

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "K(SMC)" Bench, Mumbai.

Before Shri Sandeep Gosain (JM) & Shri Omkareshwar Chidara (AM)

I.T.A. No. 1930/Mum/2024 (A.Y. 2017-18)

Dombivali Daivdaya Nagari Sahakari Patpedhi (Maryadit) B2, Laxman Mukund CHS Sradhnand Path, Dombivali-E Opp. Kasturi Plaza Thane-421 201. PAN : AAAAD5539N (Appellant)	Vs.	ACIT, Circle-3 Kalyan (Respondent)
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Assessee by	Shri Meet Shah
Department by	Shri Kiran Unavekar
Date of Hearing	24.10.2024
Date of Pronouncement	09.12.2024

ORDER

Per Omkareshwar Chidara (AM) :-

In the above cited appeal, the appellant has taken a legal ground stating that the learned Assessing Officer (AO for short) neither has jurisdiction to issue notice under section 143(2) of the Income Tax Act (Act for short) nor had the authority to pass order u/s. 143(3) of the Act in view of the specific instruction issued by Hon'ble CBDT vide Instruction No. 1 of 2011 dated 31.1.2011. Hence, the main ground of the appellant is that the order passed by the Ld. AO u/s. 143(3) of the Act is illegal and void ab initio. Grounds No. 3 & 4 taken up on merits stating that the addition made by the Ld. AO relating to source of cash deposits were not pressed by the Ld. AR of the appellant during the proceedings before the bench. Hence, the adjudication is to be made only on the ground relating to legality of the assessment passed by the Ld. AO. Admittedly, the ground of challenging the jurisdiction of the Ld. AO was not taken up either before the Ld. AO or before learned Commissioner of Income Tax (Appeals) [the Ld. CIT(A) for short] and

hence they have not adjudicated this matter and passed the order only on merits.

2. Ld. AR during the proceedings before the Bench has relied on three decisions of courts/Tribunal while arguing its case for the proposition that the Ld. AO lacks jurisdiction to pass assessment order. Ld. AR of the appellant has argued that Instruction No. 1 of 2011 dated 31.1.2011 issued by Hon'ble CBDT dealing with pecuniary jurisdiction of the Assessing Officer and according to the Instruction the Ld. AO is ACIT, Circle-3, Kalyan was not vested with the jurisdiction to issue notice u/s. 143(2) of the Act and consequently he was not empowered to pass the impugned assessment u/s. 143(3) of the Act. As the Ld. AO inherently lacked jurisdiction to initiate the assessment proceedings and frame the assessment, the consequent order passed by him is null and void and the defects cannot be cured and hence submitted that illegal assessment order passed by the Ld. AO should be quashed. For this proposition, Ld. AR of the appellant relied on the decision of Hon'ble Jurisdictional High Court in the case of Ashok Devichand Jain (452 ITR 43) (Bom), where the Hon'ble High Court has quashed the notice of reopening the assessment because it was not in accordance with the pecuniary jurisdiction as provided in the Instruction No. 1/2011. Second decision relied upon by Ld. AR of the appellant is the Coordinate Bench decision in the case of Monarch and Qureshi Builders Vs. ACIT (161 taxman.com 356), wherein Hon'ble Tribunal relied on the decision of Hon'ble Supreme Court in the case of Hotel Blue Moon, quashing the illegal notice u/s. 143(2) of the Act. Finally, the Ld. AR of the appellant has also relied on the decisions of ITAT, Mumbai in the case of Ketan Tokershi Shah (ITA No. 1107 of 2023), and DCIT Vs. Parmar Built Tech Parmar Estate (ITA No. 4124/Mum/2012) and other ITAT decisions of Kolkata. Ld. AR consistently argued that if the Ld. AO does not have power/jurisdiction to issue notice, then whole assessment order passed by him becomes illegal and not curable. It was also argued that since this is a legal ground, the same can be taken

for the first time also before Hon'ble Tribunal and for the proposition, reliance was placed on the decision of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. (229 ITR 383). In view of arguments as well as decisions relied upon, Ld. AR has submitted that the assessment order should be quashed.

3. In reply to the arguments of Ld. AR of the appellant, Ld. DR has submitted that he will confine his arguments to the legality of passing the assessment order as the Ld. AR of the appellant did not press the grounds relating to the merits. Ld. DR has argued the case extensively and his arguments summarized are as follows :-

- a) Instruction No. 1/2011 issued by CBDT is only for administrative purposes and it was aimed at “removing the hardship faced by taxpayer” i.e. reducing the compliance cost of taxpayer. The instruction does not talk about the jurisdiction of the Ld. AO but was issued as a matter of administrative purpose only. Hence, appellant’s reliance on this instruction for challenging the validity of notice u/s. 143(2) issued by ACIT, Circle-3, Kalyan is incorrect and misplaced.
- b) The main contention of Ld. DR is that section 124 of the Act provides the jurisdiction of the Ld. AO and relevant clause (a) of sub-section 3 of this section provides that if at all the appellant wishes to challenge the jurisdiction of the Ld. AO to issue notice u/s. 143(2) of the Act, the same has to be done as per the provisions of section 124(3)(a) of the Act and Ld. DR has argued that the appellant can challenge the jurisdiction of the Ld. AO to issue notice u/s. 143(2) of the Act within one month or completion of the assessment whichever is earlier. In the instant case, the ACIT, Circle-3, Kalyan issued notice u/s. 143(2) on 9.8.2018 and appellant can challenge the jurisdiction till 8.9.2018 only. As the appellant has raised this issue for the first time before the Tribunal, it was submitted that sub-section 3 of section 124 of the Act

starts with “No person shall be entitled to call in question the jurisdiction of an AO”, which means if the appellant fails to challenge the jurisdiction within 30 days of issue of notice, then the appellant cannot challenge the jurisdiction thereafter. The word “shall” mentioned in the opening statement makes the law very clear that once the jurisdiction is not challenged before the Ld. AO within 30 days, the same cannot be challenged thereafter. For this proposition, Ld. DR placed reliance on the decision of Hon'ble Supreme Court in the case of Kalinga Institute of Industrial Technology (293 taxman 493) dated 1.5.2023. It was submitted that from this decision, it is clear that Hon'ble Supreme Court has laid down a legal principle that once the appellant has participated in the assessment proceedings and not questioned the jurisdiction of the Ld. AO within 30 days, then section 124(3)(a) comes into play and appellant is precluded from questioning the jurisdiction of the AO. As the present case is squarely covered by the decision of Hon'ble Supreme Court, the appellant cannot question the jurisdiction of the AO now. Ld. DR has relied on the Coordinate Bench decision in the case of M/s. Staark Accessories Pvt. Ltd. dated 6.2.2024 where the ITAT upheld that contention of the Department that the notice u/s. 143(2) can be challenged only within 30 days by relying on the decision of above Hon'ble Supreme Court. Ld. DR also placed reliance on the decision of Hon'ble High Court of Allahabad in the case of CIT Vs. All India Children Care and Educational Development Society (221 Taxman 5) and decision of Elite Pharmaceutical Vs. ITO (242 Taxman 345). Ld. DR has rebutted the arguments of Ld. AR of the appellant and argued that the decision of Peter Vaz of Hon'ble Bombay High Court is not applicable here as the facts are different and distinguishable because in that case proceedings u/s. 153C of the Act were challenged and there was no issue of ‘pecuniary’ versus ‘territorial’ jurisdiction as argued by Ld. AR. Hence, it was argued that decision of Hon'ble Bombay High Court is

not applicable. It was also argued by Ld. DR that none of the decisions relied on by the Ld. AR of the appellant dealt with the issue of impugned case and Hon'ble Supreme Court case of Kalinga Institute of Industrial Technology (supra) is squarely applicable.

4. After hearing both sides, the Bench has decided that there is force in the arguments of Ld. DR as he relied on the decision of Hon'ble Supreme Court in the case of Kalinga Institute of Industrial Technology (supra), where it was decisively held that the jurisdiction can be challenged within 30 days of issuance of notice by the Ld. AO and there is no dispute that the jurisdiction was not challenged either before the AO or before the Ld. CIT(A) and challenge was made for the first time before the ITAT after very long gap of more than 4 years. Decision of Hon'ble Supreme Court in the case of Kalinga Institute of Industrial Technology (supra) is reproduced as under :-

“The impugned order sets aside the assessment for A.Y. 2014-15 on the ground that the jurisdictional officer had not adjudicated upon returns. However, the records also reveal that the assessee had participated pursuant to the notice issued u/s. 143(1) of the Act and had not questioned the jurisdiction of the AO. Section 124(3)(a) of the Act precludes the assessee from questioning the jurisdiction of the AO, if he does not do so within 30 days of receipt of notice u/s. 142(1). In the present case, the facts did not warrant the order made by the High Court. It is clarified, therefore that the AO is free to complete the assessment (in case the assessment order has not been issued) within the next 60 days. In such event, the question of limitation shall not be raised by the assessee. The Special Leave Petition filed by the Department is allowed in above terms.”

4.1 As the Hon'ble Supreme Court was very categorical that the jurisdiction issue should be raised within 30 days of the issuance of notice and if the same is not raised, the appellant is precluded from raising the same afterwards.

4.2. From the decision Hon'ble Allahabad High Court in the case of All India children Care and Educational Development Society (supra) it was held

that the ITAT is not competent to decide the jurisdictional issues because the same were not raised earlier within 30 days as provided under section 124(3)(a) of the Act. This issue was also decided by the Coordinate “G” Bench, Mumbai in the case of M/s. Staark Accessories Pvt. Ltd. (ITA No. 2418/Mum/2023), where it has followed the decision of Hon'ble Supreme Court after discussing more than 10 cases relied on by the Ld. AR of the appellant. The ITAT, Mumbai in this decision, has also placed reliance on the decision of Hon'ble Bombay High Court in the case of Ultratech Cement Ltd. Vs. Addl. CIT (81 taxman.com 74), where it was clearly held that “therefore before an additional ground is allowed to be raised, the appellate authority must be satisfied that the ground raised could not have been raised earlier for good reasons.” Moreover, Hon'ble Delhi High Court in the case of PCIT Vs. Mega Corporation Ltd. (ITA No. 128/2016) has held that section 124(3)(a) clearly says that the jurisdiction issues should be objected within one month and if it is not raised earlier, then the same cannot be raised for the first time in ITAT only.

4.3 Similarly, Hon'ble High Court of Kolkata in the case of Elite Pharmaceuticals (supra) has held that if objection relating to issue of notice was raised by the appellant on 32nd day i.e. even delay of 2 days was not allowed by Hon'ble High Court because the statute has stated that the objection should be raised within 30 days only and not thereafter.

4.4 Reliance is placed on the decision of Hon'ble Delhi High Court in the case of Shri Shyam Sunder Infrastructure (P) Ltd. (ITA No. 236 of 2014), where Hon'ble High Court has held Section 124(3)(a) time limits should be adhered strictly by the appellant as follows :

“Facially, [Section 124\(3\)](#) stipulates a bar to any contention about lack of jurisdiction of an AO. It is not as if the provisions of the Act disable an assessee from contending that in the given circumstances the AO lacks jurisdiction; rather [Section 124\(3\)](#) limits the availability of those options at the threshold. The assessee upon receipt of notice of the kind

mentioned in Clause (a) and (b) of sub-section 3 has the option to urge the question of jurisdiction; the expressed tenor and terms of the provisions clarify that such objections are to be articulated at the threshold or at the earlier points of time. The two points of time specified in Section 124(3)(a) are as under:

- (i) Within one month from the date of service of notice or;
- (ii) After completion of assessment - whichever is earlier.”

4.5 The decision relied upon by Ld. AR of the appellant viz., Peter Vaz, Hon'ble Bombay High Court is not applicable to the facts of the case because there was no finding on the issue of pecuniary jurisdiction as argued by Ld. AR. Similarly, case of ACIT Vs. Hotel Blue Moon (supra) relied upon by Ld. AR relates to the issuance of notice u/s. 143(2). In this case Hon'ble Supreme Court has held that notice u/s. 143(2) is mandatory, whereas in the present case notice u/s. 143(2) was issued or not, is not a question but question relates to the jurisdiction of the Ld. AO to issue notice and hence reliance placed by Ld. AR on this decision of Hon'ble Supreme Court is not proper.

5. In view of the above the decisions of various courts including the decision of Hon'ble Supreme Court, appeal of the appellant is dismissed.

Order pronounced in the open court on 9th December, 2024.

Sd/-
(Sandeep Gosain)
Judicial Member

Sd/-
(Omkareshwar Chidara)
Accountant Member

Mumbai : 09.12.2024

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.

6. Guard File.

//True Copy//

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BY ORDER,

(Assistant Registrar)
ITAT, Mumbai