/s. 143(2) is dated 10.10.2004 and the same was served on the assessee on 19.10.2004 fixing the date of hearing on 16.12.2004. When going through the order sheet entry, which is taken by assessee from the assessment records clearly reveals that factually notice u/s. 143(2) was first time issued on 18.10.2004 and not on 10.10.2004. This fact has not been contested by Ld. Sr. DR. Respectfully following the decision of Hon'ble Chhatisgarh High Court in the case of Sunita Finlease Ltd. (supra), we quash the issuance of notice u/s. 143(2) of the Act and subsequent assessment framed u/s. 143(3) of the Act. Appeal of assessee is allowed.

Keeping in view of the above and the facts relating to ITA No. 1426/Kol/2011 this Tribunal has quashed the assessment framed u/s. 143(1) of the IT Act since the issuance of notice u/s. 143(2) of the Act is beyond the dates specified in Instruction No. 9 dated 20th September, 2004. At this juncture, we would like to clarify that Instruction No. 9/2004 dated 20th September, 2004 referred by the Tribunal in Ajanta Financial Services (P.) Ltd.'s case (supra) as well as the Hon'ble

Chattisgarh High Court in the case of Dy. CIT v. Sunita Finlease Ltd. [2011] 330 ITR 491/11 taxmann.com 241 are in respect of the corporate assesses. However, in the case of the non-corporate assesses similar instruction has been issued in Instruction No. 10 dated 20.09.2004. In this case also as per the order sheet entries incorporated in the preceding paragraphs, it is observed that the selection of scrutiny was made on 20.06.2005 and notice u/s. 143(2)(ii) and 142(1) was issued on 11.07.2005 i.e. beyond the period of the scrutiny as specified in Instruction No. 10/2004 dated 20.09.2004. Therefore, keeping in view of the decision of Hon'ble Chattisgarh High Court in the case of Sunita Finlease Ltd. (supra) as well as Tribunal's order in ITA No. 1426/Kol/2011 in the case of Ajanta Financial Services (P.) Ltd. (supra).

***8.1** In view of above we set aside the orders of the revenue authorities by quashing the order of the assessment framed u/s. 143(3) of the Act since the issue of notice u/s. 143(2) of the Act was not done by the ITO as specified in **CBDT Instruction No. 1/2011 dated 31.1.2011**. As the assessment proceedings u/s. 143(3) of the Act have been held as invalid, therefore in our considered view the other issues raised by the assessee do not require any adjudication. Hence the ground raised by the assessee is allowed."*

10. On identical facts our view is further fortified by the Judgment of Co-ordinate Bench of ITAT, Kolkata in the case of Sukumar Ch. Sahoo vs. ACIT, Circle-27, Haldia in ITA No. 2073/Kol/2016 for A.Y. 2012-13 dated 27.09.2017 wherein it was held as follows:

"5. From a perusal of the above Instruction of the CBDT it is evident that the pecuniary jurisdiction conferred by the CBDT on ITOs is in respect to the 'non corporate returns' filed where income declared is only upto Rs.15 lacs ; and the ITO doesn't have the jurisdiction to conduct assessment if it is above Rs 15 lakhs. Above Rs. 15 lacs income declared by a non- corporate person i.e. like assessee, the pecuniary jurisdiction lies before AC/DC. In this case, admittedly, the assessee an individual (non corporate person) who undisputedly declared income of Rs.50,28,040/- in his return of income cannot be assessed by the ITO as per the CBDT circular (supra). From a perusal of the assessment order, it reveals that the statutory notice u/s. 143(2) of the Act was issued by the then ITO, Ward-1, Haldia on 06.09.2013 and the same was served on the assessee on 19.09.2013 as noted by the AO. The AO noted that since the returned income is more than Rs. 15 lacs the case was transferred from the ITO, Ward-1, Haldia to ACIT, Circle-27 and the same was received by the office of the ACIT, Circle-27, Haldia on 24.09.2014 and immediately ACIT issued notice u/s. 142(1) of the Act on the same day. From the aforesaid facts the following facts emerged:

i) The assessee had filed return of income declaring Rs.50,28,040/-. The ITO issued notice under section 143(2) of the Act on 06.09.2013.

ii) The ITO, Ward-1, Haldia taking note that the income returned was above Rs. 15 lacs transferred the case to ACIT, Circle-27, Haldia on 24.09.2014.

iii) On 24.09.2014 statutory notices for scrutiny were issued by ACIT, Circle-27, Haldia.

6. We note that the CBDT Instruction is dated 31.01.2011 and the assessee has filed the return of income on 29.03.2013 declaring total income of Rs.50,28,040/-. As per the CBDT Instruction the monetary limits in respect to an assessee who is an individual which falls under the category of 'non corporate returns' the ITO's increased monetary limit was upto Rs.15 lacs; and if the returned income is above Rs. 15 lacs it was the AC/DC. So, since the returned income by assessee an individual is above Rs.15 lakh, then the jurisdiction to assess the assessee lies only by AC/DC and not ITO. So, therefore, only the AC/DC had the jurisdiction to assess the assessee. It is settled law that serving of notice u/s. 143(2) of the Act is a sine qua non for an assessment to be made u/s. 143(3) of the Act. In this case, notice u/s. 143(2) of the Act was issued on 06.09.2013 by ITO, Ward-1, Haldia when he did not have the pecuniary jurisdiction to assume jurisdiction and issue notice. Admittedly, when the ITO realized that he did not had the pecuniary jurisdiction to issue notice he duly transferred the file to the ACIT, Circle-27, Haldia on 24.09. 2014 when the ACIT issued statutory notice which was beyond the time limit prescribed for issuance of notice u/s. 143(2) of the Act. We note that the ACIT by assuming the jurisdiction after the time prescribed for issuance of notice u/s. 143(2) of the Act notice became qoarum non judice after the limitation prescribed by the statute was crossed by him. Therefore, the issuance of notice by the ACIT, Circle-27, Haldia after the limitation period for issuance of statutory notice u/s. 143(2) of the Act has set in, goes to the root of the case and makes the notice bad in the eyes of law and consequential assessment order passed u/s. 143(3) of the Act is not valid in the eyes of law and, therefore, is null and void in the eyes of law. Therefore, the legal issue raised by the assessee is allowed. Since we have quashed the assessment and the appeal of assessee is allowed on the legal issue, the other grounds raised by the assessee need not to be adjudicated because it is only academic. Therefore, the additional ground raised by the assessee is allowed."

From the above-mentioned precedents, it is abundantly clear that notice u/s 143(2) of the Act is a *sine qua non* for an assessment to be framed u/s 143(3) of the Act, which must be issued by the jurisdictional Assessing Officer. The CBDT has issued instruction no. 01/2011 wherein the CBDT has declared the monetary limits for assigning the cases for the purpose of scrutiny u/s 143(3) of the Act by the Income Tax Officer, Deputy Commissioner and Assistant Commissioner. As per CBDT instruction no. 01/2011 the scrutiny notice u/s 143(2) must be issued by the Deputy Commissioner or Assistant Commissioner, but in the assessee's case the scrutiny notice u/s 143(2) was issued by Income Tax Officer, Ward-5(2), Kolkata therefore the assessment framed by Deputy Commissioner of Income Tax, Circle-10(2), Kolkata is invalid and void, and hence we quash the assessment order u/s

143(3) dated 28.03.2015. Since we have quashed the assessment order and cross objections raised by the assessee are allowed on the legal issue therefore we do not adjudicate the Revenue's appeal on merits.

11. In the result, the cross objection filed by the assessee in CO No. 36/Kol/2019 is allowed and the appeal filed by the Revenue is dismissed as a necessary corollary.

Order pronounced in the Court on 18.03.2020

Sd/-	**Sd/-**
(S.S. GODARA)	**(A.L.SAINI)**
न्यायिकसदस्य / JUDICIAL MEMBER	**लेखासदस्य / ACCOUNTANT MEMBER**

दिनांक/ Date: 18/03/2020
(*SB, Sr.PS*)

Copy of the order forwarded to:
1. DCIT, Circle-5(1), Kolkata
2. M/s Proficient Commodities Pvt. Ltd..
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), KolkataBenches, Kolkata.
6. Guard File.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches