Form No.[J2]

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

PRESENT:
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

ITAT/58/2017
IA NO:GA/1/2017 [OLD NO:GA/608/2017]

PRINCIPAL COMMISSIONER OF INCOME TAX-11, KOLKATA
VS.
M/S. NOPANY & SONS
....

ITAT/58/2017
IA NO:GA/2/2017 [OLD NO:GA/611/2017]

PRINCIPAL COMMISSIONER OF INCOME TAX-11, KOLKATA
VS.
M/S. NOPANY & SONS
....

For the appellant: Mr. Tilak Mitra, Adv.

For the respondent: Mr. Ananda Sen, Adv.
Ms. Atasi Sarkar, Adv.

Heard on : February 4, 2022.

Judgement on : February 4, 2022.

RE: GA/1/2017 [OLD NO:GA/608/2017)

T.S. SIVAGNANAM, J. : We have heard Mr. Tilak Mitra, learned senior standing counsel for the appellant/revenue and Mr. Ananda Sen, learned advocate assisted by Ms. Atasi Sarkar for the respondent/assessee.

There is a delay of 55 days in filing this appeal. Since we are inclined to take up the main appeal itself for hearing, we exercise discretion and condone the delay in filing the appeal. Accordingly, the delay in filing this appeal is condoned.

The application, IA NO.GA/1/2017 [OLD No:GA/608/2017] stands disposed of accordingly.

RE: ITAT/58/2017

This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961, (the Act, in brevity) is directed against the order dated 20.7.2016 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata (Tribunal) in ITA Nos.1621 & 1301/Kol/2011 for the assessment year 2007-08. The revenue has raised the following substantial question of law for our consideration.

a. Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, "C" Bench, Kolkata is illegally justified to hold that since notice under Section 143(2) was not issued by the ITO – Ward 56(4), Kolkata, the assessment order passed by him is a nullity and without jurisdiction ?

We have heard Mr. Mitra, learned senior standing counsel for the appellant and Mr. Ananda Sen, learned counsel assisted by Ms. Atasi Sarkar for the respondent/assessee.

The short issue which falls for consideration is whether the assessing officer, who had jurisdiction over the assessee at the relevant time had issued notice under Section 143(2) of the Act before taking up the scrutiny assessment under Section 143(3). Before we go into the facts, we take note of the legal position as laid down by the Hon'ble Supreme Court in *Asst. CIT vs. Hotel Blue Moon [2010] 321 ITR 362 [SC]***,** wherein the Hon'ble Supreme Court held that omission on the part of the assessing officer to issue notice under Section 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under Section 143(2) cannot be dispensed with. Further, we also take note of the decision in the case of *Commissioner of Income Tax -vs.- Gitsons Engineering Company, reported in [2015] 370 ITR 87*, wherein it was held that the word 'shall' employed in Section 143(2) of the Act, contemplates that the assessing officer should issue notice to the assessee so as to ensure that the assessee has not understated income or has not computed excessive loss or has not under paid the tax in any manner. It was further held that when the assessing officer considers it necessary and expedient to ensure that tax is paid in accordance with law, he should call upon the assessee to produce evidence before him to ensure that the tax is paid in accordance with law. The section makes it clear that service of notice under Section 143(2) of the Act within the time limit prescribed is mandatory and it is not a mere procedural requirement. At this juncture, it would be relevant to take note of the definition of assessing officer as defined in Section 2(7A) of the Act. The said provision defines 'assessing officer' to mean the Assistant Commissioner or Deputy Commissioner or Assistant Director or Deputy Director or the Income Tax Officer, who is vested with the relevant jurisdiction by virtue of directions or orders issued under sub-Section (1) or sub-Section (2) of Section 120 or any other provision of the Act, and the Additional Commissioner or Additional Director or Joint Commissioner or Joint Director, who is directed under clause (b) of sub-Section (4) of Section 120 to exercise or perform all or any of the powers and functions conferred on, or assigned to, an assessing officer under this Act. In the instant case, the order of assessment was challenged on several grounds and, particularly, on the ground that no notice under Section 143(2) of the Act was issued within the time prescribed by the assessing officer, who had jurisdiction over the assessment file of the assessee at the relevant time. The Commissioner of Income Tax (Appeals)-XXXVII, Kolkata, {CIT(A)} did not agree with the contentions raised by the assessee that there is failure to comply with the mandatory statutory requirement. The CIT(A) opined that the assessing officer, who originally dealt with the e-return filed by the assessee had issued notice under Section 143(2) of the Act. With regard to the merits of the matter, the CIT(A) held it in favour of the assessee. Therefore, the revenue was on appeal before the Tribunal and cross-objection was filed by the assessee questioning that portion of the order of the CIT(A) which held that there is no procedural irregularity committed by the assessing officer. The Tribunal considered the correctness of the finding of the CIT(A) and, on facts, found that both the assessing officers, namely, the assessing officer, who had jurisdiction over the assessee till 06.04.2009 and the assessing officer, who had jurisdiction post the said date had not issued notice under Section 143(2) of the Act within the prescribed period of six months from the end of the financial year in which the return was filed. 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 assessing officer was on the issuance of notice under Section 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.

The stay application, IA NO.GA/2/2017 [OLD NO:GA/611/2017] also stands dismissed.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

pkd/spal
AR(CR)