IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.2239/Del/2024
Assessment Year: 2016-17

M/s. Times Internet Ltd. (Representative Assessee of Willow TV International Ltd.), Express Building, 9-10 Bahadurshah Zafar Marg, New Delhi	**Vs.**	DCIT, New Delhi
PAN: AABCT1559M		
(Appellant)		**(Respondent)**

Assessee by	Sh. Ajay Vohra, Sr. Adv. Sh. Shaurya, CA Sh. Deepesh Jain, Adv.
Department by	Sh. Vijay B. Basanta, CIT(DR)

Date of hearing	06.03.2025
Date of pronouncement	21.03.2025

ORDER

PER SATBEER SINGH GODARA, JM

This assessee's appeal for assessment year 2016-17, arises against the DCIT, Circle- Intl. Taxation 3(1), Delhi's/the Assessing Officer's assessment framed dated 29.03.2024 having DIN & Letter No. ITBA/COM /S/250/2024-25/1065357259(1), involving

proceedings under section 147 r.w.s. 144 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

2. Heard both the parties. Case file perused.

3. It transpires during the course of hearing that there arises the first and foremost legal issue of correctness of section 148/147 proceedings herein initiated against the assessee in the capacity of the alleged "representative assessee" of M/s. Willow TV International Ltd. This is for the precise reason that the learned assessing authority had set into motion section 148 proceedings vide it's notice dated 30th June, 2021 followed by its order under section 148A(d) dated 20th of July, 2022 and section 148 notice dated 28th July, 2022 (pages 210 to 211) in the paper-book in light of Union of India Vs. Ashish Agarwal, (2022) 444 ITR 1 (SC), respectively.

4. We make it clear at the cost of repetition that since the assessee/appellant herein has been treated as "representative assessee", the learned departmental authorities had issued section 163 notice dated 16th March, 2021 and passed the corresponding order under sub-section (2) thereof on 29th May, 2023 (pages 214 to 217) in the paper-book.

5. The Revenue vehemently argues in this backdrop that the learned departmental authorities had very well issued section 163 notice to the assessee on 16.03.2021 followed by section 148 notice setting into motion the reopening in question. And the issue of the assessee being treated as the representative assessee stood decided on 29th May, 2023 (supra). The Revenue accordingly clarifies that section 163 proceedings against the assessee had indeed been initiated well before section 148 reopening and therefore, the same deserves to be sustained.

6. We find no merit in the Revenue's foregoing legal arguments as the issue, as to whether section 163 order against the assessee holding it as the representative assessee; has to be passed before initiation of reopening/reassessment; as per the CIT Vs. Belapur Sugar and Allied Industries Ltd. (1983) 141 ITR 404 (Bom.) rejecting the Revenue's contention as under:

> *".....Section 163 of the Income-tax Act, 1961, occurs in Chap. XV which provides for liability in special cases. One of the special cases provided for in this chapter is of a representative assessee who has certain obligations therein indicated. Section 163 provides for the persons who may be regarded as agents in relation to a non-resident. Sub-section (2) of section 163 provides that no person shall be treated as the agent of a non-resident unless he had an opportunity of being heard by the ITO as to his liability to be treated as such. It may be mentioned further, and this marks a deliberate departure from the provisions of the Indian Income-tax Act. 1922, that an order may be made under s, 163 treating the assessee as the agent of a non-*

resident is now specifically made appealable, and the relevant provision in this behaif is section 246(g) of the said Act.

We now turn to sections 147 to 149 of the Income-tax Act, 1961. Section 147 is a special provision for assessment or reassessment in case of income escaping assessment. Section 148 makes obligatory the issue of a notice before making a reassessment or recomputation in such cases. A further obligation seems to have been cast on the ITO, making it necessary for him to record his reasons before the issue of such notices. Section 149 finally fixes certain time-limit for the issue of notices under section 148. We are concerned only with sub-section (3) of section 149, which reads as under:

> *"149. Time limit for notice.*
>
> *(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment, reassessment, or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year."*

It is clear, therefore, that before making the reassessment a notice under section 148 is necessary. Under sub-section (3) of section 149 if such notice is to be served on a person treated as the agent of a non-resident under section 163, the notice is to be issued before the expiry of a period of two years from the end of the relevant assessment year. The short question is, whether the determination, which is contemplated under section 163 after necessary opportunity being given to the assessee, is required to be made before the issue of such notice

It would appear that as far as the Indian Income-tax Act, 1922, was concerned, this court appears to have, rejected a similar contention in Blue Star Engineering Co. Bombay (P.) Ltd. v. CIT [1969] 73 ITR 283 (see observations at p. 296). Indeed, the point had been clearly negatived by the decision of the Privy Council in CIT v. Nawal Kishore Kharaiti Lal [1938] 6 ITR 61. It had been expressly held therein that under the Indian Income-tax Act, 1922, it was not necessary for the validity of a notice calling for a return of income under section 23(2), where it is served upon a person as the agent of a non-resident under section 43, that it should have been preceded not only by the notice of the intention prescribed by section 43 and by the opportunity of being heard prescribed by the proviso thereto but also by an order declaring the person to be the agent of the non-resident person or treating him as such agent.

The question to be considered is whether the same position enures after the enactment of the Income-tax Act, 1961. The differences between the Act of 1922 and the Act of 1961 have been noted by a Full Bench of the Punjab and Haryana High Court in CIT v. Kanhaya Lal Gurumukh Singh [1973] 87 ITR 476. There was a difference of opinion initially, which was resolved on a reference 'to a third judge, and the majority judgment, after considering the language of the statutory provisions earlier extracted, observed that Nawal Kishore's case [1938] 6 ITR 61 (PC), was not applicable to a notice issued under section 148 of the Income-tax Act, 1961, to a person as an agent of a non-resident. According to the majority, there was no doubt that the ITO had to pass an order under section 163 before initiating proceedings by issuing a notice under section 148 of the Act. The learned judges also extracted the opinions of various commentators but seem to have been principally influenced by the provision for appeal specifically from an order under section 163. A similar provision was earlier absent under the Indian Income-tax Act, 1922. One of the judges constituting the majority (Bal Raj Tuli J.) has observed as under (p. 487):

> *"It is a well-settled principle of interpretation of statutes that every section of the statute must receive such a construction as the language in its plain meaning imports, that is, strict grammatical meaning of the words is the only safe guide. Moreover, in interpreting taxing statutes, if the language admits of two interpretations, one favourable to the asses-see has to be preferred to the one favouring the revenue. The change of language made in sections 149(3) and 163 of the 1961 Act as compared to the corresponding provisions in the 1922 Act is not without meaning and purpose and the only meaning and purpose that can be gathered from the language of these sections is that the dictum of their Lordships of the Privy Council in Nawal Kishore's ease [1938] 6 ITR 61 (PC), is no more applicable to a notice to be issued under section 148 of the 1961 Act to a person as an agent of a non-resident. That notice can only be issued after passing an order that the assessee is the agent of the non-resident and is to be treated as such. This decision has, of course, to be made after complying with the provisions of sub-section (2) of section 163 of the 1961 Act. Without deciding this matter, no notice under section 148 read with section 149(3) of the 1961 Act can be issued."*

This decision of the Punjab and Haryana High Court came to be considered by the Madras High Court in CIT v. Express Newspapers (P.) Ltd. [1978] 111 ITR 347. This aspect of the matter, however, did

not specifically arise before the said High Court, and the Madras High Court has expressly stated that they were not called upon to hold whether an order of assessment which was made without serving a recognition order on the representative-assessee was void and unenforceable or (to decide) the specific question which directly arose before the Punjab and Haryana High Court. We were also referred at the Bar to a decision of the Calcutta High Court in CIT v. T.I. & M. Sales Ltd. [1978] 114 ITR 59. On the aspect of the matter which we are considering, the said decision is of no assistance.

It may be pointed out that as far as the Punjab and Haryana High Court is concerned, we are invited on behalf of the Department to concur with D.K. Mahajan J., who was of the clear view that the decision in Nawal Kishore's case [1938] 6 ITR 61 (PC), had not been shaken or otherwise affected by the change in phraseology of the corresponding provisions in the Income-tax Act, 1961. He had upheld the contention of the Department, and we were invited to follow his judgment in preference to those of the other two judges.

Before expressing our views in the matter it is necessary to consider question No. 1. It is now well settled, as far as this court is concerned, that a point which goes to the jurisdiction of the assessment can be allowed to be taken, although not earlier taken either before the ITO or the AAC. This was decided in CIWT v. N.A. Narielwalla [1980] 126 ITR 344 (Bom.). In the said case a contention was taken for the first time before the Tribunal. This was objected to on behalf of the Department, which objection was overruled. The action of the Tribunal was upheld by the Division Bench of this court, which observed that the contention raised before the Tribunal on behalf of the assessee was a pure question of law going to the root of the jurisdiction of the WTO. In the view of this court, the Tribunal had properly exercised its discretion in the interest of justice when it permitted the assessee to raise the point of jurisdiction before it. It was also observed that there was no erroneous or arbitrary exercise of jurisdiction by the Tribunal.

The principal plea sought to be raised by the learned counsel for the assessee before the Tribunal, at any rate, is clearly covered by the said observations in Narielwalla's case [1980] 126 ITR 344 (Bom.). Since we are inclined to uphold that plea, we are not required to express our opinion on the other contentions.

In our opinion, it is necessary to concur with the view taken by the majority of the judges in Kanhaya Lal's case [1973] 87 ITR 476 (Punj. & Har.). This view appears to be in accord with the plain language of the statutory provisions, and we are inclined to agree with the majority view that the decision of the Privy Council in Nawal Kishofe's case [1938] 6 ITR 61, is no longer applicable to the Income-tax Act,

1961, by reason of the specific statutory changes, which the Division Bench of the said court has noted in extenso. If the right of appeal of the assessee is to have any real meaning, then the decision under section 163 must be given previous to the notice under section 148 being issued to an assessee on the basis that the alleged income which had escaped assessment is the income on which the assessee is liable as a representative assessee being the agent of a non-resident covered by section 163. We are also in agreement with the approach indicated by one of the judges of the said High Court in the passage which we have fully extracted. As the passage indicates, the matter is not free from doubt, and, indeed, there was initially a difference of opinion between the two judges, but then it would appear that if two views are possible, the view which ultimately found favour with the majority will be required to be upheld inasmuch as it is the view in favour of the assessee. If the period of limitation of two years prescribed under section 149(3) creates a difficulty for the working out of these provisions, it is for the revenue to seek an amendment of those provisions.

In our view, the Tribunal was thus right in holding that an order under section 163 of the Income-tax Act, 1961, is to be passed in the first place and thereafter a notice under section 148 is to be served on the assessee who is sought to be made liable as a representative assessee, namely, as the agent of a non-resident. On the facts of the instant case, such determination under section 163 took place for the three assessment years in A question on 28th March, 1969, by three separate orders. It was only then or thereafter that a fresh notice under section 148 was required to be issued. Since by that time the period of limitation under sub-section (3) section 149 had expired, no such notice could be validly issued. The earlier notice issued was clearly not in order, and any assessment, reassessment or recomputation done in pursuance of such invalid notice is required to be held as invalid, as the Tribunal has done."

7. We accordingly adopt their lordships foregoing reasoning mutatis mutandis to decide the instant legal issues in assessee's favour and against the department and quash the impugned section 148/147 proceedings taken recourse by the learned lower

authorities; before deciding the above section 163 "representative assessee" issue in very terms.

8. There is yet another clinching issue which emerges during the course of hearing before us. The learned lower authorities have admittedly assessed the assessee on "protective" basis qua amount in question of Rs. 20,36,61,760/- without framing any substantive assessments thereof in any taxpayer's case. We thus quote Lalji Haridas Vs. ITO (1961) 43 ITR 387 (SC) that their lordships have settled the issue long-back that such a "protective" assessment arises in case a doubt comes in the Assessing Officer's mind as to in whose hands a particular income is to be taxed and not otherwise. Case law DHFL Venture Capital Fund Vs. ITO (2013) 34 taxmann.com 300 (Bom) further holds that such a reopening for the purpose of making a "protective" assessment is not sustainable in law. We thus conclude that the impugned reopening for the purpose of making protective assessment in question has to be quashed in the instant latter appeal as well. Ordered accordingly.

9. All other pleadings on merits between the parties stand rendered academic at this stage.

10. This assessee's appeal is allowed.

Order pronounced in the open court on 21st March, 2025

Sd/-	***Sd/-***
(S. RIFAUR RAHMAN)	**(SATBEER SINGH GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 21st March, 2025.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi