

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 5TH DAY OF OCTOBER, 2021

PRESENT

THE HON'BLE MRS.JUSTICE S.SUJATHA

AND

THE HON'BLE MR. JUSTICE RAVI V. HOSMANI

I.T.A.No.282/2018

BETWEEN :

- 1 . PR. COMMISSIONER OF
INCOME TAX (CENTRAL)
CENTRAL REVENUE BUILDINGS,
QUEENS ROAD, BANGALORE.
- 2 . THE DEPUTY COMMISSIONER OF
INCOME TAX, CENTRAL CIRCLE-2 (1)
BENGALURU. ...APPELLANTS

(BY SRI JEEVAN J. NEERALGI, ADV.)

AND :

SHRI CHERIAN ABRAHAM
3-2/1, CLEVELAND ROAD,
FRAZER TOWN, BANGALORE-560 005. ...RESPONDENT

(BY SRI CHYTHANYA K.K., ADV.)

THIS INCOME TAX APPEAL IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 21.11.2017 PASSED IN ITA NO.1575/BANG/2016, FOR THE ASSESSMENT YEAR 2012-2013, PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND/OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT. (B) SET ASIDE THE APPELLATE ORDER DATED 21.11.2017 PASSED BY THE

INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH, BENGALURU
IN APPEAL PROCEEDINGS ITA NO.1575/BANG/2016 FOR
ASSESSMENT YEAR 2012-2013.

THIS APPEAL COMING ON FOR HEARING, THIS DAY,
S. SUJATHA, J., DELIVERED THE FOLLOWING:

J U D G M E N T

This appeal is filed by the Revenue under Section 260A of the Income Tax Act, 1961 ['Act' for short] assailing the order of the Income Tax Appellate Tribunal Bangalore Bench "C" ['Tribunal' for short] dated 21.11.2017 passed in ITA No.1575/bang/2016 relating to the assessment year 2012-13.

2. The appeal has been admitted by this Court to consider the following substantial question of law:

"Whether on the facts and in the circumstances of the case, the Tribunal is right in law in quashing the assessment order dated 28.03.2014 by holding that the notice under Section – 143[2] of the Income tax Act, 1961 was issued beyond the period of limitation as provided in the section and consequently the assessing authority cannot

assume jurisdiction to frame the assessment?”

3. The search action under Section 132 of the Act was conducted in the case of assessee in connection with search in another case of Shri.M.M.Prasanna Kumar and others on 06.02.2012. Accordingly, proceedings under Section 153C were initiated. The Assessing Officer issued notice under Section 142[1] of the Act to the assessee on 12.09.2013 calling for return of income. The assessee filed a reply on 08.10.2013 submitting that the return of income for the assessment year 2012-13 was already filed on 26.09.2012 enclosing the copy of the same for ready reference. The Assessing Officer issued notice under Section 143[2] on 21.10.2013 and concluded the assessment under Section 143[3] read with Section 153C of the Act on 28.03.2014 making an addition of Rs.11,79,60,000/- towards unexplained loan advanced by the assessee to Sri.Peter Caddy. On further appeal by the assessee

before the Commissioner of Income Tax [Appeals], the same came to be dismissed. Being aggrieved, the assessee preferred further appeal before the Tribunal. The Tribunal allowed the appeal quashing the assessment order as well as the order of the Commissioner of Income Tax [Appeals], holding that the notice under Section 143[2] was issued beyond the period of limitation as provided in Section 143[2] and consequently, the assessing officer cannot assume jurisdiction to frame assessment. Being aggrieved, the Revenue has preferred this appeal.

4. Learned counsel Sri.Jeevan J. Neeralgi appearing for the Revenue submitted that the Tribunal has grossly erred in quashing the assessment order and the first appeal order erroneously holding that the notice under Section 143[2] of the Act was issued beyond the period of limitation and consequently the assessing officer cannot assume jurisdiction to frame

the assessment sans appreciating that the assessee has not raised any objections to the jurisdiction in the reply submitted to the notice under Section 142[1] of the Act, but appeared and cooperated during the assessment proceedings without raising the issue of limitation. The limitation period ought to have been reckoned from the date of filing of the reply by the assessee on 08.10.2013. The Tribunal even otherwise ought to have been held that the same is curable under Section 292BB of the Act. In support of his submissions, he referred to the Circular No.1/2009 issued by the CBDT wherein it has been held that the new Section 292BB were applicable for all proceedings pending for all cases from 01.04.2008. Reliance was placed on the following judgments:

1. *Padinjarekara Agencies [P.] Ltd., V/s. Commissioner of Income-tax [(2017) 85 taxmann.com 129 (Kerala)]*

2. *Venkatesan Raghuram Prasad V/s. Income-tax Officer, Non-Corporate Ward-2(3), Chennai [(2018) 94 taxmann.com 249 (Madras)]*
3. *Aravali Engineers [P.] Ltd., V/s. Commissioner of Income-tax [(2011) 11 taxmann.com 291 (Punjab & Haryana)]*
4. *Commissioner of Income-tax, Bathinda V/s. Panchvati Motors [P.] Ltd., [(2011) 12 taxmann.com 111 (Punjab & Haryana)]*

5. Learned counsel Sri.Chythanya.K.K., appearing for the respondent – assessee would submit that reply dated 08.10.2013 was submitted by the assessee pursuant to the notice issued by the department under Section 142[1] of the Act. The gist of the reply would indicate that the assessee had filed the return of income for the assessment year 2012-13 and a copy of the same was enclosed along with the reply. The said reply would not come to the assistance of the department to contend that the period of limitation for issuing notice under Section 143[2] would reckon from

the said date. In terms of the proviso to Section 143[2], the financial year has come to an end on 31.03.2013, the notice under Section 143[2] was issued on 21.10.2013. The letter dated 08.10.2013 would not extend the period of limitation prescribed under Section 143[2] of the Act. Nextly, it was argued that the plea of 292BB was not raised by the Revenue before the Tribunal. Learned counsel submitted that 292BB would deal with service of notice, if the notice exists, not with respect to a non-existent notice. Referring to clause 42.2 of the CBDT circular dated 27.03.2009, learned counsel submitted that there is difference in issue of notice and service of notice. Section 292BB would deal with the service of notice which was issued well within the period of limitation but found defective in the three circumstances specified therein which could be cured but not in the absence of notice i.e., non-issuance of notice within the prescribed period of limitation. In

support of his contentions, learned counsel has placed reliance on the following judgments:

1. *Commissioner of Income-tax V/s. Laxman Das Khandelwal [(2019) 417 ITR 325 (SC)]*

2. *Pr. Commissioner of Income-tax V/s. Silver Line [(2016) 383 ITR 455 (Delhi)]*

6. We have heard the learned counsel appearing for the parties and perused the material on record.

7. Section 143[2] and the proviso therein reads thus:

“143(2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer or the prescribed income-tax authority, as the case may be, if, considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, shall serve on the assessee a notice requiring

him, on a date to be specified therein, either to attend the office of the Assessing Officer or to produce, or cause to be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return:

Provided that no notice under this subsection shall be served on the assessee after the expiry of 86[three] months from the end of the financial year in which the return is furnished.”

8. The undisputed facts are that the search was conducted in the case of a search person on 06.02.2012. Pursuant to which Section 153C proceedings were initiated against the assessee. Notice under Section 142[1] was issued on 12.09.2013 calling the assessee to file the return. Reply was filed on 08.10.2013 by the assessee stating that the return of income for the assessment year 2012-13 was already filed on 26.09.2012 enclosing the copy of the same for ready reference. Subsequently, notice under Section

143[2] was issued on 21.10.2013. Financial year has come to an end on 31.03.2013. Six months time would lapse on 30.09.2013. Notice was issued on 31.10.2013. The relevant paragraph of Circular No.1/2013 reads thus:

“42.2 *Instances have come to the notice of the department, where notices under sub-section (2) of section 143, though issued by registered post within twelve months from the end of the month in which the return was furnished, have been held ‘invalid’ on the ground that the notice was actually received by the assessee after the limitation date and there was no "service" as postulated under the section. This is notwithstanding the fact that the assessee has attended the assessment proceedings in response to the notice served on him. Instances have also come to notice where the orders of the Assessing Officer is being quashed on the consideration that there is no evidence of issue or service of notice, even though the assessee and his authorized representative*

have attended the hearing before the Assessing Officer during the assessment proceedings. Further, the design of the limitation period with reference to the end of the month leads to administrative inconvenience inasmuch as the last day of every month becomes a time barring date.”

9. Section 292BB of the Act has come into force with effect from 01.04.2008 and the same reads thus:

“Notice deemed to be valid in certain circumstances.

292BB. Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act 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:

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment.”

10. In the case of ***Padinjarekara Agencies [P.] Ltd.***, supra, the Hon'ble High Court of Kerala while considering income escaping assessment in the course of reassessment proceedings, held that mere omission to mention Section 143 (2) of the Act equally in any one of the notices so issued is held to be not fatal and would not invalidate the assessment order. In that context, it has been held that the Court is not prepared to think that there was absence of notice under Section 143 (2) of the Act or that any prejudice was caused to the assessee in defending the case against the State.

11. In the case of **Venkatesan Raghuram Prasad** supra, the Hon'ble High Court of Madras referring to the decision in the case of **R.K.Upadhyaya .v. Shanabhai Patel [(1987) 166 ITR 163 (SC)]** and **CIT .v. Chetan Gupta [(2016) 382 ITR 613 (Del)]**, has observed that without prejudice, even if the assessee were to assume so, to succeed on the question of 292BB and further, presuming a valid objection regarding service of notice under Section 149 of the Act, it would necessitate examination of the assessee's objections on merits, the matter shall have to necessarily travel back to the file of assessing officer to cause service and assessment a fresh, for which a time limit shall run from the date of the said service.

12. In the case of **Chetan Gupta** supra, admittedly notice was issued within the prescribed period of limitation. The requirement of issue of notice being satisfied, which is the mandate of Section 148(1)

of the Act, it has been observed that once a notice is issued within the period of limitation, jurisdiction becomes vested in the Income Tax officer to proceed to make the assessment.

13. The Hon'ble High Court of Punjab and Haryana in the case of ***Aravali Engineers [P.] Ltd.***, supra, was dealing with the plea raised that since the notice under Section 143 (2) of the Act was not served within the stipulated time, the assessment was barred by limitation. In such a scenario, the Tribunal had refused to entertain the plea raised by the assessee while upholding the findings of the Tribunal.

14. The aforesaid judgments cited by the Revenue would enunciate that the notice issued within the period of limitation, if found not served on the assessee within the stipulated period, i.e. defective service of notice cannot invalidate the assessment, or in other words, the existence of the notice well within the period of

limitation prescribed under the provision is *sine qua non* for invoking Section 292BB of the Act.

15. This view is further fortified by the instructions issued by the CBDT in Circular No.1/2009 dated 27.03.2009 wherein, it has been observed that notices under sub-section (2) of 143 of the Act though issued by registered post within the period of limitation, the same have been held invalid on the ground that the assessee had received the notice after the limitation date. In order to address these issues and to reduce litigation, a new Section, viz., Section 292BB has been inserted and the provision of 143 (2) of the Act has been amended.

16. The parameters set out in Section 292BB of the Act are that the notice was:

- (a) not served upon assessee; or
- (b) not served in time; or
- (c) served upon assessee in an improper manner.

Thus, what is significant is service of notice. It is obvious that the issuance of notice is a pre-condition to cure the defects in service of notice.

17. In the case of **Lakshman Das Khandelwal** supra, the Hon'ble Apex Court has considered the law laid down by the Hon'ble Apex Court in the case of **ACIT .v. Hotel Blue Moon [(2010) 321 ITR 362 (SC)]** regarding the question whether notice under Section 143 (2) of the Act would be mandatory for the purpose of making an assessment under the said provision and thereafter, considered the question whether Section 292BB which came into effect on and from 1.4.2008 has effected any change. It has been held that the law on the point as regards applicability of notice under Section 143 (2) of the Act is quite clear in the decision in the case of **Hotel Blue moon** supra. However, considering the impact of Section 292BB on the issue, it has been held thus:

“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 the 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.”

18. This judgment has a direct bearing on the facts of the present case. In the light of this judgment, it is clear that the infirmities in the manner of service of notice alone would be amenable to under Section 292BB of the Act, but not the complete absence of notice itself. Notice issued beyond the period of

limitation partakes the character of absence of notice itself in the eye of law. As such, Section 292BB would not save such a notice dehorse the limitation prescribed.

19. Though the learned counsel for the Revenue contended that **Hotel Bluemoon** supra was rendered in the regime prior to the insertion of S.292BB of the Act, the said judgment has been considered by the Hon'ble Apex Court in the case of **Lakshmandas Khandelwal** supra as aforesaid, which is squarely applicable to the facts of the present case.

20. The Tribunal has rightly observed that the foundation process of reassessment is under Section 148 of the Act, but such jurisdiction is subject to further compliance as being stipulated in the statute itself and thus, quashed the assessment being invalid. It is a well settled legal principle that issuance of notice beyond period of limitation or absence of notice goes to

the root of the matter and is the jurisdiction aspect, not a procedural irregularity and the same is not curable.

21. Thus, we are of the view that the failure of the assessing officer in issuing the notice within the period of limitation under Section 143 (2) of the Act which is a notice giving jurisdiction to the assessing officer to frame assessment cannot be condoned by referring to S.292BB of the Act. We find no ground to interfere with the impugned order of the Tribunal.

22. For the reasons aforesaid, we answer substantial question of law in favour of the assessee and against Revenue.

In the result, the appeal stands dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

NC/VGH