

IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA
(Virtual Court)

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

I.T.A. No. 2517/Kol/2019
Assessment Year: 2012-13

Bhagyalaxmi Conclave Pvt. Ltd......*Appellant*
[PAN: AADCB 8033 E]

Vs.

DCIT, Circle-13(1), Kolkata.....*Respondent*

I.T.A. No. 2518/Kol/2019
Assessment Year: 2012-13

Dhanlaxmi Conclave Pvt. Ltd......*Appellant*
[PAN: AADCD 1866 B]

Vs.

DCIT, Circle-13(1), Kolkata.....*Respondent*

I.T.A. No. 2519/Kol/2019
Assessment Year: 2012-13

Bindhyawasini Developers Pvt. Ltd......*Appellant*
[PAN: AADCB 8031 G]

Vs.

DCIT, Circle-13(1), Kolkata.....*Respondent*

I.T.A. No. 2520/Kol/2019
Assessment Year: 2012-13

Bhubaneshwari Developers Pvt. Ltd......*Appellant*
[PAN: AADCB 8032 F]

Vs.

DCIT, Circle-13(1), Kolkata.....*Respondent*

Appearances by:

Sh. Miraj D. Shah, Adv., appeared on behalf of the Assessee.

Smt. Ranu Biswas, Addl. CIT, appeared on behalf of the Revenue.

Date of concluding the hearing : January 28th, 2021

Date of pronouncing the order : February 3rd, 2021

ORDER

Per J. Sudhakar Reddy, AM:

All these appeals are filed by the assesseees directed against separate orders of the Learned Commissioner of Income Tax (Appeals)-5, Kolkata, [hereinafter the "CIT(A)"], passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), for the Assessment Year 2012-13. As the issues arising in all these appeals are common, for the sake of convenience, they are heard together and disposed off by way of this common order.

2. In all these cases, the assesseees filed e-return of income. Thereafter, the assessments in all these four cases were selected for scrutiny.

2.1. The ld. DCIT, Circle-1, Kolkata issued notices u/s 143(2) of the Act to each of these companies. The assesseees objected and submitted that DCIT, Circle-1, Kolkata has no jurisdiction of the assessee. Thereafter, the file of the assessee was transferred to DCIT-13(1), Kolkata as the assessee companies are located in Howrah. The DCIT-13(1), Kolkata did not issue fresh notice u/s 143(2) of the Act to any of these companies. He completed the assessment u/s 143(3) of the Act inter alia making certain additions u/s 68 of the Act.

2.2. Aggrieved, all these companies carried the matter in appeal before the ld. CIT(A). They submitted that the assessment order was bad in law as the ld. DCIT-13(1), Kolkata did not issue any notice u/s 143(2) of the Act as statutorily required. He argued that the notice u/s 143(2) of the Act by DCIT, Circle-1, Kolkata, was without jurisdiction and hence the assessment order passed u/s 143(3) of the Act by the AO having jurisdiction of the assessee i.e. DCIT-13(1), Kolkata without issue of notice u/s 143(2) of the Act is bad in law.

2.3. He further submitted that the assessee's income in each of these four cases is ₹1,15,850/- in the case of Bhagyalaxmi Conclave Pvt. Ltd., ₹29,210/- in the case of Dhanlaxmi Conclave Pvt. Ltd., ₹1,04,990/- in the case of Bindhyawasini Developers Pvt. Ltd. and ₹13,240/- in the case of Bhubaneshwari Developers Pvt. Ltd. and that as per the CBDT Instruction No. 1/2011 the jurisdiction of all these four assesseees fall under the jurisdiction of the ITO and not ACIT or DCIT. As the DCIT passed the assessment

order it was argued that the assessment is bad in law. The reliance was placed on a number of case laws.

2.4. The ld. CIT(A) rejected his contentions of the assessee by holding that, from a perusal of the records, a notice u/s 143(2) of the Act has been issued by the Department and hence this ground of Revenue fails. He has not stated that notice u/s 143(2) of the Act was issued by the DCIT-13(1), Kolkata. On the issue of the ITO having jurisdiction over these assessee companies and not the DCIT, Circle-1, Kolkata as per the CBDT Circular, the ld. CIT(A) held that monetary limits are not sacrosanct. He held that discretion vests with the Pr. CIT or DIT to adjust the monetary limit by up to ₹5 lakhs. He held that violation of administrative direction would call for administrative action against the concerned officer but by itself cannot be taken as a ground to nullify the assessment.

2.5. On merits, the assessee raised a number of contentions and these were also rejected by the ld. CIT(A) for the reasons given in his order. Aggrieved, the assessee is before us.

3. The ld. Counsel for the assessee repeated the contentions raised by the assessee before the ld. CIT(A). The ld. Sr. D/R relied on the order of the ld. CIT(A). As both the contentions of the assessee and findings of the ld. CIT(A) are stated in the order of the ld. CIT(A), for the sake of brevity, we do not extract the same.

4. Rival contentions heard. On a careful consideration of the facts and circumstances of the case and a perusal of the case law cited as well as the orders of the authorities below, we hold as follows.

5. In the remand report, the AO clearly stated that notice u/s 143(2) of the Act was issued by DCIT, Circle-1, Kolkata. The ld. D/R could not controvert the contention of the assessee that no notice u/s 143(2) of the Act was issued by the DCIT-13(1), Kolkata, who completed the assessment.

5.1. Further, the income of each of all these four assessee companies which are in appeal before us is below ₹2 lakhs. Thus, as per the CBDT Instruction No. 1/2011, the jurisdiction of these assessee, based on monetary limits lies with the ITO and not with

the DCIT. This fact could not be controverted by the ld. D/R. CBDT instructions are binding on all the Income Tax Authorities.

5.2. The assessee relied on the recent decision of this Tribunal in the case of *Hillman Hosiery Mills Pvt. Ltd. vs. DCIT*, in ITA No. 2634/Kol/2019, order dated 12.01.2021. We find that the issues that arise in this appeal are clearly covered in favour of the assessee. This order followed the principles of law laid down in a number of other decisions of the ITAT, Kolkata Bench on this issue.

5.3. Kolkata "B" Bench of the Tribunal in the case of *Hillman Hosiery Mills Pvt. Ltd.*(supra) held as follows:

"10. In this case, the ITO Ward-3(3), Kolkata, issued notice u/s 143(2) of the Act on 04/09/2014. In reply, on 22/09/2014, the assessee wrote to the ITO, Ward-3(3), Kolkata, stating that he has no jurisdiction over the assessee. Thereafter on 31/07/2015, the DCIT, Circle-11(1), Kolkata, had issued notice u/s 142(1) of the Act to the assessee. The DCIT, Circle-11(1), Kolkata, completed assessment u/s 143(3) of the Act on 14/03/2016. The issue is whether an assessment order passed by DCIT, Circle-11(1), Kolkata, is valid as admittedly, he did not issue a notice u/s 143(2) of the Act, to the assessee. This issue is no more res-integra. This Bench of the Tribunal in the case of Soma Roy vs. ACIT in ITA No. 462/Kol/2019; Assessment Year 2015-16, order dt. 8th January, 2020, under identical circumstances, held as under:-

"5. After hearing rival contentions, I admit this additional ground as it is a legal ground, raising a jurisdictional issue and does not require any investigation into the facts. The ld. Counsel for the assessee submitted that as per Board Instruction No. 1/2011 [F. No. 187/12/2010-IT(A-I)], dt. 31/01/2011, the jurisdiction of the assessee is with the Assistant Commissioner of Income Tax, Circle-1, Durgapur, as the assessee is a non-corporate assessee and the income returned is above Rs.15,00,000/- and whereas, the statutory notice u/s 143(2) of the Act, was issued on 29/09/2016, by the Income Tax Officer, ward-1(1), Durgapur, who had no jurisdiction of the case. He submitted that the assessment order was passed by the ACIT, Circle-1(1), Durgapur, who had the jurisdiction over the assessee, but he had not issued the notice u/s 143(2) of the Act, within the statutory period prescribed under the Act. Thus, he submits that the assessment is bad in law.

5.1. On merits, he rebutted the findings of the lower authorities. The ld. Counsel for the assessee relied on certain case-law, which I would be referring to as and when necessary.

6. The ld. D/R, on the other hand, submitted that the concurrent jurisdiction vests with the ITO as well as the ACIT and hence the assessment cannot be annulled simply because the statutory notice u/s 143(2) of the Act, was issued by the ITO and the assessment was completed by the ACIT. He further submitted that the assessee did not object to the issue of notice before the jurisdictional Assessing Officer and even otherwise, Section 292BB of the Act, comes into play and the assessment cannot be annulled. On merits, he relied on the orders of the lower authorities.

7. I have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, I hold as follows:-

8. I find that there is no dispute in the fact that the notice u/s 143(2) of the Act dt. 29/09/2016 has been issued by the ITO, Wd-1(1), Durgapur. Later, the case was transferred to the jurisdiction of the ACIT on 11/08/2017. Thereafter, no notice u/s 143(2) of the Act was issued by the Assessing Officer having jurisdiction of this case

and who had completed the assessment on 26/12/2017 i.e., ACIT, Circle-1(1), Durgapur. Under these circumstances, the question is whether the assessment is bad in law for want of issuance of notice u/s 143(2) of the Act.

9. This Bench of the Tribunal in the case of *Shri Sukumar Ch. Sahoo vs. ACIT in ITA No. 2073/Kol/2016* order dt. 27.09.2017, held as follows:-

"5. From a perusal of the above Instruction of the CBDT it is evident that the pecuniary jurisdiction conferred by the CBDT on ITOs is in respect to the 'non corporate returns' filed where income declared is only upto Rs.15 lacs ; and the ITO doesn't have the jurisdiction to conduct assessment if it is above Rs 15 lakhs. Above Rs. 15 lacs income declared by a non- corporate person i.e. like assessee, the pecuniary jurisdiction lies before AC/DC. In this case, admittedly, the assessee an individual (non corporate person) who undisputedly declared income of Rs.50,28,040/- in his return of income cannot be assessed by the ITO as per the CBDT circular (supra). From a perusal of the assessment order, it reveals that the statutory notice u/s. 143(2) of the Act was issued by the then ITO, Ward-1, Haldia on 06.09.2013 and the same was served on the assessee on 19.09.2013 as noted by the AO. The AO noted that since the returned income is more than Rs. 15 lacs the case was transferred from the ITO, Ward-1, Haldia to ACIT, Circle-27 and the same was received by the office of the ACIT, Circle-27, Haldia on 24.09.2014 and immediately ACIT issued notice u/s. 142(1) of the Act on the same day. From the aforesaid facts the following facts emerged:

i) The assessee had filed return of income declaring Rs.50,28,040/-. The ITO issued notice under section 143(2) of the Act on 06.09.2013.

ii) The ITO, Ward-1, Haldia taking note that the income returned was above Rs. 15 lacs transferred the case to ACIT, Circle-27, Haldia on 24.09.2014.

iii) On 24.09.2014 statutory notices for scrutiny were issued by ACIT, Circle-27, Haldia.

6. We note that the CBDT Instruction is dated 31.01.2011 and the assessee has filed the return of income on 29.03.2013 declaring total income of Rs.50,28,040/-. As per the CBDT Instruction the monetary limits in respect to an assessee who is an individual which falls under the category of 'non corporate returns' the ITO's increased monetary limit was upto Rs.15 lacs; and if the returned income is above Rs. 15 lacs it was the AC/DC. So, since the returned income by assessee an individual is above Rs.15 lakh, then the jurisdiction to assess the assessee lies only by AC/DC and not ITO. So, therefore, only the AC/DC had the jurisdiction to assess the assessee. It is settled law that serving of notice u/s. 143(2) of the Act is a sine qua non for an assessment to be made u/s. 143(3) of the Act. In this case, notice u/s. 143(2) of the Act was issued on 06.09.2013 by ITO, Ward-1, Haldia when he did not have the pecuniary jurisdiction to assume jurisdiction and issue notice. Admittedly, when the ITO realized that he did not had the pecuniary jurisdiction to issue notice he duly transferred the file to the ACIT, Circle-27, Haldia on 24.09. 2014 when the ACIT issued statutory notice which was beyond the time limit prescribed for issuance of notice u/s. 143(2) of the Act. We note that the ACIT by assuming the jurisdiction after the time prescribed for issuance of notice u/s. 143(2) of the Act notice became *quarum non iudice* after the limitation prescribed by the statute was crossed by him. Therefore, the issuance of notice by the ACIT, Circle-27, Haldia after the limitation period for issuance of statutory notice u/s. 143(2) of the Act has set in, goes to the root of the case and makes the notice bad in the eyes of law and consequential assessment order passed u/s. 143(3) of the Act is not valid in the eyes of law and, therefore, is null and void in the eyes of law. Therefore, the legal issue raised by the assessee is allowed. Since we have quashed the assessment and the appeal of assessee is allowed on the legal issue, the other grounds raised

by the assessee need not to be adjudicated because it is only academic. Therefore, the additional ground raised by the assessee is allowed.

7. In the result, appeal of assessee is allowed.

9.1. This Bench of the Tribunal in the case of Krishnendu Chowdhury vs. ITO reported in [2017] 78 taxmann.com 89 (Kolkata-Trib.) held as follows:-

“Return of income of assessee was Rs. 12 lakhs - As per CBDT instruction, jurisdiction for scrutiny assessment vested in Income-tax Officer and notice under section 143(2) must be issued by Income-tax Officer, Ward-I, Haldia and none other - But, notice was issued by Asstt. Commissioner, Circle Haldia much after CBDT's instruction and knowing fully well that he had no jurisdiction over assessee - Whether, therefore, notice issued by Asstt. Commissioner was invalid and consequently assessment framed by Income-tax Officers becomes void since issue of notice under section 143(2) was not done by Income-tax Officers as specified in CBDT instruction No. 1/2011.”

9.2. The Hon'ble High Court of Calcutta in the case of West Bengal State Electricity Board vs. Deputy Commissioner of Income Tax, Special Range – I, reported in [2005] 278 ITR 218 (Cal.) has held as follows:-

“Section 254 of the Income-tax Act, 1961 - Appellate Tribunal - Powers of - Assessment years 1983-84 to 1987-88 - Whether a question of law arising out of facts found by authorities and which went to root of jurisdiction can be raised for first time before Tribunal - Held, yes Whether jurisdiction of Assessing Authority is not dependent on date of accrual of cause of action but on date when it is initiated - Held, yes - Whether once a particular jurisdiction is created, same must be prospective and cannot be retrospective and it has to be interpreted having regard to manner in which it has been sought to be created - Held, yes - Assessee”

9.3. The Hon'ble Supreme Court in the case of CIT vs. Laxman Das Khandelwal [2019] 108 taxmann.com 183 (SC), held as follows:-

“7. A closer look at Section 292BB shows that if the assessee has participated in the proceedings it shall be deemed that any notice which is required to be served upon was duly served and the assessee would be precluded from taking any objections that the notice was (a) not served upon him; or (b) not served upon him in time; or (c) served upon him in an improper manner. According to Mr. Mahabir Singh, learned Senior Advocate, since the Respondent had participated in the proceedings, the provisions of Section 292BB would be a complete answer.

On the other hand, Mr. Ankit Vijaywargia, learned Advocate, appearing for the Respondent submitted that the notice under Section 143(2) of the Act was never issued which was evident from the orders passed on record as well as the stand taken by the Appellant in the memo of appeal. It was further submitted that issuance of notice under Section 143(2) of the Act being prerequisite, in the absence of such notice, the entire proceedings would be invalid.

8. The law on the point as regards applicability of the requirement of notice under Section 143(2) of the Act is quite clear from the decision in Hotel Blue Moon's case (supra). The issue that however needs to be considered is the impact of Section 292BB of the Act.

9. According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of

notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself."

10. Respectfully following the propositions of law laid down in all these case-law and applying the same to the facts of the case, we hold that the assessment order is bad in law for the reason that the Assessing Officer having jurisdiction over the assessee, has not issued a notice u/s 143(2) of the Act as required by the statute. Notice issue by the officer having no jurisdiction of the assessee is null and void. When a notice is issued by an officer having no jurisdiction, Section 292BB of the Act, does not come into play. Coming to the argument of the Id. D/R that objection u/s 124(3) of the Act has to be taken by the assessee on rectifying notice u/s 143(2) of the Act from a non-jurisdictional assessing officer, I am of the view that I need not adjudicate this issue, as I have held that non-issuance of statutory notice/s 143(2) of the Act by the jurisdictional Assessing Officer makes the assessment bad in law. Under these circumstances, we allow this appeal of the assessee."

6. Respectfully following the propositions of law laid down in these orders stated above, we hold that the orders are bad in law for the reason that the assessing authority passed the order u/s 143(3) of the Act i.e. DCIT-13(1), Kolkata has not issued a notice u/s 143(2) of the Act and also for the reason that the jurisdiction of these cases lies with the ITO and not the DCIT. Hence all the orders passed by the Id. CIT(A) in these four cases are hereby quashed and the appeals of the assesseees are allowed.

7. In the result, all these appeals filed by the assesseees are allowed.

Kolkata, the 3rd February, 2021.

Sd/-
[Aby T. Varkey]
Judicial Member

Dated: 03.02.2021

Bidhan (P.S.)

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Copy of the order forwarded to:

1. ***Bhagalaxmi Conclave Pvt. Ltd., 10, Dr. Abani Dutta Road, Salkia, Howrah-711 106.***
2. ***Dhanlaxmi Conclave Pvt. Ltd., 10, Dr. Abani Dutta Road, Salkia, Howrah-711 106.***
3. ***Bindhyawasini Developers Pvt. Ltd., 10, Dr. Abani Dutta Road, Salkia, Howrah-711 106.***
4. ***Bhubaneshwari Developers Pvt. Ltd., 10, Dr. Abani Dutta Road, Salkia, Howrah-711 106.***
5. ***DCIT, Circle-13(1), Kolkata.***
6. CIT(A)-5, Kolkata. (sent through mail)
7. CIT-
8. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches