

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC"
(Virtual Court Hearing), BENCH KOLKATA

Before Shri Sanjay Garg, Judicial Member

I.T.A. No.850/Kol/2019
Assessment Year: 2011-12

Hirak Sarkar.....Appellant
37/C, Bose Para Lane,
Serampore, Hooghly-712202.
[PAN: AKAPS2117A]

vs.

ACIT, Circle-23(1), Hooghly.....Respondent

Appearances by:

Shri Miraj D. Shah, Advocate, appeared on behalf of the appellant.

Shri Jayanta Khanra, JCIT, Sr. DR, appeared on behalf of the Respondent.

Date of concluding the hearing : July 15, 2021

Date of pronouncing the order : August 12, 2021

ORDER

The present appeal has been preferred by the assessee for the assessment year 2011-12 against the order dated 22.02.2019 of the Commissioner of Income Tax(Appeals)-6, Kolkata.

2. The assessee in this appeal has taken the following grounds of appeal:

"1. For that in the facts and circumstances of the case the appellate order passed was in violation of principals of natural justice hence is bad in law and be quashed.

2. For that in the facts and circumstance the Learned Commissioner of Income Tax Appeals erred in upholding the addition of Rs.39,14,951/- made u/s 68 of the income tax Act, 1961 read with section 115BBE of the IT Act 1961 as unexplained cash credit on account of bogus long term capital gains on sale of listed equity shares. The addition is not called for and hence the same be deleted.

3. For that in the facts and circumstances of the case the Learned Commissioner of Income Tax Appeals erred in upholding that the income from sale of listed equity shares was to be assessed as income taxed u/s 115BBE of the IT Act 1961. The same is bad in law and be reversed.

4. For that in the facts and circumstance the Learned Commissioner of Income Tax Appeals erred in upholding the addition of Rs.19,580/- made u/s 69C of the income tax Act, 1961 read with section 115BBE of the IT Act 1961 as unexplained expenditure towards total commission for arranging bogus long term capital gains on sale of listed equity shares. The addition is not called for and hence the same be deleted.

5. *For that in the facts and circumstance the Learned Commissioner of Income Tax Appeals erred in not allowing the exemption u/s 10(38) of the IT Act 1961. The exemption be allowed as per law.*
6. *For that in the facts and circumstance the Learned Commissioner of Income Tax Appeals erred in not allowing the capital gains from the sale of listed shares to be exempted income. The exemption should be allowed as per law.*
7. *For that in the facts and circumstance of this case the material based on which the Ld. Assessment Officer passed the assessment order are collected behind the back of the assessee and which were not provided during the course of assessment proceeding, thus material should be excluded/ignored for the purpose of this case.*
8. *For that in the facts and circumstances of the case the statement of third parties on which the Ld Assessment officer relied during the course of assessment proceeding were not subjected to cross examination for the assessee, thus the third party statement relied upon should be excluded/ignored for the purpose of this case.*
9. *For that the learned CIT (Appeals) erred in upholding the reopening of the assessment AY: 2011-2012 u/s 148 of the I.T. Act 1961 by the Ld assessing officer. The reopening was bad in law and thus the reopening of the assessment be held bad in law and hence the assessment be quashed.*
10. *For that the learned CIT (Appeals) erred in upholding the reasons recorded before reopening of assessment u/s 148 of the IT Act 1961 did not meet the test of law laid down by various courts and hence the reopening be declared to be bad in law and the reassessment order be quashed.*
11. *For that the learned CIT (Appeals) erred in upholding the reopening of assessment u/s 148 of the IT Act 1961 was on borrowed satisfaction and not on any independent application of mind by the assessing officer and hence the reopening be declared to be bad in law and the reassessment order be quashed.*
12. *For that the learned CIT (Appeals) erred in upholding the reopening of assessment u/s 148 of the IT Act 1961 was without any relevant material having link to escapement of income and hence the reopening be declared to be bad in law and the reassessment order be quashed.*
13. *For that the learned CIT (Appeals) erred in upholding that the sanction u/s 151 of the IT Act 1961 before the reopening of assessment u/s 148 of the IT Act 1961 was mechanical and without application of proper mind and the sanction was bad in law and hence the reopening be held to be bad in law.*
14. *For that the learned CIT (Appeals) erred in upholding that the assessment order was passed without service of notice as per law and hence the order was bad in law and the same be quashed.*
15. *For that the learned CIT (Appeals) erred in upholding that the assessment order was passed by an assessing officer not having jurisdiction over the assessee as per law and hence the order was bad in law and the same be quashed.*

16. For that the learned CIT (Appeals) erred in upholding that the Learned Assessing Officer erred in using survey report u/s 133A of the IT Act 1961 in case of third parties against the assessee.

17. For that the learned CIT (Appeals) erred in upholding that statement given in survey proceedings is not evidence under the provision of the Income Tax act 1961 and hence the same be ignored.

18. For that the learned CIT (Appeals) erred in confirming the interest charged u/s 234 A/B/C the same was unjustified and hence the same be recalculated as per the applicable law.

19. The appellant craves leave to produce additional evidences in terms of Rule 29 of the Income Tax (Appellate Tribunal) Rules 1963.

20. The appellant craves leave to press new, additional grounds of appeal or modify, withdraw any of the above grounds at the time of hearing of the appeal.”

3. A perusal of the above grounds of appeal reveals that the assessee, inter alia, has contested the jurisdiction of the concerned ACIT to frame the assessment order u/s 147 of the Income Tax Act (hereinafter referred to as the ‘Act’). Since this legal ground goes to the root of the case, hence I proceed to decide this legal ground first.

4. The Id. Counsel for the assessee has invited my attention to the copy of the reasons recorded for reopening of the assessment u/s 147 of the Act to show that the reasons were recorded by ITO, Ward-23(3), Hooghly. The Id. Counsel has further invited my attention to the copy of the notice issued u/s 148 of the Act, which was issued by ITO, Ward-23(3), Hooghly. The Id. Counsel has further invited my attention to the impugned assessment order framed u/s 143(3) r.w.s 147 of the Act to submit that the reassessment order in this case was passed by ACIT, Circle-23(1), Hooghly. The Id. Counsel for the assessee has further invited my attention to the copy of the Income Tax Return to submit that the returned income of the assessee was less than Rs.15 lacs. The Id. Counsel has further submitted that as per the relevant statutory provisions not only the territorial jurisdiction but also the pecuniary jurisdiction of the Income Tax Officers/Assessing Officer has been fixed by the CBDT and that if the returned income is less than Rs.15 lacs, the jurisdiction to frame to assessment lies to the Income Tax Officer whereas if the returned is more than Rs.15 lacs, the jurisdiction lies with the concerned ACIT/JCIT. The Id. counsel has submitted that the jurisdiction to pass

assessment order in this case lies with ITO, Ward-23, Hooghly, who, in fact had issued notice u/s 148 of the Act, but the assessment has been done by ACIT who did not have the pecuniary jurisdiction to pass the assessment order in this case.

The Id. DR has not disputed the aforesaid factual position. However, he has submitted that the concerned ACIT being the overall in-charge of the concerned ward was competent to frame the assessment.

5. I have considered the rival contentions of both the Id. representatives of the parties. Before proceeding further, it will be appropriate to refer to section 120 of the Act which, for the sake of ready reference, is reproduced as under:

“Jurisdiction of income- tax authorities

(1) Income- tax authorities shall exercise all or any of the powers and perform all or any of the functions Conferred on, or, as the case may be, assigned to such authorities by or under this Act in accordance with such directions as the Board may issue for the exercise of the powers and performance of the functions by all or any of those authorities.

[Explanation.- For the removal of doubts, it is hereby declared that any income-tax authority, being an authority higher in rank, may, if so directed by the Board, exercise the powers and perform the functions of the income-tax authority lower in rank and any such direction issued by the Board shall be deemed to be a direction issued under sub-section (1)].

(2) The directions of the Board under sub- section (1) may authorise any other income- tax authority to issue orders in writing for the exercise of the powers and performance of the functions by all or any of the other income- tax authorities who are subordinate to it.

(3) In issuing the directions or orders referred to in sub- sections (1) and (2), the Board or other income- tax authority authorised by it may have regard to any one or more of the following criteria, namely:-

(a) territorial area;

(b) persons or classes of persons;

(c) incomes or classes of income; and

(d) cases or classes of cases

.....

6. A perusal of the aforesaid statutory provisions would reveal that the jurisdiction of Income Tax Authorities may be fixed not only in respect of territorial area but also

having regard to a person or classes of persons and income or classes of income also. Therefore, the CBDT having regard to the income as per return has fixed the jurisdiction of the Assessing Officers.

7. Now, in this case, the reasons for forming belief of escapement of income by the assessee were recorded by the ITO, Ward-23(3), Hooghly and thereafter, notice u/s 148 of the Act was also issued by the by the ITO, Ward-23(3), Hooghly. However, the assessment has been framed by the ACIT, Circle-23(1), Hooghly. At this stage, it will be appropriate to refer to the provisions of section 127 of the Act as under:

Power to transfer cases

(1) The [Principal Director General or] Director General or [Principal Chief Commissioner or] Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more Assessing Officers subordinate to him (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) also subordinate to him.

8. A perusal of the above statutory provisions would reveal that jurisdiction to transfer case from one Assessing Officer to other Officer lies with the Officers as mentioned in section 127(1) who are of the rank of Commissioner or above. No document has been produced on the file by the Department to show that the case was transferred by the competent authority from ITO, Ward-23(3), Hooghly to ACIT, Circle-23(1), Hooghly. Even, there is no document on the file that the ACIT, Circle-23(1), Hooghly had ever recorded any reasons to form belief that the income of the assessee has escaped assessment nor did he issue any notice u/s 147 of the Act. On the other hand, the ITO, Ward-23(3), Hooghly had recorded the reasons for reopening of the assessment and had issued notice u/s 148 of the Act, but did not proceed further with the framing of assessment. Under the circumstances, the assessment framed by ACIT, Circle-23(1), Hooghly, is bad in law on two counts, firstly he did not have any pecuniary jurisdiction to frame the assessment and secondly he himself did not form any belief that the income of the assessee has escaped assessment nor did he issue notice u/s 148 of the Act which was sine qua non to assume jurisdiction to frame to assessment. The issue relating to the

pecuniary jurisdiction also came into consideration before the Coordinate Bench of the Tribunal in ITA No.2517/Kol/2019 and Others vide order dated 03.02.2021, wherein the Tribunal further relying upon various other decisions of the Coordinate Benches of the Tribunal has decided the issue in favour of the assessee and held that the assessment framed by Assessing Officer who was not having pecuniary jurisdiction to frame such assessment was bad in law. The relevant part of the order dated 03.02.2021 passed in ITA No.2517/Kol/2019 and Others is reproduced as under:

“5.2. The assessee relied on the recent decision of this Tribunal in the case of Hillman Hosiery Mills Pvt. Ltd. vs. DCIT, in ITA No. 2634/Kol/2019, order dated 12.01.2021. We find that the issues that arise in this appeal are clearly covered in favour of the assessee. This order followed the principles of law laid down in a number of other decisions of the ITAT, Kolkata Bench on this issue.

5.3. Kolkata “B” Bench of the Tribunal in the case of Hillman Hosiery Mills Pvt. Ltd.(supra) held as follows:

“10. In this case, the ITO Ward-3(3), Kolkata, issued notice u/s 143(2) of the Act on 04/09/2014. In reply, on 22/09/2014, the assessee wrote to the ITO, Ward-3(3), Kolkata, stating that he has no jurisdiction over the assessee. Thereafter on 31/07/2015, the DCIT, Circle-11(1), Kolkata, had issued notice u/s 142(1) of the Act to the assessee. The DCIT, Circle-11(1), Kolkata, completed assessment u/s 143(3) of the Act on 14/03/2016. The issue is whether an assessment order passed by DCIT, Circle-11(1), Kolkata, is valid as admittedly, he did not issue a notice u/s 143(2) of the Act, to the assessee. This issue is no more res-integra. This Bench of the Tribunal in the case of Soma Roy vs. ACIT in ITA No. 462/Kol/2019; Assessment Year 2015-16, order dt. 8th January, 2020, under identical circumstances, held as under:-

“5. After hearing rival contentions, I admit this additional ground as it is a legal ground, raising a jurisdictional issue and does not require any investigation into the facts. The ld. Counsel for the assessee submitted that as per Board Instruction No. 1/2011 [F. No. 187/12/2010-IT(A-I)], dt. 31/01/2011, the jurisdiction of the assessee is with the Assistant Commissioner of Income Tax, Circle-1, Durgapur, as the assessee is a non-corporate assessee and the income returned is above Rs.15,00,000/- and whereas, the statutory notice u/s 143(2) of the Act, was issued on 29/09/2016, by the Income Tax Officer, ward-1(1), Durgapur, who had no jurisdiction of the case. He submitted that the assessment order was passed by the ACIT, Circle-1(1), Durgapur, who had the jurisdiction over the assessee, but he had not issued the notice u/s 143(2) of the Act, within the statutory period prescribed under the Act. Thus, he submits that the assessment is bad in law.

5.1. On merits, he rebutted the findings of the lower authorities. The ld. Counsel for the assessee relied on certain case-law, which I would be referring to as and when necessary.

6. The ld. D/R, on the other hand, submitted that the concurrent jurisdiction vests with the ITO as well as the ACIT and hence the assessment cannot be annulled simply because the statutory notice u/s 143(2) of the Act, was issued by the ITO and the assessment was completed by the ACIT. He further submitted that the assessee did not object to the issue of notice before the jurisdictional Assessing Officer and even otherwise, Section 292BB of the Act, comes into play and the assessment cannot be annulled. On merits, he relied on the orders of the lower authorities.

7. I have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, I hold as follows:-

8. I find that there is no dispute in the fact that the notice u/s 143(2) of the Act dt. 29/09/2016 has been issued by the ITO, Wd-1(1), Durgapur. Later, the case was transferred to the jurisdiction of the ACIT on 11/08/2017. Thereafter, no notice u/s 143(2) of the Act was issued by the Assessing Officer having jurisdiction of this case and who had completed the assessment on 26/12/2017 i.e., ACIT, Circle-1(1), Durgapur. Under these circumstances, the question is whether the assessment is bad in law for want of issuance of notice u/s 143(2) of the Act.

9. This Bench of the Tribunal in the case of *Shri Sukumar Ch. Sahoo vs. ACIT in ITA No. 2073/Kol/2016* order dt. 27.09.2017, 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 *quarum 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.

7. In the result, appeal of assessee is allowed.

9.1. This Bench of the Tribunal in the case of Krishnendu Chowdhury vs. ITO reported in [2017] 78 taxmann.com 89 (Kolkata-Trib.) held as follows:-

“Return of income of assessee was Rs. 12 lakhs - As per CBDT instruction, jurisdiction for scrutiny assessment vested in Income-tax Officer and notice under section 143(2) must be issued by Income-tax Officer, Ward-I, Haldia and none other - But, notice was issued by Asstt. Commissioner, Circle Haldia much after CBDT's instruction and knowing fully well that he had no jurisdiction over assessee - Whether, therefore, notice issued by Asstt. Commissioner was invalid and consequently assessment framed by Income-tax Officers becomes void since issue of notice under section 143(2) was not done by Income-tax Officers as specified in CBDT instruction No. 1/2011.”

9.2. *The Hon'ble High Court of Calcutta in the case of West Bengal State Electricity Board vs. Deputy Commissioner of Income Tax, Special Range – I, reported in [2005] 278 ITR 218 (Cal.) has held as follows:-*

“Section 254 of the Income-tax Act, 1961 - Appellate Tribunal - Powers of - Assessment years 1983-84 to 1987-88 - Whether a question of law arising out of facts found by authorities and which went to root of jurisdiction can be raised for first time before Tribunal - Held, yes Whether jurisdiction of Assessing Authority is not dependent on date of accrual of cause of action but on date when it is initiated - Held, yes - Whether once a particular jurisdiction is created, same must be prospective and cannot be retrospective and it has to be interpreted having regard to manner in which it has been sought to be created - Held, yes – Assessee”

9.3. *The Hon'ble Supreme Court in the case of CIT vs. Laxman Das Khandelwal [2019] 108 taxmann.com 183 (SC), held as follows:-*

“7. A closer look at Section 292BB shows that if the assessee has participated in the proceedings it shall be deemed that any notice which is required to be served upon was duly served and the assessee would be precluded from taking any objections 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. According to Mr. Mahabir Singh, learned Senior Advocate, since the Respondent had participated in the proceedings, the provisions of Section 292BB would be a complete answer.

On the other hand, Mr. Ankit Vijaywargia, learned Advocate, appearing for the Respondent submitted that the notice under Section 143(2) of the Act was never issued which was evident from the orders passed on record as well as the stand taken by the Appellant in the memo of appeal. It was further submitted that issuance of notice under Section 143(2) of the Act being prerequisite, in the absence of such notice, the entire proceedings would be invalid.

8. The law on the point as regards applicability of the requirement of notice under Section 143(2) of the Act is quite clear from the decision in Hotel Blue Moon's case (supra). The issue that however needs to be considered is the impact of Section 292BB of the Act.

9. According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.”

10. Respectfully following the propositions of law laid down in all these case-law and applying the same to the facts of the case, we hold that the assessment order is bad in law for the reason that the Assessing Officer having jurisdiction over the assessee, has not issued a notice u/s 143(2) of the Act as required by the statute. Notice issue by the officer having no jurisdiction of the assessee is null and void. When a notice is issued by an officer having no jurisdiction, Section 292BB of the Act, does not come into play. Coming to the argument of the ld. D/R that objection u/s 124(3) of the Act has to be taken by the assessee on rectifying notice u/s 143(2) of the Act from a non-jurisdictional assessing officer, I am of the view that I need not adjudicate this issue, as I have held that non-issuance of statutory notice/s 143(2) of the Act by the jurisdictional Assessing Officer makes the assessment bad in law. Under these circumstances, we allow this appeal of the assessee."

6. Respectfully following the propositions of law laid down in these orders stated above, we hold that the orders are bad in law for the reason that the assessing authority passed the order u/s 143(3) of the Act i.e. DCIT-13(1), Kolkata has not issued a notice u/s 143(2) of the Act and also for the reason that the jurisdiction of these cases lies with the ITO and not the DCIT. Hence all the orders passed by the ld. CIT(A) in these four cases are hereby quashed and the appeals of the assessees are allowed."

9. In view of the discussion made above and respectfully following the decision cited above, it is held that the reassessment framed u/s 147 of the Act being without jurisdiction is bad in law and the same is accordingly set aside.

10. In the result, the appeal of the assessee stands allowed.

Order is pronounced in the open court on 12.08.2021.

Sd/-
[Sanjay Garg]
Judicial Member

Dated: 12.08.2021.

RS

Copy of the order forwarded to:

1. Hirak Sarkar
2. ACIT, Circle-23(1), Hooghly
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Sr.PS/D.D.O, Kolkata Benches

