
(2016) 09 J&K CK 0007
In the Jammu And Kashmir High Court
Case No : ITA No. 51 of 2013

Promila Gupta

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 21-09-2016

Acts Referred:

Income Tax Act, 1961 — Section 143, Section 144, Section 147, Section 264

Citation : (2016) 4 JKJ 231

Hon'ble Judges : Mr. Ramalingam Sudhakar and Mr. B.S. Walia, JJ.

Bench : Division Bench

Advocate : Mr. S.C. Gupta, Advocate, for the Appellant/Petitioner; Mr. Aruna Thakur, Advocate, for the Respondent

Final Decision : Allowed

Judgement

1. Heard learned counsel for the parties at length.

2. The brief facts leading to the filing of present appeal are as follows:

The assessee presently is an individual stating that she is the wife of late Sh. Sudesh Gupta Proprietor of M/s Hotel Moti Mahal Tringla, Batote

District Ramban. The Assessing Officer had earlier passed an assessment order in terms of Section 144/147 of Income Tax Act, 1961 (hereinafter

called the "Act") vide order dated 10.12.2009, and that assessment was made on the status that the assessee is a Firm. It appears that the

said assessment order was an ex-parte assessment, order. In view of the fact that the statutory notice issued from time to time was not responded

or complied by the assessee (Firm).

3. Aggrieved by ex-parte assessment order passed in terms of Section 144/147 of the Act (best judgment assessment), an appeal was filed to the

CIT(A). The present assessee also, filed a petition under Section 264 of the Act before the Commissioner of Income Tax, inter alia contending that

the assessment order was passed against the Firm which was not in existence and that proper opportunity of hearing was not given. The

Commissioner accepted this plea and set aside the assessment order passed in respect of the firm, under Section 144/147 of the Act, holding that

the assessment was wrongly made in the status of the Firm. The Commissioner further directed the Assessing Officer to re-do the assessment. The

lady legal heir is the present appellant, LR of w/o late Sh. Sudesh Gupta.

4. In so far as the present proceedings are concerned, on 17.03.2011 notice under Section 148 of the Act was issued to the assessee requiring her

to file a return on or before 15.04.2011 but she did not file the return in time, However, the said return was filed belatedly on 18.11.2011. The

assessment order in this case was made thereafter on 28.12.2011. The Assessing Officer while finalising the assessment treated the return as

nonest. His contention was that notice under Section 148 of the Act was duly served upon the assessee by Speed Post i.e. on 17.03.2011 along

with reasons for issuing of such notice which is a detailed one, however, the assessee did not respond in time. On 22.07.2011, a detailed

questionnaire was served on the assessee along with the statutory notice in terms of Section 142 (1) of the Act fixing the date of hearing as

08.08.2011. In response to said notice under Section 142 (1) of the Act no one appeared and no request for adjournment was made by the

assessee. Nevertheless, the department issued another notice under Section 142 (1) of the Act on 12.08.2011 for hearing on 26.08.2011. There

again none attended. Thereafter, another notice under Section 142(1) of the Act was issued on 23.09.2011 fixing the date of hearing on

06.10.2011 and the above notice was duly served on the son of the assessee on 22.09.2011. Thereafter, it is recorded by the Tribunal that further

notices were issued and the written reply was filed by the assessee on 02.12.2011 as is recorded in Paragraph Nos. 6 & 7 of the Assessing

Officer's order.

5. The Assessing Officer after considering the reply of the assessee and after going into the merits of the stand taken by the assessee decided the

case in terms of Section 144/147 of the Act and determined the total taxable

income at Rs. 69,61,285/-.

6. That order was challenged before the CIT(A) primarily contending that notice under Section 143 (2) of the Act was not issued and that is a

mandatory requirement, and therefore, proceedings are void ab initio and contrary to the provisions of the Act and should be set aside. The

CIT(A) at Para 4.1 in his order accepted this plea and recorded as follows:

5. I have carefully considered the submission made by the appellant, the assessment order and relevant case laws. Admittedly, the appellant had

filed a return pursuant to the notice u/s 148 though beyond the period mentioned in the said notice, and this was done before the completion of

assessment. Return pursuant no notice u/s 148 was filed by the appellant on 18.11.2011. The A.O. has failed to issue notice u/s 143(2) of the Act

before completing the assessment. I have called the records of the proceedings and found that on 22.07.2011 there was an order sheet entry that

notice 142(1) 143(2) was issued, however on perusal of letter dated 22.07.2011 and case records no notice u/s 143(2) was found".

7. Consequently, Commissioner's appeal held that issuance of notice under Section 143(2) of the Act is essential requirement for proceeding

under Section 144/147 of the Act. CIT(A) relying on various decisions of Tribunals and Courts, CIT (A) also came to hold that provisions of

Section 292 BB would come into play only when notice is issued but not served, served later or served in an improper manner but if no notice

issued, then Section 292 BB would not apply. On the premise, he allowed the appeal which was challenged by the department in appeal on

following question of law.

1. On the facts and circumstances whether the Ld. CIT(A) was right in quashing the assessment when the assessee during assessment

proceedings has never raised any objection regarding issuance of notice u/s 143(2) of the Income Tax Act, 1961, as per the provisions of Section

292 B of the Income Tax Act, 1961.

2. On the facts and circumstances whether the Ld. CIT(A) was right in quashing the assessment when the Hon'ble ITAT Agra Bench in the

case of Chandra Bhan Bansal v. DCIT 79 ITD 659, has held that the law makers have made it abundantly clear that the limitation period

imposed in provision to Section 143(2) was not applicable to the returns filed in

response to notice u/s 148 of the Income Tax Act, 1961".

3.....

4.....

8. The Tribunal went into the entire legal gamut of the case and the factual position as stood before the Assessing Officer to take a view that it is

not lie proper on the part of the assessee to contend that notice under Section 143(2) of the Act is a mandatory requirement for proceeding under

Sections 144/147 of the Act, placing reliance on the decision of Punjab and Haryana High Court in case titled Commissioner of Income Tax v.

Ram Narain Bansal. The Tribunal also held that the assessee had participated in the assessment proceedings and did not raise the plea of no

notice under Section 142(3) of the Act at the first instance and therefore, assessee is precluded from raising such plea subsequently. It was held

that the department is justified in contending that the order of assessment is correct if mad with the terms of Section 292 BB of the Finance Act,

2008 w.e.f. 01.04.2008.

9. As a consequence, the Tribunal held that the decision by the Punjab and Haryana High Court in case titled Commissioner of Income Tax v.

Ram Narain Bansal case would directly answer the question involved in the present case and would apply to the facts of this case and the

decision relied upon by the assessee was distinguishable. It held in favour of the department. Going further, the Tribunal without recording anything

on merits of the case, issued a further direction which reads as follows:

Thus, under the aforesaid facts and circumstances and the decision of the Honâ??ble Court, restored the matter to the Tribunal and we are

bound to follow the decision of the jurisdictional High Court of Punjab & Haryana which is directly on the question involved in the present case

and the decisions as relied upon by the Ld. Counsel which are not directly on the issue does not support the case of the assessee and likewise the

decision of Chennai Bench of Tribunal relied upon by the Ld. AR cannot prevail on the decision of Honâ??ble Punjab & Haryana High Court in

the case of Ram Narain Bansal (supra). In view of the matter and our findings herein above, the matter is set aside to the file of the A.O. who is

directed to issue notice u/s 143(2) of the Act to the assessee for a decision in accordance with law. Thus, grounds raised by the Revenue are

allowed for statistical purposes.

(Emphasis supplied)

10. Aggrieved by this, the present appeal has been filed on a following questions of law as raised upon.

Whether the IT AT (Asr.) order dated 16.07.2013 reversing CIT(A), Jammu order 11.1.2013 is not legally justified and exceeds the jurisdiction

in directing Assessing Officer to issue notice u/s 143(2) of the Act when the period prescribed in said provision has expired"".

11. We have heard learned counsel for the parties at length.

12. In fact the department should have also filed an appeal against that portion of the order directing the issuance of notice u/s 143(2) since the

Tribunal has accepted the department plea. The core issue that arises for consideration, is whether in the case of this nature in assessment under

Sections 144/147 of the Act, the requirement of notice u/s 143(2)(ii) is mandatory.

13. No doubt Section 148(1) proviso (ii) (b) indicates that notice under sub-section 2 of Section 143 is required. That however, is circumscribed

by certain other parameters laid down in Section 144(1) (c) IInd proviso which reads as follows:

144. Best Judgment Assessment (1) If any person;

(a).....

(b).....

(c) having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of Section 143.

Provided further that it shall not be necessary to give such opportunity in a case where a notice under sub-section (1) of Section 142 has been

issued prior to the making of an assessment under this section.

14. This will be relevant as the assessment proceedings in both u/s 144/147 of the Act. In this case as already referred above, factually it is evident

that under Section 142(1), notice has been issued on several dates and that is not disputed by the assessee and therefore, the Assessing Officer is

well within his jurisdiction to make t his judgment (best judgment assessment) in terms of Section 144/147 of the Act. Even otherwise, it is

pertinent to note that the original assessment order undisputedly has been made

in terms of Section 144/147 of the Act as is evident from

Annexure-A to this petition. Even in a case of income escaping assessment the requirement of notice under Section 148 is required but, the

provision of Section 292 BB would also be relevant. Section 292 BB reads as follows:

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 the 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 ti me; 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.

A presumption has been raised under the said provision relating to service of notice upon the assessee in respect of assessment or reassessment

proceedings"".

15. Hence where the assessee has appeared in any proceeding and cooperated in the inquiry relating to an assessment or reassessment, it shall be

deemed that any notice under any provisions 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 this

Act that the notice was not served upon him; or not served upon him in time; or served upon him in an improper manner, meaning thereby if he has

participated in the proceedings, the requirement of complying with provisions of the notice is not necessary. This however, will not apply, if any

objections have been raised in the first instance that no notice has been issued in terms of the Act before the Assessing Authority. This admittedly is

not the position. There is no objection before the Assessing Officer on the

requirement of Section 143(2).

16. The requirement of notice in terms of Section 143(2) of the Act is intended to comply with the requirement of principles of natural justice, that

is evident from the decision of Kerala High Court in case titled K.J. Thomas v. CIT reported as (2008) ITR 301. Relevant portion is extracted

hereunder:

The procedure under Section 143(2) of the Act is to ensure that an adverse order is issued only after proper opportunity is given to the assessee.

In this case, it is conceded that the assessee got opportunity to file reply and detailed reply was in fact filed and reassessment notice and final order

were also issued within the time limit prescribed under the Act".

17. The Tribunal relied upon the decision of CIT v. Ram Narain Bansal, to overturn the plea of the assessee that notice as required under

Section 143(2) was not issued relying upon the dictums of decisions of cases titled CIT v. Ram Narain Bansal and K.J. Thomas v. CIT,

referred to supra.

18. In the present case, it is evident that the assessee in this case initially challenged the assessment order in respect of the Firm which when in her

favour before CIT, who set aside the order and remanded the matter for fresh consideration. Thereafter, series of notices were issued under

Section 142(1) on various dates as already referred to above. Therefore, it is evident that at no point of time till order of assessment was made,

objection relating to non issuance of notice under Section 142(3) of the Act, was raised. Therefore, the provisions of Section 292 BB clearly

stands attracted. Furthermore, admittedly a case of assessment under Section 144/147 of the Act as has been earlier set out in respect of (best

judgment assessment) which is a case on hand. The requirement of notice in terms of Section 144(1) (c) of the Act becomes irrelevant, in view of

the proviso of Section 144(1)(c).

19. In the present case, the question of non issuance of notice under Section 143(2) of the Act will not in any manner affect the proceedings in

view of the fact that the assessee in receipt of several notices under Section 142(1) of the Act. She also participated in the assessment proceedings

consequent to Section 148, notice dated 17.03.2011 and she has filed the return on 18.11.2011 though belatedly. Finally, the assessment order

has been passed on 28.12.2011 and all the objections were duly considered. There is, however, no objection in relation of Section 143(2) notice.

20. Therefore, in the light of the above, the plea of the assessee that no notice under Section 143(2) of the Act was served and hence assessment

order is bad, has no legal basis. We however, find that the Tribunal in this case having accepted the legal principles in favour of department based

on the decision of Punjab and Haryana High Court in Ram Narain Bansal's case and the Kerala High Court in K.J. Thomas's case has

gone further by erroneously setting aside the assessment order instead of the CIT (A) order without there being any reason for doing so, with a

further direction that notice under Section 143(2) of the Act be issued. There is no such requirement but unfortunately without going into the merits

of the case as to why the assessment order is recalled, the learned Tribunal has set aside the same for fresh consideration. The department,

however, is not in appeal against this portion of the order of the Tribunal which apparently is against them because we find that there is absolutely

no reason whatsoever given by the Tribunal for setting aside the order of Assessing Officer on merits. Since the department is not in appeal before

us and a direction has been issued for re-hearing of the matter, we leave that issue to rest holding that the question of law raised by the assessee is

not tenable. The question of law is answered against the assessee and in favour of the revenue.

21. Appeal disposed of accordingly.