

आयकर अपीलीय अधिकरण, कोलकाता पीठ “बी”, कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
श्री राजेश कुमार, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्य के समक्ष
[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. Nos. 638 & 639/Kol/2022
Assessment Year: 2010-11 & 2015-16

Manish Jain (PAN: ADYPJ 1348 M)	Vs.	ITO, Ward-6(1), Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	27.03.2024
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	03.05.2024
For the Appellant/ निर्धारिती की ओर से	Shri Miraj D Shah, A.R
For the Respondent/ राजस्व की ओर से	Shri P.P Barman, Addl. CIT Sr. D.R

ORDER / आदेश

Per Rajesh Kumar, AM:

These are the appeals preferred by the assessee against the separate orders of the Ld. Commissioner of Income Tax (Appeals)-NFAC, Delhi (hereinafter referred to as the Ld. CIT(A)"] dated 06.10.2022 for the AY 2010-11 & 2015-16.

2. Issue raised in ground no. 1 is against the passing of assessment order u/s 147/143(3) of the Act by the AO without valid jurisdiction which has been affirmed by the Ld. CIT(A).

3. Facts in brief are that the assessee has filed return of income with ACIT, Range-24, Kolkata on 14.06.2010 declaring total income of Rs. 2,83,40,000/-. The assessment was re-opened y/s 147 of the Act by issuing notice u/s 148 of the Act dated 30.03.2017 Shri Gautam Banerjee, ITO, Ward-61(4), Kolkata without valid jurisdiction. The notice u/s 143(2) of the Act dated 6.07.2017 was also issued by Shri Gautam Banerjee, ITO, Ward-61(4), Kolkata who was not having the jurisdiction to frame the assessment. The case was reopened u/s 147 read with Section 148 of the Act as stated above which was complied with by the assessee by filing return of income on 04.04.2017. The assessee vide letter dated 1.4.2017 sent by registered post on 5.4.2017 addressed to ITO, Ward-61(4), Kolkata specifically raised an objection that there was no jurisdiction with the AO over the assessee's case. The assessee is a director of a company which was assessed by ITO, Ward-6(1), Kolkata and therefore directors of the company have to be assessed by the same AO. Upon assessee having raised objection before the AO vide letter dated 1.4.2017, the case was transferred to the correct AO and accordingly the ITO, Ward-6(1), Kolkata framed this assessment. The contention raised by the counsel of the assessee before us is that with the assessment having framed by the correct AO, however the same was without jurisdiction as the notice u/s 148 of the Act and 143(2) of the Act as referred to above were issued by another ITO, Ward-61(4), Kolkata who was not having the jurisdiction over the assessee's case.

4. The Ld. A.R vehemently submitted before us that the assessment has been framed by the AO without any jurisdiction as notice u/s 148 of the Act as well as notice 143(2) of the Act were issued by ITO, Ward-61(4), Kolkata whereas the assessment was framed by ITO, Ward-6(1), Kolkata. The Ld. A.R stated that assessment so framed is invalid and may be quashed for the reasons that no notice u/s 148 of the Act as well as 143(2) of the Act were issued by non jurisdictional AO. In defense of arguments the assessee relied on the following decisions:

i) PCIT-15, Kolkata vs. M/s Mohan Chand Motilal Kothari & Company in ITAT No. 228 of 2016 GA No. 1497 of 2016 dated 29.06.2018.(Cal HC)

ii) *PCIT-11, Kolkata vs. M/s Nopany & Sons in ITAT/58/2017 IA No: GA/1/2017 [Old No. GA/608/2017] dated 04.02.2022.(Cal HC)*

iii) *PCIT-2, Kolkata vs. Cosmet Traders Pvt. Ltd. in ITAT No. 78/2022 IA No. GA/2/2022 dated 15.11.2022.(Cal HC)*

iv) *PCIT-5, Kolkata vs. Bhagyalaxmi Conclave Pvt. Ltd. in ITAT/221/2022 GA/2/2022 dated 06.12.2022.(Cal HC)*

v) *PCIT-5, Kolkata vs. Bhubaneswari Developers Pvt. Ltd. in ITAT/220/2022 GA /2/2022 dated 06.12.2022.(Cal HC)*

vi) *PCIT-5, Kolkata vs. M/s Dhanlaxmi Conclave Pvt. Ltd. in ITAT/214/2022 GA/2/2022.(Cal HC)*

5. The Ld. D.R on the other hand submitted that the jurisdiction of AO who issued the notices u/s 148 of the Act as well as u/s 143(2) of the Act was determined on the basis of PAN data. The Ld. D.R therefore prayed that upon the assessee's request the case file was transferred to ITO, Ward-6(1), Kolkata and therefore the assessment has been framed correctly. On the issue of issuance of notices by wrong ITO ,the Ld. D.R stated that the same were issued on the basis of PAN data available.

6. In the rejoinder of Ld. A.R strongly rebutted the grounds given by the Ld. D.R by submitting that the assessee filed the return of income with ACIT, Range-24, Kolkata and therefore the arguments as taken by the Ld. D.R qua jurisdiction on the basis of PAN data is devoid of any merit as in that event the said notices should have been issued by Range-24, Kolkata.

7. After hearing the rival contentions and perusing the material on record, we find that the assessee has filed the return of income with AC, Range-24, Kolkata whereas the notice u/s 148 of the Act dated 31.03.2017 and 143(2) of the Act dated 6.7.2017 were issued by ITO, Ward-61(4), Kolkata. We note that the assessee objected to the jurisdiction of the AO who issued the said notices vide letter dated 1.4.2017 and

considering the assessee's request, the case was transferred to ITO, Ward-6(1), Kolkata and the assessment was framed accordingly. Now the question before us whether the assessment so framed by ITO, Ward-6(1), Kolkata is invalid. In view of the fact that notice u/s 148 as well as 143(2) of the Act were issued by ITO, Ward-6(1), Kolkata. We have perused the various decisions of Hon'ble Calcutta High Court as cited before us and same are discussed as under:

a) In the case of PCIT vs. Mohan Chand Motilal (supra), the Hon'ble Jurisdictional High Court has upheld the tribunal order. In this case the Tribunal dismissed the appeal filed by the revenue on the ground that the same was filed by ACIT-39, Kolkata while the jurisdiction was with ITO-44 which was upheld by the Hon'ble Court by holding that there was a fundamental error on which the appellate tribunal dismissed as incompetent since the order of AO who had no jurisdiction to undertake the assessment qua the assessee could have been found to be legal or resurrected and Court held that the order which was sought to be revived by carrying an appeal to the Appellate Tribunal in this case was itself an order without jurisdiction and there was no question of the Appellate Tribunal going into the merits of the matter or seeking to give legal support to an order that was inherently lacking in jurisdiction. The appeal of the revenue is dismissed.

b) In the case of PCIT vs. Nopani & Sons (supra) the Hon'ble High Court has under:

"This factual position could not be controverted by the revenue before us. As pointed out by the Hon'ble Supreme Court in the case of Asst. CIT vs. Hotel Blue Moon (supra), non-issuance of notice under Section 143(2) is not a procedural irregularity and, therefore, it is not curable. Thus, on facts, it having been established that no notice was issued under Section 143(2) of the Act, the order passed by the Tribunal was perfectly legal and valid. The revenue also sought to rely upon Section 292BB of the Act to justify their stand that notice is deemed to be valid and sought to bring the assessee's case under the circumstances mentioned in Section 292BB. This question was considered by the Tribunal and it was pointed out that Section 292BB provides that where an assessee has appeared in any proceedings or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any of the provision of the Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of the Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under the Act that the notice was not served upon him or not served upon him in time or served upon him in an improper manner. This amendment to the Act was introduced with effect from 01.04.2008 and the assessment year under consideration is AY 2007-08. In any event, the

Tribunal examined as to whether at all the revenue can rely upon Section 292BB of the Act and noted that the assessee has filed an objection vide letter dated 16.11.2009 objecting to the issuance of notice under Section 142(1) of the Act without valid service of notice under Section 143(2) of the Act. Taking note of the said letter the Tribunal, in our view, rightly held that the proviso to Section 292BB would not stand attracted and the said Section cannot be made applicable to the assessee's case. The Tribunal, thereafter, analysed as to the correctness of the submission of the revenue seeking to sustain their stand by referring to a notice issued by the assessing officer, who at the relevant point had no jurisdiction over the assessee and, on facts, found that there is no valid compliance of Section 143(2) of the Act as the notice issued under Section 143(2) of the Act by the assessing officer/Income Tax Officer, Ward-3(1) had no jurisdiction over the assessee at the relevant time. The Tribunal to support its conclusion placed reliance in the case of CIT & Another Vs. Mukesh Kumar Agarwal [2012] 345 ITR 29 (Allahabad), wherein it was held that the assessing officer did not have jurisdiction to proceed further and make assessment since notice under Section 143(2) of the Act was admittedly not issued. As in the case on hand, the revenue sought to take coverage under Section 292BB of the Act which was rejected on the ground that the very foundation of the jurisdiction of the AO was on the issuance of notice u/s 143(2) of the Act and the same having been complied with, the revenue cannot take shelter under the provisions of Section 292BB of the Act.

Thus, we are of the clear view that the Tribunal was right in rejecting the revenue's appeal. In the result, this appeal is dismissed and the substantial question of law is answered against the revenue."

c) In the case of PCIT vs. Cosmat Traders Pvt. Ltd. (supra), the Hon'ble Court has held as under:

"We have heard Mr. Soumen Bhattacharjee, Learned standing counsel appearing for the appellant/ revenue and Mr. Abhratosh Majumdar, learned senior counsel assisted by Mr. Avara Majumder, learned Advocate for the respondent/assessee.

After elaborately hearing the learned Advocates for the parties and carefully perusing the order passed by the Tribunal, we find that the Tribunal was fully justified in allowing the assessee's appeal by taking note of the decision of this Court in the case of Principal Commissioner of Income Tax vs. Oberoi Hotels Pvt. Ltd. reported in [2018] 409 ITR 132 (Cal) . In the said decision it was held that the notice under Section 143(2) of the Act was required to be mandatorily issued and Section 292BB had no manner of operation. The earliest of the decision is that of the Hon'ble Supreme Court in the case of Assistant Commissioner of Income Tax & Anr. vs. Hotel Blue Moon reported in [2010] 321 ITR 362 (SC), wherein it was held that if an assessment is to be completed under Section 143(3) read with Section 158BC, notice under Section 143(2) should be issued within one year from the date of filing of the block return. Omission on the part of the assessing authority to issue notice under Section 143(2) cannot be a procedure irregularity and is not curable and, therefore, the requirement of notice under Section 143(2) cannot be dispensed with.

This Court in the case of Principal Commissioner of Income Tax-11, Kolkata vs. Nopany & Sons reported in 2022(2)TMI 399- Calcutta High Court held that the proviso to Section 292BB could not stand attracted and the said section cannot be made applicable to the assessee's case. Very recently, the Hon'ble Supreme Court in the case of Assistant Commissioner of Income Tax vs. S.K. Industries reported-in [2022] 141 taxmann.com 569(SC) dismissed the Special Leave Petition filed by the revenue against the order of the

High ' Court holding that where the assessing officer of a particular Circle passed an assessment order under Section 143(3) without issuing notice under Section 143(2) and only in pursuance with the notice issued under Section 143(2), he had no jurisdiction over the assessee at the relevant time and such assessment order was liable to be set aside.

It is the submission of the learned standing counsel for the Department ..-that the assessee had not raised the question of jurisdiction before the assessing officer but participated in the assessment proceedings and, therefore, could not have raised the said issue before the Tribunal.

This argument cannot be acceded to for more than one reasons, firstly, there cannot be any estoppel against the statute. It is not the case of the revenue that the assessee consciously waived his right to raise such a jurisdictional issue. Secondly, the assessee had filed an application before the learned Tribunal seeking leave to raise additional grounds and this application was held and after contest the application was allowed. The learned Tribunal, in fact, recorded that the Department could not controvert any of the submissions of the assessee on the additional grounds which have been raised and, therefore, the application was allowed taking note of thematter that the issue goes to the root of the entire proceedings.

Thus, we are of the considered view that the learned Tribunal was fully justified in allowing the assessee's appeal. For the above reasons, the appeal filed by the revenue (ITAT/78/2022) is dismissed and the substantial questions of law are answered against the revenue.

Consequently, the connected application for stay (IA No.GA/2/2022) also stands dismissed.”

d) In the case of PCIT vs. Bhagyalaxmi Conclave Pvt. Ltd. (supra) it has been held as under by the Hon'ble High Court:

“We have heard Mr. Prithu Dudheira, learned standing counsel for the appellant/revenue and Mr. Jawed Ahmed Khan, learned counsel assisted by Mr. Talha Ahmed and Mr. Bhaskar Sengupta, learned Advocates for the respondent/assessee. The short question involved in the instant case is

whether the notice required to be issued under Section 143(2) was issued. The Tribunal has referred to a remand report submitted by the Assessing Officer wherein the Department could not controvert the contention made by the assessee that no notice under Section 143(2) of the Act was issued by the Deputy Commissioner of Income Tax, Circle-13(1), Kolkata who completed the assessment. Further, the Tribunal has also noted therelevant decisions and rightly held that the assessment order is bad in law for the reason that the Assessing Officer passed the order under Section 143(2) of the Act without issuing any notice 143(2). We find that there is no substantial question of law arising for consideration in this appeal.

Accordingly, the appeal [ITAT/221/2022] fails and is dismissed.

Consequently, the connected application [GA/2/2022]stands closed.”

7.1. Considering the above facts of the assessee in the light of the aforesaid decisions of Hon'ble Calcutta High Court, we are inclined to hold that the order framed by ITO, Ward-6(1), Kolkata without issuing any notices u/s 148 of the Act as well as u/s 143(2) of the Act when the officers have sufficient time to issue the notices when the assessee raised objections of jurisdiction is apparently without jurisdiction and is accordingly quashed.

8. The other issue raised on merits by the assessee are not adjudicated as the appeal of the assessee has been allowed on legal issue however the merit is left open to be adjudicated at later stage if need arises for the same.

ITA No. 639/Kol/2022.

9. Issue raised in ground no. 1 and 2 by the assessee is against the order of Ld. CIT(A) upholding the assessment order which has been framed by the AO without jurisdiction.

10. Facts in brief are that the assessee filed return of income on 28.08.2015 declaring total income of Rs. 12,19,800/- which is selected for scrutiny under CASS. A notice u/s 143(2) was issued on 28.07.2016 which was served to the assessee on 05.10.2016. The said notice was issued by ITO, Ward-61(4). The assessee objected to the said issuance of notice by the AO without having any jurisdiction vide letter dated 25.08.2016. Accordingly the case was transferred to ITO, Ward-6(1), Kolkata who framed the assessment accordingly but without issuing any notice.

11. Since the issue raised before us in this appeal is similar to one as decided by us in ITA No. 638/Kol/2022 wherein we have quashed the assessment order as without jurisdiction on the ground that notices u/s 148/143(2) of the Act were issued by AO who was not having any jurisdiction over the assessee. Accordingly, in the present case also the facts are quite similar and would, mutatis mutandis, apply to his appeal as well. Consequently the appeal of the assessee is allowed by quashing the assessment.

12. In the result, both the appeals of the assessee are allowed.

Order is pronounced in the open court on 3rd May, 2024

Sd/-
(Sonjoy Sarma /संजय शर्मा)
Judicial Member/न्यायिक सदस्य

Sd/-
(Rajesh Kumar/राजेश कुमार)
Accountant Member/लेखा सदस्य

Dated: 3rd May, 2024

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- Manish Jain, 15B, Clive Row, Kolkata-700001
2. Respondent- ITO, Ward-6(1), Kolkata
3. Ld. CIT(A)-NFAC, Delhi
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata