

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'SMC' BENCH, KOLKATA  
[Before Shri J. Sudhakar Reddy, Accountant Member]**

**I.T.A. No. 2572/Kol/2019  
Assessment Year: 2015-16**

**Shake Akhtar Hossain.....Appellant  
[PAN: AMAPS 1802 Q]**

**Vs.**

**ACIT, Circle-31, Kolkata.....Respondent**

**Appearances by:**

*Sh. Somnath Ghosh, Adv., appeared on behalf of the Assessee.*

*Sh. Supriyo Pal, JCIT, Sr. DR, appeared on behalf of the Revenue.*

Date of concluding the hearing : February 12<sup>th</sup>, 2020  
Date of pronouncing the order : March 18<sup>th</sup>, 2020

**ORDER**

**Per J. Sudhakar Reddy, AM:**

This is an appeal filed by the assessee directed against the order of the Commissioner of Income Tax (Appeals)-9, Kolkata ['CIT(A)' for short] dated 26.03.2019 u/s 250 of the Income Tax Act, 1961 ('the Act' for short) for AY 2015-16.

2. The assessee raised an additional ground which reads as follows:

*"For that in the facts and circumstances of the instant case, the Ld. Commissioner of Income Tax (Appeals)-9, Kolkata acted unlawfully in not appreciating that the conditions precedent for issuance of notice u/s. 143(2) of the Income Tax Act, 1961 was not complied with and/or fulfilled for the Ld. Assistant Commissioner of Income Tax, Circle 31, Kolkata in passing the assessment order u/s. 143(3) of the Income Tax Act, 1961 and his purported findings on that behalf are absolutely is at initio void, ultra vires and null in law"*

3. The ld. Counsel for the assessee submitted that the notice u/s 143(2) of the Act was issued by an officer who had no jurisdiction over the assessee. He submitted that the jurisdiction of the assessee was with ITO, Kolkata as the returned income was filed with total income of ₹19,27,470/- which is below the total income limit of ₹20 lakh. For this, he relied on instruction no.1/2011 [F.No.187/12/2010-IT(A-I)] dated 31.01.2011. He pointed out that the notice u/s 143(2) of the Act was also issued by the ACIT, Circle-31, Kolkata who had no jurisdiction over the case. Thus he submitted that the

assessment is bad in law. In support of this contention he relied on the following case laws:

- i. *Shri Sukumar Chandra Sahoo, Purba Medinipur vs. ACIT, Circle-27, Haldia, Purba Medinipur, ITA 2073/KOL/2016 dated 27.09.2017.*
- ii. *K.A.Wires Ltd., Kolkata vs. I.T.O., Ward-8(3), Kolkata, ITA 1149/KOL/2019 dated 22.01.2020.*
- iii. *Sri Krishnendu Chowdhury, Kolkata vs. ITO, WD-1, HALDIA, Purba Medinipur, ITA 1153/KOL/2015 dated 18.11.2016.*

4. On merits he submitted that the assessment was selected for scrutiny for the limited purpose of verifying the following: 1) contract receipt/fees mismatch, 2) Bonus/commission to employee mismatch, 3) Sales turn over mismatch, 4) Sundry creditors and tax credit mismatch and whereas the AO travelled beyond these items and made disallowance u/s 43B of the Act as well as 36(1)(va) of the Act. This, he submitted is not permissible in law. He submitted that the issue is covered in his favour by the decision of 'C' Bench of ITAT, Chandigarh in the case of *Sh. Vijay Kumar, Patiala vs. ITO Ward-1, Patiala in ITA No. 434/Chandi/2019 order dated 12.09.2019*. He further submitted that the entire amount of service tax was paid on or before 31st March, 2015 and hence, the question of disallowance u/s 43B does not arise. On disallowance made of payment of employees' contribution towards provident fund, he relied on a number of case laws and submitted that, as the entire remittances were made prior to filing of the return of income, no disallowance should be made u/s 43B of the Act. For this proposition he relied on the case of *CIT vs. Vijay Shree Ltd. (2014) taxman 12 (Cal)(Mag)*.

5. Written submissions were made by the ld. DR. The ld. DR opposed the contention of the assessee and submitted that the assessee has not objected to the jurisdiction of the AO as required u/s 120(4) of the Act and under those circumstances, he cannot question the jurisdiction by way of raising additional grounds. He pointed out that the assessee had participated in the assessment proceedings and under those circumstances the ground of the assessee should be dismissed.

6. On the issue of the assessee travelling beyond the items listed out for scrutiny through CASS, he submitted that there is no such legal bar on the AO disallowing items which were patently no allowable under the Act. On merits he submitted that, the

service tax an amount of ₹16,51,313/- was paid after 30.09.2015 which is the last date for filing of the return of income and hence the disallowance was correct in law. Similarly on employees' contribution towards provident fund, he relied on the Board's instruction no. 22 of 2015 dated 17.12.2015 and argued that, an amount paid beyond the 15<sup>th</sup> of the next month on the amount collected during the month should be disallowed u/s 43B, as the same is paid beyond the due date.

7. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and case laws cited, I hold as follows.

8. The first issue is jurisdiction. The undisputed fact is that jurisdiction of the assessee lies with the ITO and not with the ACIT for the reason that the returned income is below 20 lakh. This issue has been considered by the Tribunal in the case of *Sri Krishnendu Chowdhury (supra)* wherein this circular of the Board dated 31.01.2011 was considered and thereafter it was held as follows:

*"8.1 In view of above we set aside the orders of the revenue authorities by squashing 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 31.01.2011. 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."*

9. This Bench of the Tribunal in the case of *Shri Sukumar Chandra Sahoo (supra)* on a similar issue at para 4.5 and 6 held as follows:

*"4. Brief facts of the case are that the assessee is an individual who filed his return of income for the year under consideration wherein he declared total income to the tune of Rs.50,28,040/-. The Ld. AR for the assessee submitted that as per the CBDT Instruction No. 1/11 (F. No. 187/12/2010-IT(AT) dated 31.01.2011 CBDT fixed new monetary limit in Mufassil areas, according to which income above Rs. 15 lacs for 'non corporate assessee' and Rs.20 lacs for 'corporate returns' has to be assessed by ACIT/DCIT. Thus, according to Ld. Counsel, since Haldia is a Muffasil area and instructions given by the CBDT is binding on the officers of the Department and since the assessee has declared more than Rs. 50 lacs as his returned income, then the scrutiny assessment can be done only by the ACIT/DCIT and not by the ITO who does not have the jurisdiction to do so. For ready reference, Instruction No. 1/2011 is reproduced below:*

*"INSTRUCTION NO. 1/2011 (F. NO. 187/12/2010-IT(A-1), 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.”

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 noncorporate 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 quorum 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."*

10. Applying the propositions of law laid down in these case laws to the facts of this case we have to necessarily hold that the notice issued to the assessee u/s 143(2) of the Act by the Id. ACIT, Circle-31, Kolkata was without jurisdiction. Hence the assessment framed in pursuant to this notice is bad in law. The appeal has to be allowed on this ground.

11. On the issue of addition/disallowance made beyond the CASS criteria, the Chandigarh Bench of the Tribunal in the case of *Sh. Vijay Kumar* (supra) order dated 12.09.2019 held as follows:

*"5. I find that the additions made by the Assessing Officer, thus, being exceeding his jurisdiction are not sustainable in the eyes of law and the same are accordingly ordered to be deleted."*

12. Notice u/s 143(2) of the Act issued to the assessee was for the limited purpose of verifying the following:

- i. Contract Receipts/Fees Mismatch
- ii. Bonus or Commission to employee mismatch
- iii. Sales Turnover Mismatch
- iv. Sundry Creditors
- v. Tax Credit Mismatch

13. Disallowance u/s 43B was beyond the power given to the AO in the limited scrutiny proceedings. If the AO wanted to go beyond the items of limited scrutiny, a procedure has been prescribed by the CBDT. Approval of a higher authority was required to be taken. This is not done. Hence, the disallowances are bad in law.

14. Be it as it may, the assessee has filed before us evidences that the service tax in question was paid before closing of the final year 31st March, 2015. Proof of payment was also submitted. The dates of payment are as follows:

Date	Particulars	Vch Type	Debit	Credit
29-4-2014	To Corporation Bank	Payment	10,38,500.00	
5-5-2014	To Corporation Bank	Payment	10,38,500.00	
24-9-2014	To Corporation Bank	Payment	17,613.00	
5-12-2014	To Corporation Bank	Payment	2,26,600.00	
9-12-2014	To Corporation Bank	Payment	1,33,900.00	

10-2-2015	To Corporation Bank	Payment	2,67,800.00	
31-3-2015	To Corporation Bank	Payment	2,06,000.00	
	To Corporation Bank	Payment	1,54,500.00	
	To Corporation Bank	Payment	1,03,000.00	
	To Corporation Bank	Payment	1,28,750.00	
	To Corporation Bank	Payment	<u>1,23,600.00</u>	
			34,38,763.00	
	By Closing Balance			34,38,763.00
			<u>34,38,763.00</u>	<u>34,38,763.00</u>

15. Thus the disallowance of service tax payment u/s 43B is against the facts of the case. I delete the same.

16. On the issue of disallowance of employees' contribution towards provident fund, the undisputed fact is that the payment was made prior to the due date of filing of return of income. Under such circumstances the payment is allowable as a deduction. This issue was considered by the Hon'ble Calcutta High Court in the case of *Sh. Vijay Kumar* (supra) adjudicated in view of the assessee. Respectfully following the same, we delete the disallowance and allow this ground of the assessee.

17. In the result, this appeal of the assessee is allowed.

***Kolkata, the 18<sup>th</sup> March, 2020.***

Sd/-  
[J. Sudhakar Reddy]  
Accountant Member

Dated: 18.03.2020

*Bidhan*

*Copy of the order forwarded to:*

1. ***Shake Akhtar Hossain, C/O. S.N. Ghosh & Associates, Advocates "Seben Brothers' Lodge", P.O. Buroshibatala, P.S. Chinsurah, Dist. Hooghly, West Bengal-712 105.***
2. ***ACIT, Circle-31, Kolkata.***
3. CIT(A)-9, Kolkata. (sent through e-mail)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through e-mail)

True copy

By order

Assistant Registrar  
ITAT, Kolkata Benches