

OD - 7

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction [Income Tax]

ORIGINAL SIDE

ITAT/44/2025
IA NO: GA/1/2025
PRINCIPAL COMMISSIONER OF INCOME TAX 5
KOLKATA
VS
ROHIT BAID

BEFORE :
THE HON'BLE CHIEF JUSTICE T.S SIVAGNANAM
And
THE HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)
Date : 6th May, 2025

Appearance :
Mr. Tilak Mitra, Adv.
Mr. Prithu Dudhuria, Adv.
..for the appellant.

The Court : This appeal has been filed by the revenue under Section 260A of the Income Tax Act, 1961 (in short, the Act) challenging the order dated September 12, 2024 passed by the Income Tax Appellate Tribunal, B-Bench, Kolkata (in short, the Tribunal) in ITA/15/Kol/2024 for the assessment year 2015-16.

The revenue has raised the following substantial question of law for consideration :

"WHETHER in facts and in the circumstances of the case the Ld. Income Tax Appellate Tribunal was justified in holding the assessment order passed by the Assessing Officer under Section 147 read with Section 144B of the Income Tax Act, 1961 on March 28, 2022 as bad in law based on an incorrect understanding of the provisions of Section 120 of the Income Tax Act, 1961 read with CBDT's Instruction No.1/2011 issued vide F. No. 187/12/2010-IT(A-

I) dated January 31, 2011 which does not fix any rigid jurisdiction but is made for equitable distribution of work and thereby failing to appreciate that the Notice under Section 148 was correctly issued by the ITO, Ward 36(1), Kolkata who was the Assessing Officer having PAN jurisdiction over the assessee and subsequent assessment passed by the Faceless Assessing Officer was a valid assessment?"

We have heard Mr. Prithu Dhudhoria, learned senior standing counsel appearing for the appellant/revenue. Though notice has been served, none appears for the respondent/assessee. On perusal of the impugned order passed by the learned Tribunal, we find that the issue is squarely covered in favour of the assessee by the decision of this Court in the case of Principal Commissioner of Income Tax- 11, Kolkata Vs. M/s. Nopany & Sons in ITAT/58/2017 dated February 4, 2022. The operative portion of the judgment reads as follows :

"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."

The learned Tribunal has taken note of the above decision while allowing the assessee's appeal. Apart from that, the other

decision of this Court is in the case of PCIT Vs. Cosmat Traders (P) Ltd. reported at [2023] 146 taxmann.com 207 (Calcutta). The above decisions were rendered following the decision of the Hon'ble Supreme Court in the case of Asst. CIT Vs. Hotel Blue Moon, reported at [2010] 321 ITR 362 (SC). Thus, the issue is fully covered against the revenue.

In the result, the appeal stands dismissed and the substantial question of law is answered against the revenue. The connected application stands closed.

(T.S SIVAGNANAM)
CHIEF JUSTICE

(CHAITALI CHATTERJEE (DAS), J.)

