

\$~
*
4.
+

IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 578/2015

PR. COMMISSIONER OF INCOME TAX -18 Appellant
Through: Mr. N.P. Sahni, Senior Standing counsel
with Mr. Nitin Gulati, Advocate.

versus

SILVER LINE Respondent
Through: Dr. Rakesh Gupta with Ms. Poonam
Ahuja, Mr. Somil Agarwal and Mr. Rohit Kumar
Gupta, Advocates.

WITH

5.
+

ITA 579/2015

PR. COMMISSIONER OF INCOME TAX -18 Appellant
Through: Mr. N.P. Sahni, Senior Standing counsel
with Mr. Nitin Gulati, Advocate.

versus

SILVER LINE Respondent
Through: Dr. Rakesh Gupta with Ms. Poonam
Ahuja, Mr. Somil Agarwal and Mr. Rohit Kumar
Gupta, Advocates.

WITH

6.
+

ITA 580/2015

PR. COMMISSIONER OF INCOME TAX -18 Appellant
Through: Mr. N.P. Sahni, Senior Standing counsel
with Mr. Nitin Gulati, Advocate.

versus

SILVER LINE

..... Respondent

Through: Dr. Rakesh Gupta with Ms. Poonam Ahuja, Mr. Somil Agarwal and Mr. Rohit Kumar Gupta, Advocates.

WITH

7.

+

ITA 581/2015

PR. COMMISSIONER OF INCOME TAX -18

..... Appellant

Through: Mr. N.P. Sahni, Senior Standing counsel with Mr. Nitin Gulati, Advocate.

versus

SILVER LINE

..... Respondent

Through: Dr. Rakesh Gupta with Ms. Poonam Ahuja, Mr. Somil Agarwal and Mr. Rohit Kumar Gupta, Advocates.

WITH

8.

+

ITA 585/2015

PR. COMMISSIONER OF INCOME TAX -18

..... Appellant

Through: Mr. N.P. Sahni, Senior Standing counsel with Mr. Nitin Gulati, Advocate.

versus

SILVER LINE

..... Respondent

Through: Dr. Rakesh Gupta with Ms. Poonam Ahuja, Mr. Somil Agarwal and Mr. Rohit Kumar Gupta, Advocates.

WITH

9.

+

ITA 586/2015

PR. COMMISSIONER OF INCOME TAX -18 Appellant
Through: Mr. N.P. Sahni, Senior Standing counsel
with Mr. Nitin Gulati, Advocate.

versus

SILVER LINE Respondent
Through: Dr. Rakesh Gupta with Ms. Poonam
Ahuja, Mr. Somil Agarwal and Mr. Rohit Kumar
Gupta, Advocates.

WITH

10.
+

ITA 587/2015

PR. COMMISSIONER OF INCOME TAX -18 Appellant
Through: Mr. N.P. Sahni, Senior Standing counsel
with Mr. Nitin Gulati, Advocate.

versus

SILVER LINE Respondent
Through: Dr. Rakesh Gupta with Ms. Poonam
Ahuja, Mr. Somil Agarwal and Mr. Rohit Kumar
Gupta, Advocates.

AND

11.
+

ITA 588/2015

PR. COMMISSIONER OF INCOME TAX -18 Appellant
Through: Mr. N.P. Sahni, Senior Standing counsel
with Mr. Nitin Gulati, Advocate.

versus

SILVER LINE Respondent
Through: Dr. Rakesh Gupta with Ms. Poonam

Ahuja, Mr. Somil Agarwal and Mr. Rohit Kumar
Gupta, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

ORDER
4.11.2015

%

S. Muralidhar, J.:

1. These eight appeals by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') are directed against a common impugned order dated 26th September 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in four appeals of the Revenue being ITA Nos. 1809, 1504, 1505 and 1506/Del/2013 and four cross objections of the Assessee being CO Nos. 122, 109, 107 and 108/Del/2013 for the Assessment Years ('AYs') 2005-06, 2006-07, 2007-08 and 2008-09.

2. The central issue in the present case is whether the failure by the Assessing Officer ('AO') to issue a notice to the Assessee under Section 143(2) of the Act is fatal to the reassessment proceedings under Sections 147/148 of the Act?

3. The Assessee firm is engaged in the business of trading in silver and gold jewellery and also in precious and semi-precious stones. A return of income in the 'Saral Form' was initially filed by the Assessee for AY 2005-06 on 20th September 2005. The return was processed under Section 143(1) of the Act. The return filed by the Assessee for the subsequent AY 2006-07 was also processed under Section 143(1) of the Act. For AY 2007-08, the return was picked up for scrutiny and a notice under Section 143(2) of the Act was

issued. Subsequently, the assessment was finalised by the AO by passing an order under Section 143 (3) of the Act. The return for AY 2008-09 was processed under Section 143(1) of the Act.

4. Information was received from the Director of Income Tax (Investigation), Jaipur by letter dated 10th May 2010 that the Assessee was making bogus purchases for which cheques were issued and bills were obtained without any physical delivery of goods. It was stated that the purchases shown were bogus and the purchase bills obtained had been used to suppress the profits and, therefore, income to that extent had escaped assessment. On the above basis, reasons were recorded for re-opening of assessment under Section 147 of the Act and notice under Section 148 of the Act was issued on 28th March 2011 and served upon the Assessee on 31st March 2011. It was stated by the AO in the said notice that he had reason to believe that the income for AY 2005-06 had escaped assessment. The Assessee was called upon to file a return in the prescribed form for the said AY.

5. On 1st April 2011, the Assessee wrote a letter to the AO stating, *inter alia*, that the return for AY 2005-06 originally filed on 20th September 2005 should be treated as the return in response to the notice under Section 148 of the Act. The Assessee asked for a certified copy of the reasons recorded and noted that the return was being filed 'under protest'. Thereafter the AO on 14th November 2011 issued a notice to the Assessee under Section 142(1) of the Act stating as under:

“Sir,

In connection with the assessment for the AY-2005-06, you

are required to:

(a)** prepare a true and correct return of income/ for above years.....in respect of which you are assessable under the Income Tax Act, 1961. During the previous year relevant to the assessment year mentioned above. The return should be in the appropriate form as prescribed in Rule 12 of the Income Tax Rules, 1962. A blank return form is enclosed. It should be duly verified and signed in accordance with the provisions of section 140 of the said Act and delivered at my office on or before.....

(b)** produce or cause to be produced before me at my office at Room No.185-A 1st floor, C.R. Bldg., I.P. Estate, New Delhi on 18-11-2011, at 11:00 a.m. the accounts and/or documents specified and make compliance of the questionnaire annexed.

(c)** furnish in writing and verified in the prescribed manner information called as per annexure and on the points or matters specified therein before me at my office at Room No. 185A, 1st floor, C.R. Bldg., I.P. Estate, New Delhi on 18-11-2011 at 11:00 a.m.”

6. It is not in dispute that although the above letter refers to the enclosure of a blank return form, no such blank return form was in fact enclosed. It is further not disputed that the above notice under Section 142(1) of the Act is in a standard form.

7. For AY 2005-06, the reassessment proceedings were finalised and an assessment order was passed by the AO on 28th December 2011 making an addition of Rs.7,05,600 on account of deduction wrongly made. The taxable income was computed at Rs.2,02,19,273. Similar orders of reassessment were passed by the AO for AYs 2006-07, 2007-08 and 2008-09.

8. The Assessee appealed to the Commissioner of Income Tax (Appeals) ['CIT (A)'] questioning the initiation of the reassessment proceedings as well as the reassessment orders on merits. By the order dated 31st December 2012 for AY 2005-06, the CIT (A) upheld the re-opening of the assessment but held on merits that the addition was not justified. Similar orders were passed in the Assessee's appeals for the other three AYs.

9. Against the said orders of the CIT (A), the Revenue filed four appeals before the ITAT. The Assessee filed cross-objections. During the course of hearing of the appeals before the ITAT, the Assessee raised an additional ground that no notice under Section 143(2) of the Act had been issued prior to finalisation of the reassessment orders by the AO and therefore those orders were without jurisdiction. In the impugned common order, the ITAT considered the said ground and decided it in favour of the Assessee and against the Revenue.

10. Mr. N.P. Sahni, learned Senior Standing counsel for the Revenue, first submitted that the ITAT erred in permitting the Assessee to raise a ground regarding non-issuance of notice under Section 143(2) of the Act, when no such ground has been raised during the reassessment proceedings before the AO. He accordingly submitted that in terms of the proviso to Section 292BB of the Act, it was not open to the Assessee to raise such a plea and that too for the first time before the ITAT. Secondly, it was submitted that the Assessee had failed to file any return pursuant to the notice issued under Section 148 of the Act. The return initially filed had been processed under Section 143 (1) for three of the AYs. There was no occasion for the AO, in

the absence of any return having been filed by the Assessee pursuant to the notice issued under Section 148 of the Act, to issue a notice under Section 143 (2) of the Act. It was for the above reason that the AO thought it appropriate to issue the notice under Section 142 (1) of the Act. Relying on the decision in ***Alpine Electronics Asia Pte. Ltd. v. Director General of Income Tax (2012) 341 ITR 247***, Mr. Sahni submitted that in the facts and circumstances of the present case, the failure of the AO to issue a notice under Section 143(2) of the Act was not fatal to the reassessment proceedings.

11. Dr. Rakesh Gupta, learned counsel for the Assessee, pointed out that the requirement of issuance of notice under Section 143(2) of the Act prior to finalisation of the reassessment order was a jurisdictional one and the compliance of such requirement could not be dispensed with by resorting to the proviso to Section 292BB of the Act. Referring to the decisions of the Allahabad High Court in ***Commissioner of Income Tax v. Parikalpana Estate Development (P.) Ltd. (2012) 79 DTR 246 (All.)*** and ***Manish Prakash Gupta v. Commissioner of Income Tax (2012) 259 CTR 57 (All.)***, he submitted that Section 292BB of the Act was only a rule of evidence for dealing with service of notice and has nothing to do with the mandatory requirement of issuance of notice under Section 143 (2) of the Act which is a notice giving jurisdiction to AO. Reference was also made to the decision of this Court in ***Pr. CIT v. Shri Jai Shiv Shankar Traders Pvt. Ltd.*** (decision dated 14th October 2015 in ITA No. 519 of 2015). Dr. Gupta further pointed out that for three of the AYs in question i.e. 2005-06, 2006-07 and 2007-08, Section 292 BB of the Act could not be invoked since that

provision was introduced in the statute book with effect from 1st April 2008. Referring to the decision in ***Commissioner of Income Tax v. Mohammad Khaleeq (2015) 229 Taxman 566 (All.)*** and the decision of this Court dated 6th October 2010 in ITA No. 1159/2010 (***CIT v. Kuber Tobacco Producers P. Ltd.***) he pointed out that Section 292BB of the Act has been held to be prospective, i.e., applicable only from AY 2008-09. Finally Dr. Gupta submitted that in any event the question as to the legal effect of the failure of the AO to issue a notice under Section 143(2) of the Act was a pure question of law and on the strength of the decision of the Supreme Court in ***National Thermal Power Co. Ltd. v. Commissioner of Income Tax (1998) 229 ITR 383 (SC)*** and ***Gedore Tools (P) Ltd. v. Commissioner of Income Tax (1999) 238 ITR 268 (Del)*** such a point could have been raised by the Assessee during the course of hearing in the ITAT, as long as it did not require any new or disputed facts to be brought on record. Reliance, in this regard, was also placed on the decision in ***Assam Company (I) Ltd. v. CIT (2002) 256 ITR 423 (Gau.)***

12. The Court first proposes to consider the question as to whether in terms of the proviso to Section 292BB of the Act, the Assessee was precluded, at the stage of the proceedings before the ITAT, from raising a contention regarding failure of the AO to issue a notice under Section 143(2) of the Act. The legal position appears to be fairly well settled that Section 292BB of the Act talks of the drawing of a presumption of service of notice on an Assessee and is basically a rule of evidence. In ***Commissioner of Income Tax v. Parikalpana Estate Development (P.) Ltd.*** (*supra*) in answering a similar question, the Court referred to its earlier decision in ***Commissioner***

of Income Tax v. Mukesh Kumar Agrawal (2012) 345 ITR 29 (All.) and pointed out that Section 292BB of the Act was a rule of evidence which validated service of notice in certain circumstances. It introduces a deeming fiction that once the Assessee appears in any proceeding or has cooperated in any enquiry relating to assessment or reassessment it shall be deemed that any notice under any provision of the Act that is required to be served has been duly served upon him in accordance with the provisions of the Act and the Assessee in those circumstances would be precluded from objecting that a notice that was required to be served upon him under the Act was not served upon him or not served in time or was served in an improper manner. It was held that Section 292BB of the Act is a rule of evidence and it has nothing to do with the mandatory requirement of giving a notice and especially a notice under Section 143(2) of the Act which is a notice giving jurisdiction to the AO to frame an assessment. The decision of the Allahabad High Court in *Manish Prakash Gupta v. Commissioner of Income Tax* (*supra*) is also to the same effect.

13. In *Pr. CIT v. Shri Jai Shiv Shankar Traders Pvt. Ltd.* (*supra*), this Court has also discussed the distinction between a failure to 'issue' notice and a failure to 'serve' a notice on an Assessee. It was held, after noticing the decisions of the Allahabad High Court in *Commissioner of Income Tax v. Rajeev Sharma (2011) 336 ITR 678* and *Commissioner of Income-tax-II, Lucknow v. Salarpur Cold Storage (P.) Ltd. [2014] 50 taxmann.com 105 (All.)* and the decision of the Madras High Court in *Sapthagiri Finance & Investments v. Income Tax Officer (2013) 90 DTR (Mad) 289*, that Section 292 BB of the Act would apply insofar as failure of 'service' of

notice was concerned and not with regard to the failure to 'issue' notice. In other words, the failure of the AO, in re-assessment proceedings, to issue notice under Section 143(2) of the Act, prior to finalising the re-assessment order, cannot be condoned by referring to Section 292BB of the Act.

14. Consequently, the Court does not find merit in the objection of the Revenue that the Assessee was precluded from raising the point concerning the non-issuance of notice under Section 143 (2) of the Act in the present case in view of the proviso to Section 292BB of the Act.

15. The Court also finds merit in the contention of the Assessee that in any event as far as AYs 2005-06 to 2007-08 is concerned, Section 292BB of the Act would not apply since it is prospective in its application, i.e., applicable from AY 2008-09 onwards. The legal position in this regard appears to be well settled as explained in *CIT v. Kuber Tobacco Producers P. Ltd.* (*supra*) and *Commissioner of Income Tax v. Mohammad Khaleeq* (*supra*).

16. As regards the objection of the Revenue to the ITAT permitting the Assessee to raise the point concerning non-issuance of notice under Section 143(2) of the Act for the first time in the appeal before the ITAT, the Court is of the considered view that in view of the settled legal position that the requirement of issuance of such notice is a jurisdictional one, it does go to the root of the matter as far as the validity of the reassessment proceedings under Section 147/148 of the Act is concerned. It raises a question of law as far as the present cases are concerned since it is not in dispute that prior to finalisation of the reassessment orders, notice under Section 143(2) of the Act was not issued by the AO to the Assessee. With there being no fresh

evidence or disputed facts sought to be brought on record, and the issue being purely one of law, the ITAT was not in error in permitting the Assessee to raise such a point before it. This finds support in the decision of the Supreme Court in *National Thermal Power Co. Ltd. v. Commissioner of Income Tax* (*supra*) and the decision of this Court in *Gedore Tools (P) Ltd. v. Commissioner of Income Tax* (*supra*).

17. On the question of whether the notice under Section 143(2) of the Act was in the facts and circumstances mandatory, Mr. Sahni sought to distinguish the long line of decisions including the recent decision of this Court in *Pr. CIT v. Shri Jai Shiv Shankar Traders Pvt. Ltd.* (*supra*) on the ground that there was no occasion for the AO to issue any notice under Section 143 (2) of the Act since the Assessee had, in fact, not filed a return. He submitted that the original return was filed in the 'Sarl Form' which had since been replaced with a different form for filing of returns. Consequently, the said return could not have been treated as a return filed pursuant to the notice issued to the Assessee under Section 148 of the Act. He further submitted that with no discrepancy having been found by the AO in the returns for AYs 2005-06 till 2007-08, which were processed under Section 143 (1) of the Act, there was no occasion for the AO to issue a notice under Section 143 (2) of the Act. Mr. Sahni submitted that in the circumstances, the action of the AO in finalising the reassessment orders without notice under Section 143 (2) of the Act was justified.

18. The wording of Section 143(2)(ii) of the Act, which is applicable in the present case, requires the AO to be satisfied on examining the return filed that *prima facie* the Assessee has 'understated the income' or has 'computed

excessive loss' or has 'underpaid the tax in any manner'. The AO has the discretion to issue a notice under Section 143 (2) if he considers it 'necessary or expedient' to do so. This exercise by the AO under Section 143 (2) of the Act is qualitatively different from the issuance of a notice under Section 142(1) of the Act, which as noted hereinbefore, is in a standard proforma.

19. The Court is unable to accept the submission of the Revenue that in the present case, no return was filed by the Assessee pursuant to the notice issued to it under Section 148 of the Act. If after receiving the letter dated 1st April 2011 of the Assessee the AO was of the view that the return originally filed in the Saral Form could not be treated as the return pursuant to the notice under Section 148 of the Act, then he should have drawn the attention of the Assessee to that fact. In the present case all that the AO did was to send a notice under Section 142 (1) of the Act. The Assessee was not made aware as to why he was required to file a return. Had a notice been issued to him under Section 143 (2) of the Act, the AO would have been obliged to let the Assessee know why he was being asked to file a return notwithstanding his letter dated 1st April 2011. In the circumstances, the Assessee was justified in proceeding on the basis that it had not committed any default in communicating to the AO that the return already filed should be treated as the return filed pursuant to the notice under Section 148 of the Act.

20. The proposal to reopen an assessment under Section 147 of the Act is to be based on reasons to be recorded by the AO. Such reasons have to be communicated to the Assessee. However, merely because the Assessee

participates in the proceedings pursuant to such notice under Section 148 of the Act, it does not obviate the mandatory requirement of the AO having to issue to the Assessee a notice under Section 143(2) of the Act before finalising the order of the reassessment.

21. In this context reference may be made to the decision of the Madras High Court in *Sapthagiri Finance & Investments v. Income Tax Officer* (*supra*) where again the Assessee did not file a return pursuant to Section 148 of the Act. The AO then issued a notice to it under Section 142(1) of the Act. The Assessee thereafter appeared before the AO and stated that the original return filed should be treated as the return filed in response to the notice under Section 148 of the Act. In those circumstances, the High Court observed that if there was some explanation that was required to be offered by the Assessee, notwithstanding the above submission made by it, the AO ought to have issued a notice under Section 143(2) of the Act. The Madras High Court observed:

“Merely because the matter was discussed with the Assessee and the signature is affixed it does not mean the rest of the procedure of notice under Section 143(2) of the Act was complied with or that on placing the objection the Assessee had waived the notice for further processing of the reassessment proceedings. The fact that on the notice issued u/s 143(2) of the Act, the assessee had placed its objection and reiterated its earlier return filed as one filed in response to the notice issued u/s 148 of the Act and the Officer had also noted that the same would be considered for completing of assessment, would show that the AO has the duty of issuing the notice under Section 143(3) to lead on to the passing of the assessment. In the circumstances, with no notice issued u/s 143(3) and there being no waiver, there is no justifiable ground to accept the view of the Tribunal that there was a waiver of right of notice to be issued u/s 143(2) of the Act.”

22. The decisions of the Allahabad High Court in *Commissioner of Income Tax v. Rajeev Sharma* (*supra*) and *Commissioner of Income-tax-II, Lucknow v. Salarpur Cold Storage (P.) Ltd.* (*supra*) also reiterate the above legal position. As far as this Court is concerned, the decision in *Director of Income Tax v. Society For Worldwide Interbank Financial Telecommunications (2010) 323 ITR 249 (Del)* and the recent decision in *Pr. CIT v. Shri Jai Shiv Shankar Traders Pvt. Ltd.* (*supra*) hold likewise.

23. With the legal position being abundantly clear that a reassessment order cannot be passed without compliance with the mandatory requirement of notice being issued by the AO to the Assessee under Section 143(2) of the Act, the ITAT was in the present case right in concluding that the reassessment orders in question were legally unsustainable.

24. In view of the settled legal position on all the issues raised by the Revenue in these appeals, the Court is of the view that no substantial question of law arises for determination.

25. The appeals are accordingly dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

NOVEMBER 04, 2015

dn/sr