IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1268 OF 2015

The Principal Commissioner of Income Tax-35
Mumbai .. Appellant

v/s.

Shri Jawahar Hiranand Bhatia .. Respondent

Mr. A.R. Malhotra a/w Mr. N.A. Kazi for the appellant
Dr. K. Shivram, Senior Counsel a/w Ms. Neelam Jadhav for the respondent

CORAM : M.S. SANKLECHA &
SANDEEP K. SHINDE, J.J.

DATED : 19th MARCH, 2018.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 19th December, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2009-10.

2. The Revenue has urged only the following re-framed question of law for our consideration :-

"Whether on the facts and circumstances of the case and in law,

the Tribunal was justified in quashing the assessment order passed under Section 143(3) of the Act for failure to serve the Notice u/s 143(2) of the Act upon the respondent assessee within the permitted time?

3. The impugned order of the Tribunal allowed the respondent assessee's appeal by setting aside the Assessment Order dated 26th December, 2011. This on the ground that the notice as required under Section 143(2) of the Act was not served upon the respondent assessee within the time provided in the proviso thereto i.e. within six months from the end of the financial year in which the return is filed.

4. The grievance of the Revenue is that though the notice was admittedly served beyond the time prescribed under Section 143(2) of the Act, yet it would make no difference as the respondent assessee had participated in the proceedings before the Assessing Officer. Further, the objection of non service of notice under section 143(2) of the Act was taken at the fag end of the hearing for assessment before the Assessing Officer. Thus, it is submitted on behalf of the Revenue that this is only a procedural irregularity and would not render the order passed under Section 143(3) void.

5. It is a settled position in law that a service of notice under Section 143(2) of the Act is a *sine qua non* for completion of assessment under Section 143(3) of the Act. The Apex Court in ***Asstt. Commissioner of Income Tax Vs. Hotel Blue Moon, 321 ITR 362***, has held that service of notice under Section 143(2) within the prescribed time is a mandatory for making an assessment under Section 143(3) of the Act. Thus, non service of notice under Section 143(2) of the Act cannot be considered to be a mere procedural irregularity. In this case, admittedly, the notice is served beyond the period as prescribed in Section 143(3) of the Act. Further, the grievance of the Revenue that as the respondent had participated in the assessment proceedings and raised the objection of non service of notice under Section 143(2) of the Act only at the end of the assessment proceedings, it must be deemed that the objection is waived. In support, attention is invited to Section 292BB of the Act. However, the proceedings in the absence of service of notice, within the prescribed time will not be saved by Section 292BB of the Act as the proviso thereto very clearly states that if an objection is raised before the completion of assessment proceedings, then, a notice would not be deemed to have been validly

served upon the respondent within time provided under the Act. In fact, our attention was also drawn to the decision of this Court in ***Commissioner of Income Tax Vs. Abacus Distribution Systems (India) (P)Ltd. 78 Taxmann.com 321 (Bom)*** wherein on identical circumstances, while notice was served beyond the period as provided under Section 143(2) of the Act, the assessment order passed on such a notice was held to be void.

6. In the above view, no fault can be found with the impugned order of the Tribunal. This is so as the question as proposed stands concluded by the decision Apex Court as well as order passed by this Court referred to herein above. Therefore, no substantial question of law arises. Thus, not entertained.

7. Accordingly, appeal is dismissed. No order as to costs.

(SANDEEP K. SHINDE, J.) **(M.S. SANKLECHA, J.)**