

**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH KOLKATA**

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER  
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.2416/KOL/2017  
Assessment Year: 2014-15**

Raghvendra Mohta Calcutta Stock Exchange Building, Room No. 4C, 2 <sup>nd</sup> floor, 7, Lyons Range, Kolkata-700001. (PAN: AJTPM3146P)	Vs.	ACIT, Circle-36, Kolkata
<b>(Appellant)</b>		<b>(Respondent)</b>

**Present for:**

Appellant by : Shri Miraj D. Shah, Advocate  
Respondent by : Shri P. P. Barman, Addl. CIT, Sr. DR

Date of Hearing : 20.02.2024  
Date of Pronouncement : 08.04.2024

**ORDER**

**PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:**

This appeal filed by the assessee is against the order of Ld. CIT(A)-10, Kolkata vide Appeal No. 493/CIT(A)-10/Circle-36/2016-17/Kol dated 26.09.2017 passed against the assessment order by ACIT, Circle-36, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 29.12.2016 for AY 2014-15.

2. Grounds raised by the assessee are reproduced as under:

*“1. That on the facts and in the circumstances of the case, the ld. Commissioner of Income Tax {Appeals}-10, Kolkata, erred in holding that the sum of Rs.4227500/- represented Bogus long Term Capital Gain.*

*2. That on the facts and in the circumstances of the case, the ld. Commissioner of Income Tax {Appeals}-10, Kolkata, without finding that the Appellant is indulged in Bogus Security transactions, erred in confirming the action of the*

*Assessing Officer not to treat Rs.4227500/- as genuine long Term Capital Gain, but income of the Appellant under section 68 of the Income-tax Act, 1961.*

*3. That on the facts and in the circumstances of the case, the ld. Commissioner of Income Tax {Appeals}-10, Kolkata, erred in confirming the Addition of Rs.148657/- made on account of Bogus Commission.*

*4. That the ld. CIT{A}-10, Kolkata, erred in confirming to the extent of Rs.1626558/- made by the Assessing Officer under Section 14A of the Act.*

*5. That the Assessment Order passed by the ld. Commissioner of Income Tax, is bad in law.”*

2.1. However, assessee has also taken additional ground which is reproduced as under:

*“For that the AO passing the assessment order did not have jurisdiction over the case of the assessee. Hence, the notice is bad in law and assessment order passed on the basis of such notice is bad in law and should be quashed.”*

3. Assessee submitted that this additional ground is pure legal ground which goes to the root of the matter and no new facts are required to be investigated or placed on record for adjudicating the same. He placed reliance on the decision of Hon’ble Supreme Court in the case of National Thermal Power Corporation Ltd. Vs. CIT (1998) 229 ITR 383 (SC). He also placed reliance on the decision of CIT Vs. Mahalaxmi Textiles Mills Ltd. (1967) 66 ITR 710 (SC) whereby even if such additional ground is not taken in appeal memo or before lower authorities, appellate authority has jurisdiction to entertain an alternative plea raised during hearing of the appeal. On confronting the submission to the Ld. Sr. DR, nothing objectionable was submitted on its admission. Accordingly, this additional ground raised by the assessee which is purely legal ground and goes to the root of the matter, is admitted for adjudication.

4. Brief facts of the case are that assessee filed its return of income on 26.09.2014 reporting total income as nil. Case of the assessee was selected for scrutiny assessment through CASS. Notice u/s. 143(2) of the Act dated 31.08.2015 was issued and served on the assessee on

10.09.2015. In the course of assessment, Ld. AO noted that assessee had earned long term capital gain from sale of shares of Ashika Credit Capital Ltd. of Rs.29,73,500/- for sale of Rs.42,27,500/- which has been claimed as exempt u/s. 10(38) of the Act. Several other disallowance/additions were made towards bogus interest u/s. 69C, interest expenditure attributable to negative capital, u/s. 14A read with Rule 8D and on account of dividend stripping u/s. 94(7). Assessment was thus completed at a total income of Rs.1,15,95,560/-. Aggrieved, assessee went in appeal before the Ld. CIT(A) who partly allowed the appeal. Aggrieved, assessee is in appeal before the Tribunal.

5. We first take up the additional ground wherein it has been contended that Ld. AO passing the assessment order did not have the jurisdiction over the case of the assessee and, therefore, both notice as well as the assessment order are bad in law. In this respect, Ld. Counsel for the assessee at the outset referred to para 1 of the impugned assessment order to point out the facts noted by the AO which are undisputed. Para 1 of the assessment order is reproduced for ease of reference.

*“1. The assessee, Shri Raghavendra Mohta, filed its return of income for the assessment year 2014-15 on 26.09.2014 disclosing a total income of Rs. Nil. The case has been selected for scrutiny assessment through ‘CASS’ and subsequently, notice u/s. 143(2) of the Act dated 31.08.2015 was issued and served upon the assessee on 10.09.2015. thereafter, notice u/s. 142(1) of the Act dated 13.06.2016 along with questionnaire were issued and duly served upon the assessee.”*

6. From the above, it is noted that return of income filed by the assessee is at Rs. Nil. Notice u/s. 143(2) has been issued and served on the assessee on 10.09.2015. Notice u/s. 142(1) dated 13.06.2016 along with questionnaire has also been issued and served on the assessee. The important fact Ld. Counsel asserted is that both, the notice as well as the assessment order has been issued by the

Assistant Commissioner of Income Tax, Circle-36, Kolkata, who did not have jurisdiction over the assessee owing to the pecuniary jurisdiction mandated by CBDT in its Instruction No. 1/2011 (F. No. 187/12/2010-ITA-1) dated 31.01.2011. According to him, since the assessee has disclosed nil income, the jurisdiction for framing the assessment vide CBDT Instruction No. 1/2011 vests with the Income Tax Officer whereas the assessment order in question has been framed by the ACIT, therefore, assessment order is without jurisdiction and deserves to be quashed.

6.1. He further submitted that as per the settled proposition of law, issuing notice u/s. 143(2) by the concerned AO and competent authority is sine qua non to assume jurisdiction to frame assessment u/s. 143(3) of the Act. For this, he placed reliance on the decision of Hon'ble Supreme Court in the case of ACIT Vs. Hotel Bluemoon 321 ITR 362 (SC). In the present case of the assessee notice u/s. 143(2) has been issued by Ld. ACIT who is not the AO having competent jurisdiction. Since the notice has been issued by a non-jurisdictional AO i.e. ACIT, the said notice issued by him does not have any legal sanctity. Therefore, consequent to such an invalid notice, assessment framed thereafter by Ld. ACIT is also bad in law.

7. Per contra, Ld. Sr. DR could not rebut the aforesaid legal proposition based on aforesaid factual aspect put forth by the Ld. Counsel for the assessee. The only assertion made by him was that the higher authority i.e. ACIT had all the concurrent jurisdiction to exercise his powers which the Income Tax Officer has, who is an officer below the rank of ACIT. A written submission by the Ld. Sr. DR is also placed on record which deals with merit of the case only.

8. We have considered the rival contentions and gone through the records. 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*

*120.(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*

.....

8.1. A perusal of the aforesaid statutory provision 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. Therefore, CBDT having regard to the income as per return has fixed the jurisdiction of the Assessing Officers for class of cases with prescribed pecuniary limits based on income declared by the assesseees.

8.2. The Id. Counsel in this respect has relied upon the CBDT Instruction No.1/2011 [F.No.187/12/2010-IT(A-I), for the sake of convenience is reproduced as under:

*“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.*

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

*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:*

*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.”*

8.3. A perusal of the above provision of law along with the CBDT Instructions would show, in this case, the competent officer to proceed with the assessment by way of issue of notice u/s 143(2) of the Act was ITO, whereas, the notice u/s 143(2) has been issued by the ACIT, circle-36, Kolkata who did not have any jurisdiction to issue the aforesaid notice. As has been held by the various courts of the country including the Apex Court, the issuance of notice u/s 143(2) by the concerned Assessing Officer of a competent jurisdiction is mandatory to assume jurisdiction to proceed and frame assessment u/s 143(3) of the Act.

8.4. Identical issue came up for consideration before the Coordinate Bench of the Tribunal in the case of Bhagyalaxmi Conclave (P) Ltd. v. DCIT in IT Appeal No.2517/Kol/2019, dated 03-02-2021 wherein the

Tribunal by 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 when the notice u/s 143(2) was issued by an officer who did not have jurisdiction to proceed with the assessment and the assessment was framed by the other officer who did not issue the notice u/s 143(2) before proceeding to frame the assessment, then such an assessment order was bad in law.

9. On the above observations, the short issue which falls for consideration in the instant case is whether there is valid notice issued u/s. 143(2) of the Act in commencing the scrutiny assessment and thereafter framing the assessment order u/s. 143(3) of the Act. In this respect, it is not in dispute that on the date of selecting the case for scrutiny, the very basis for having jurisdiction over the assessee is the returned income which in the present case is less than the prescribed limit in CBDT Instruction no. 1/2011 and, therefore, the same lay with ITO. However, the notice u/s. 143(2) was issued by ACIT, Circle-36, Kolkata. It is also a fact that subsequently the assessment has been framed by ACIT, Circle-36, Kolkata only. Since a valid notice u/s. 143(2) has not been issued, the assessment proceeding carried thereafter can also not be held to be valid. We note that the assessment has been framed by the AO who is not having the prima facie jurisdiction to frame the impugned assessment, accordingly, the assessment is invalid. Case of the assessee finds support from the decision of Coordinate Bench of ITAT, Kolkata in the case of Rupasi Bangla Agro Industries Pvt. Ltd. Vs. ITO in ITA No. 909/Kol/2023 dated 14.12.2023.

10. Ld. DR has referred to the judgment of Hon'ble Supreme Court in the case of DCIT Vs. Kalinga Institute of Industrial Technology [2023] 151 taxmann.com 434 (SC) to contest that assessee did not

raise objection in accordance with sec. 124(3) within 30 days of issuance of service of notice u/s. 143(2) and participated in the assessment proceedings. Therefore, he has no legal ground to challenge the assessment at this stage.

10.1. On the contentions raised by the Ld. Sr. DR on this aspect, we refer to section 124 of the Act which is extracted as under:

“Jurisdiction of Assessing Officers.—

124. (1) Where by virtue of any direction or order issued under sub-section (1) or sub-section (2) of section 120, the Assessing Officer has been vested with jurisdiction over any area, within the limits of such area, he shall have jurisdiction—

(a) in respect of any person carrying on a business or profession, if the place at which he carries on his business or profession is situate within the area, or where his business or profession is carried on in more places than one, if the principal place of his business or profession is situate within the area, and

(b) in respect of any other person residing within the area.

(2) Where a question arises under this section as to whether an Assessing Officer has jurisdiction to assess any person, the question shall be determined by the [Principal Director General or Director General] or the [Principal Chief Commissioner or Chief Commissioner] or the [Principal Commissioner or Commissioner]; or where the question is one relating to areas within the jurisdiction of different [Principal Director General or Director General] or [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner], by the [Principal Director General or Director General] or [Principal Chief Commissioners or Chief Commissioners] or [Principal Commissioner or Commissioner] concerned or, if they are not in agreement, by the Board or by such [Principal Director General or Director General] or [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner] as the Board may, by notification in the Official Gazette, specify.

(3) No person shall be entitled to call in question the jurisdiction of an Assessing Officer—

(a) where he has made a return 1 [under sub-section (1) of section 115WD or under sub-section (1) of section 139], after the expiry of one month from the date on which he was served with a notice under sub-section (1) of section 142 or 2 [sub-section (2) of section 115WE or sub-section (2) of section 143] or after the completion of the assessment, whichever is earlier;

(b) where he has made no such return, after the expiry of the time allowed by the notice under 3 [sub-section (2) of section 115WD or sub-section (1) of section 142 or under sub-section (1) of section 115WH or under section 148 for the making of the return or by the notice under the first proviso to section 115WF or under the first proviso to section 144] to show cause why the assessment should not be completed to the best of the judgment of the Assessing Officer, whichever is earlier; 4 [(c) where an action has been taken under section 132 or section 132A, after the expiry of one month from the date on which he was served with a notice under sub-section

(1) of section 153A or sub-section (2) of section 153C or after the completion of the assessment, whichever is earlier.]

(4) Subject to the provisions of sub-section (3), where an assessee calls in question the jurisdiction of an Assessing Officer, then the Assessing Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under sub-section (2) before the assessment is made.

(5) Notwithstanding anything contained in this section or in any direction or order issued under section 120, every Assessing Officer shall have all the powers conferred by or under this Act on an Assessing Officer in respect of the income accruing or arising or received within the area, if any, over which he has been vested with jurisdiction by virtue of the directions or orders issued under sub-section (1) or sub-section (2) of section 120.”

11. From sub-section (1) of the aforesaid section, it is important to note that AO has to be vested with jurisdiction over any area as prescribed in clause (a) and (b). In sub-section (3), an assessee is not entitled to call for the jurisdiction of AO after the expiry of one month from the date on which it was served with a notice u/s. 143(2). Further, sub-section (5) states that every Assessing Officer shall have all the powers conferred by or under the Act on an Assessing Officer in respect of the income accruing or arising or received within the area over which he has been vested with jurisdiction by virtue of the directions or orders issued u/s. 120(1) and (2).

11.1. It is important to note that prima facie assumption of jurisdiction by the AO is to be first passed through the test prescribed in sub-section (1). In the case before us, the assessment has been framed u/s. 143(3) by an AO whose jurisdiction is under challenge who at the threshold itself did not had the jurisdiction over the assessee for issuing notice u/s. 143(2) of the Act. In the present case, both the notice issued u/s. 143(2) and the assessment completed thereafter are by an officer who does not have jurisdiction in terms of CBDT Instruction no. 1/2011, owing to nil income return filed by the assessee.

12. It is noted by the Hon'ble Apex Court in the case of Kalinga Institute of Industrial Technology (supra) that jurisdiction changed

after the returns were filed. Also, it noted that the High court had granted liberty to the concerned authority to issue appropriate notice. It further clarified that the Assessing Officer is free to complete the assessment if the assessment order is not issued.

12.1. On perusing the order of Hon'ble High court, it is noted that it did not express its opinion on the order of assessment and the demand u/s. 156. It dealt only with the issue of notice u/s. 143(2) for which also it was kept open for the competent authority to issue appropriate notice to the assessee as per law.

12.2. Facts in the case of Kalinga Institute of Industrial Technology (supra) are distinguishable from the facts of the present case as noted above.

13. Accordingly, we allow the additional ground raised by the assessee and hold that the assessment order framed in the case of the assessee is without jurisdiction and is a nullity. The impugned assessment order is hereby quashed since the AO i.e. ACIT, Circle-36, Kolkata framed the said assessment did not have jurisdiction over the assessee as mandated by CBDT Instruction No. 1/2011. Since the additional ground has been allowed and the assessment order being quashed, the grounds on merits raised by the assessee in Form 36 are not adjudicated upon since they have been rendered academic in nature.

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

Order pronounced in the open court on 8th April, 2024.

Sd/-  
(Sanjay Garg)  
Judicial Member

Sd/-  
(Girish Agrawal)  
Accountant Member

***Dated: 8th April, 2024***

JD, Sr. P.S.

Copy to:

1. The Appellant:
  2. The Respondent.
  3. CIT(A)-10, Kolkata.
  4. The Pr. CIT,           Kolkata
  5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar  
ITAT, Kolkata Benches, Kolkata