

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA
(Virtual Court)**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

**I.T.A. Nos. 2290 & 2291/Kol/2018
Assessment Years: 2009-10 & 2010-11**

Supertron Electronics Pvt. Ltd.....Appellant
[PAN: AADCS 5971 L]

Vs.

DCIT, Circle-5(1), Kolkata.....Respondent

Appearances by:

Sh. Arvind Agarwal, Adv., appeared on behalf of the Assessee.

Smt. Ranu Biswas, Addl. JCIT, appeared on behalf of the Revenue.

Date of concluding the hearing : September 16th, 2020

Date of pronouncing the order : September 23rd, 2020

ORDER

Per J. Sudhakar Reddy, AM:

Both these appeals are filed by the assessee directed against separate orders of the Learned Commissioner of Income Tax (Appeals)-2, Kolkata, [hereinafter the "CIT(A)"], passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dated 09.07.2018 for the Assessment Years 2009-10 & 2010-11.

2. In both these appeals the assessee has taken a jurisdictional ground that, a notice u/s 143(2) of the Act was not issued/served on the assessee after filing of a return of income in pursuance to a notice issued u/s 148 of the Act. This Bench of the Tribunal has on last date of hearing i.e. on 06.08.2020 directed the ld. DR to produce or verify the assessment record for ascertaining the claim of the assessee that the statutory notice u/s 143(2) of the Act was not issued to the assessee for both the assessment years, before framing of assessment u/s 143(3) r.w.s. 148 of the Act.

3. On a query from the Bench, the ld. DR Smt. Ranu Biswas submitted that, on an examination of the assessment record for both the assessment years, she has observed that no notice u/s 143(2) of the Act was issued to the assessee. On a query from the

Bench, she submitted that, on examination of the order sheet entries also, it is a fact that no notice u/s 143(2) of the Act was issued to the assessee for both the assessment years.

4. The ld. Counsel for the assessee submitted that on these facts the assessment orders framed for both the assessment years are bad in law. He relied on the judgement of the jurisdictional High Court in the case of *Pr. CIT vs. Oberoi Hotels Pvt. Ltd.* in *ITAT No. 152 of 2015, GA No. 3671 of 2015* judgement dated 22.06.2018, wherein the Hon'ble High Court had considered the issue and held that, failure to issue statutory notice u/s 143(2) of the Act would result in the entire proceedings, including any order of assessment being bad in law. Reliance was also placed on the judgement of the ITAT, Kolkata 'A' Bench in the case of *Sri Ujjal Dutta, Birbhum vs. ITO, Ward-3(1), Birbhum* order dated 27.11.2019. Reliance was also placed in another judgement of the High Court in the case of *Tinplate Company of India Limited vs. DCIT in WP No. 525 of 2017* order dated 06.09.2017. The ld. Counsel for the assessee submitted that he would not be required to argue all other grounds of appeal for both the assessment years, as the issue is covered in his favour and the order of assessment has to be quashed as bad in law.

5. The ld. DR, Smt. Ranu Biswas on the other hand, opposed the contention of the assessee and submitted that this issue of non-service of notice u/s 143(2) of the Act was never raised by the assessee, either before the AO or before the ld. CIT(A) and the assessee has participated in the assessment proceedings and under such circumstances he should not be allowed to raise this issue for the first time before the Tribunal. She further submits that hence this issue should be decided against the assessee and as the assessee did not argue all other grounds, they should also be decided against the assessee.

6. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and case law cited, we hold as follows.

7. The admitted fact is that no notice u/s 143(2) of the Act was issued to the assessee for both the assessment years. Only a notice u/s 148 and Section 143(2)(1) of the Act was issued. Under these circumstances we have to hold that the assessment orders for both the assessment years are bad in law and have to be quashed by

following the judgement of the jurisdictional High Court in the case of *Pr. CIT vs. Oberoi Hotels Pvt. Ltd.* (supra), wherein it was held as follows:

"In the light of the above discussion, particularly taking into consideration the law laid down by the Supreme Court in Hotel Blue Moon, it is inescapable that the issuance of a notice under Section 143(2) of the Act is mandatory if the Assessing Officer seeks not to accept any part of the return as furnished by the assessee or make an assessment order contrary thereto and, even in course of reassessment proceedings, such notice cannot be dispensed with.

One of the arguments put forth on behalf of the Revenue is that in course of reassessment proceedings once a notice is issued under Section 148 of the Act, the assessee is made aware of what part of the income or on what count the assessee's income is perceived to have escaped attention. It is submitted that in such a scenario, the requirement of a notice under Section 143(2) may be somewhat diluted, if not unnecessary. Apart from the fact that such argument cannot be countenanced in the light of the dictum in Hotel Blue Moon, it is evident that an assessment under Section 143(3) of the Act is consequent upon a hearing and the production of evidence on such points on which the Assessing Officer may harbour doubts and are indicated in his notice under Section 143(2) of the Act. Section 143(3) of the Act contemplates an assessment undertaken by the Assessing Officer upon material being produced by the assessee on grounds which are indicated by the Assessing Officer in his notice under Section 143(2) of the Act in respect whereof the Assessing Officer may have misgivings or may disagree with the return filed by the assessee. Implicit in the wording of Section 143(3) of the Act is the indispensability of a notice under Section 143(2) thereof.

Propos the second question framed above, it is necessary that Section 292BB of the Act be noticed in its entirety:

"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 had raised such objection before the completion of such assessment or reassessment."

Even if the provision does not carry a non-obstante clause, since Section 292BB is a provision of general application, it would be applicable in all situations; but only in so far as it proclaims to operate. Section 292BB of the Act, read in the context of several provisions of the Act which mandatorily require notices to be issued in divers situations, cannot be said to have dispensed with the issuance of such notices altogether. Section 292BB must be understood to cure any defect in the service of the notice and not authorise the dispensation of a notice when the appropriate interpretation of a provision makes the notice provided for thereunder to be mandatory or indispensable.

This is not a case where the assessing officer says that a notice had been issued and there is a contradiction thereof by the assessee. It is evident that the assessee carried the objection before the Commissioner (Appeals) and the Commissioner brushed aside the objection on the ground that it was a technicality without addressing the issue or applying his mind to such aspect of the matter. Further, it is evident from the order impugned passed by the Appellate Tribunal that no notice under Section 143(2) of the Act had, in fact, been issued in this case. In such a

situation, where a notice that is mandatorily required to be issued is found not to have been issued, Section 292BB of the Act has no manner of operation.

The two substantial questions of law are answered accordingly as follows: (1) If the time for issuance of the notice under Section 143(2) of the Act has expired or the time for completing the reassessment proceedings under Section 153(2) of the Act has run out, the failure to issue such notice under Section 143(2) of the Act would result in the entire proceedings, including any order of assessment, to be quashed.

(2) Section 292BB of the Act does not dispense with the issuance of any notice that is mandated to be issued under the Act, but merely cures the defect of service of such notice if an objection in such regard is not taken before the completion of the assessment or reassessment. In addition, it is held that in the light of the Supreme Court dictum in *Hotel Blue Moon*, the view expressed in *Humboldt Wedag India Pvt. Ltd* is per incuriam and, as such, not good law."

8. Respectfully following the propositions of law laid down in the judgement of the jurisdictional High Court on this issue, we quash the assessment orders of both the assessment years and allow the appeal of the assessee.

9. In the result, both the appeals filed by the assessee are allowed.

Kolkata, the 23rd September, 2020.

Sd/-
 [Aby T. Varkey]
 Judicial Member

Dated: 23.09.2020
Bidhan

Sd/-
 [J. Sudhakar Reddy]
 Accountant Member

Copy of the order forwarded to:

1. ***Supertron Electronics Pvt. Ltd., 2, Cooper Lane, Kolkata-700 001.***
2. ***DCIT, Circle-5(1), Kolkata.***
3. CIT(A)-2, Kolkata. (sent through mail)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

True copy

By order

Assistant Registrar
 ITAT, Kolkata Benches