*IN THE INCOME TAX APPELLATE TRIBUNAL*
*KOLKATA BENCH "**C**" KOLKATA*

Before **Shri Waseem Ahmed, Accountant Member** and
**Shri S.S.Viswanethra Ravi, Judicial Member**

**ITA No.1621 & 1301/Kol/2011**
Assessment Year:2007-08

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| ITO Ward-56(4),<br>3, Govt. Place, 2nd Floor,<br>Kolkkata-1<br><br>M/s Nopay & Sons<br>C/o M/s Salarpuria Jajodia<br>& CO. 7, C.R. Avenue,<br>Kolkata-700 072<br>[**PAN No.AACFN 5493 N**] | बनाम<br>**/ V/s.**<br><br>बनाम<br>**/ V/s.** | M/s Nopany & Sons<br>Chandra Kunj, 4th<br>Floor, 3 Pretoria Street,<br>Kolkata-700 071<br><br>ITO, Ward-56(4),<br>3, Govt. Place West,<br>Kolkata-001 |
| | | |
| अपीलार्थी /Appellant | .. | प्रत्यर्थी /Respondent |

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| आवेदक की ओर से/By Assessee | Shri S.K.Tulsian, Advocate |
| राजस्व की ओर से/By Respondent | Shri S.Srivastava, CIT-DR |
| सुनवाई की तारीख/Date of Hearing | 08-06-2016 |
| घोषणा की तारीख/Date of Pronouncement | 20-07-2016 |

## आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

These cross-appeals by the Revenue and assessee are against the different orders of Commissioner of Income Tax (Appeals)-XXXVI, Kolkata by even date i.e. 27.01.2010. Assessment was framed by ITO Ward-56(4), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 31.12.2009 for assessment year 2007-08.

2. Both the appeals are heard together and are being disposed of by way of a consolidated order.

Shri S.K.Tulsian, Ld. Authorized Representative appeared on behalf of assessee and Shri S.Srivastava, Ld. Departmental Representative appeared on behalf of Revenue.

**First we take up assessee's appeal ITA No.1301/Kol/2011**

3. Grounds by assessee per its appeal are as under:-

*"1. For that in view of the facts and circumstances of the case, the Ld. CIT(A) was wholly wrong and unjustified in holding the assessment order u/s 143(3) dt. 31.12.2009 as legal and valid on the alleged ground that the notice u/s 143(2) dt. 02.09.2009 issued by ITO. Ward - 3(1), Kolkata, holding jurisdiction and access over the e-return filed for relevant A.Y 2007-08 was legal and valid. The decision of the Ld. CIT(A) was wholly unreasonable, uncalled for and bad in law as the ITO, Ward-3(1) had no legal jurisdiction vested with him to commence the assessment proceeding and complete it U/S 143(3) in this case by issue of a notice U/S 143(2) of the Act.*

*2. For that in view of the facts and circumstances of the case, the Ld. CIT(A) was wholly wrong and unjustified in holding the impugned order U/S 143(3) dt. 31.12.2009 passed by the LT.O, Ward - 56(4), Kol, as legal and valid, without considering the facts that the mandatory notice U/S 143(2) of the Act for the A.Y 2007-08 was never issued and served either by the said jurisdictional ITO prior to making the assessment or by the earlier A.O i.e. DCTT, CC-XI, Kol, at any time since filing of the return on 17.01.2009 till the jurisdiction over the assessee's case was transferred from his charge to that of the LT.O, Ward-56(4) vide order u/s 127 of the Act dt. 06.04.2009.*

*The order u/s 143(3) being illegal and void abinitio is liable to be quashed/ cancelled.*

*3. For that in view of the facts and circumstances of the case, the Ld. CIT(A) was wholly wrong and unjustified in holding the impugned order U/S 143(3) as legal and valid without considering the facts that an original assessment made after scrutiny only by issue of a notice U/S 142(1) without issue of a timely notice U/S 143(2) of the Act, which is mandatory and a condition precedent for making a scrutiny assessment, is totally null and void and has no existence in the eye of law.*

*The order u/s 143(3) being illegal and void abinitio is liable to be quashed/ cancelled.*

*4. For that in view of the facts and circumstances of the case, the Ld. CIT(A) was wholly wrong and unjustified in not considering the objection raised before the IT.O, Ward - 56(4) prior to completion of the assessment by him against issue of notice U/S 142(1) and proceeding with the assessment without issue and service of the mandatory notice U/S 143(2) of the Act and further that the revision of section 292BB of the Act was not applicable in this case.*

*The order U/S 143(3) being illegal and void abinitio is liable to be quashed/ cancelled.*

*5. Without prejudice to the Gr. Nos. 1 to 4 above, the Ld. CIT(A) was wholly wrong and unjustified in confirming the AO's action in assessing the entire sale proceeds of Rs. 9.50 crores received on sale of a house property at Kolkata on 09.08.2006 by a registered deed as assessee's income from other source u/ s 56(1) of the Act on the alleged grounds that the property was owned by one M/s Murray & Co. Pvt. Ltd. and not by the assessee and that the purported old agreement dt. 06.01.1975 between the real owner and the assessee for the proposed sale of that property was unregistered and suffered from many anomalies and the title & possession of the property was not handed over to the assessee.*

*The unlawful decisions of both the AO and the Ld. CIT(A) were wholly unreasonable, uncalled for and bad in law.*

*6. For that in view of the facts and circumstances of the case, the Ld.CIT(A) was wholly wrong and unjustified in confirming the AO's action in rejecting the assessee's claim of Long Term Capital Loss of Rs. 39,54,0001- suffered on sale of the said house property without considering the facts that as per the said old agreement dt. 06.01.1975 between the assessee and the erstwhile owner M/s Murray & Co. Pvt. Ltd., duly authenticated and registered by a Notary, the assessee firm became the deemed owner of the property u/s 2(47)(v) of the I.Tax Act and accordingly the gain 1 loss on sale of the property is assessable under the head " Capital Gain" in the hands of the assessee firm as the property was sold by the erstwhile owner for and on behalf of the assessee.*

*The unlawful decisions of both the AO and the Ld. CIT(A) were wholly unreasonable, uncalled for and bad in law.*

*7. For that in view of the facts and circumstances of the case, the Ld. CIT(A) was wholly wrong and unjustified in confirming the disallowance of the Long Term Capital Loss of Rs. 16,12,812/- on sale of shares on the alleged grounds that it was a book loss generated through circular transactions among the Group concerns by passing adjustment entries in the books of a/c without considering the facts that instead of loss there was rather actual profit of Rs. 50.29 lakhs in those transactions which was converted to loss of Rs. 16,12,812/- only because of indexation permitted u/s 48 of the I.T Act.*

*The unlawful decisions of both the AO and the Ld. CIT(A) were wholly unreasonable, uncalled for and bad in law.*

*8. For that in view of the facts and circumstances of the case, the Ld.CIT(A) was wholly wrong and unjustified in not considering and adjudicating the Additional Ground of Appeal highly objecting to the A.O's action in arbitrarily disallowing in the assessment the total expenses of Rs. 6,66,935/- claimed and debited to the P&L a/c under various heads without assigning any reason whatsoever for making the said disallowances. The actions of both the AO and the Ld. CIT(A) were wholly unreasonable, uncalled for and bad in law.*

*9. For that your petitioner craves the right to put additional grounds and/or to alter/amend/modify the present grounds at the time of hearing.*

Assessee has also filed additional ground, which reproduced hereunder:-

*Additional Ground:*
*"10. Assuming that the receipt of Rs.9,50,00,000/- is not a receipt representing consideration for sale of the impugned property, the said amount receive without consideration cannot be assumed as income u/s. 56(1) of the IT Act, rather, shall amount to gift and will be exempt u/s 47(iii) of the Income Tax Act, 1961."*

4. At the outset, it was observed that Ld AR of assessee has challenged the validity of the proceedings of assessment on the ground that notice u/s. 143(2) of the Act has not been issued by the Competent Authority.

5. Facts in brief are that assessee in the present case is a partnership firm and it claimed to have been filing its income tax return with DC Central Circle-XI for the last several years. The assessee for the year under consideration also filed its ITR on 17.01.2009 with DC Central Circle XI declaring income at "Nil". The copy of ITR is placed on page 2 of the paper book. Thereafter, the jurisdictional Ward of the assessee was transferred from DC Central Circle-XI to Ward-56(4) in terms of transfer order issued u/s 127 of the Act dated 06.4.2009 by Ld. CIT, Central-1, Kolkata vide order no. 1/2009-10 dated 06/04/2009. The copy of the transfer order is placed on page 28 & 29 of the paper book. In the meantime a notice u/s 143(2) was issued and served by ITO Ward-3(1) on dated 02.09.2009. The same was challenged by assessee on the ground that jurisdiction was not lying with the ITO Ward-3(1) and

therefore notice issued is not a valid notice. The copy of the notice issued under section 143(2) is placed on page 30 of the paper book and letter for challenging the notice is placed on page 31 of the paper book. Thereafter notice was issued u/s 142(1) of the Act dated 06.11.2009 by ITO Ward-56(4) having jurisdiction over the assessee which is placed on page 32-33 of the paper book. The assessee has also objected the legality of the notice issued under section 142(1) of the Act before the AO of ward 56(4) vide its letter dated 16-11-2009 which is placed on page 81 of the paper book on the ground that no valid notice u/s. 143(2) was issued by ITO Ward-56(4). However the assessment was completed by the ITO Ward-56(4) at total income of Rs. 14,63,85,655.00 after making certain addition/ disallowance.

6. Aggrieved, assessee preferred an appeal to ld. CIT(A) and raised objection on the validity of assessment proceedings. The Ld. CIT(A) in turn called for remand report from the AO which is placed on page 82 of the paper book and after considering the remand report Ld. CIT(A) has held as under:-

> *"3.3.1 Since the return was filed electronically, the ITO, ard-3(1), Kolkata had the access and jurisdiction over appellant's '***e-return***' as per AIS Operating System. The ITO, Ward 3(1), Kolkata therefore, processed the e-return and as per Action Plan guidelines the case was selected for scrutiny through CASS, and notice under section 143(2), dated 02/9/2009 was generated from AST module. Thereafter, appellant filed a letter to the ITO, Ward-3(1), on 01/10/2009, objecting its jurisdiction and also stating that its present jurisdiction was vested with the ITO, Ward-56(4) Kolkata in view of the order u/s. 127 of the Act, dated 06/04/2009. Accordingly, the case was transferred to the ITO, Ward-56(4), who in turn issued a notice u/s. 142(1) of the Act, on 06/11/2009, calling for certain relevant details for completion of the assessment. The appellant filed a letter, dated 16/11/2009, stating that the notice u/s. 142(1) was invalid as the AO himself had not issued notice u/s. 143(2) of the Act. However, without prejudice to that, the appellant had filed certain details as requisitioned by the AO. More details were filed in the subsequent hearings and the assessment was completed u/s. 143(3) of the Act.*
>
> *3.3.2. The issue in hand therefore, is to look into whether the ITO, Ward-3(1), Kolkata was having jurisdiction over processing of appellant's '***e-return***' as per AIS Operating System and generating of*

*notice u/s. 143(2) of the Act from AST module since the case was automatically selected for scrutiny under CASS as per Acton Plan guidelines. The answer is nothing but '***yes***'. The jurisdiction of appellant's return was with the ITO, ward-3(1) as per AST Operating System and he issued and served notice u/s. 143(2) of the Act on the appellant within the prescribed time limit, while having jurisdiction over the return. Therefore, the notice was legal and valid."*

Being aggrieved by the order of ld. CIT(A), the assessee came in second appeal before us.

7. The Ld. AR before us reiterated that the entire assessment made by the ITO, Ward- 56(4), u/s.l43(3) of the Act, for the relevant Assessment year, is illegal without jurisdiction and hence, bad in law. As it is a mandatory requirement for the issuance of notice u/s 143(2) of the Act for the A.Y. 2007-08 for making the scrutiny assessment, but it was never complied by the jurisdictional ITO Ward- 56(4) or his predecessor. In this regard, the attention is invited to the relevant provisions of section 143(2) of the Income-tax Act, 1961, which reads as under:

*"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 shall*

*(i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim;*
*(Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003)*

*(ii) notwithstanding anything contained in clause (1), if he 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, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return.*

> *(Provided that no notice under clause (ii) shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished). "*

On a perusal of the foregoing provision, it is evident that the provisions of this section are mandatory. If the AO has made an assessment under sub sec (1) which is objected to by the assessee, or whether or not an assessment has been made under sub sec (1), the AO considers it necessary or expedient to verify the correctness and completeness of the return, he is bound to serve a notice under this sub section on the assessee requiring him, on a specified date, either to attend at the AO's office or to produce or cause to be produced any evidence on which the assessee desire to rely in support of his return. The above view gets fortified by the decision of the Hon'ble Madras High Court in the case of COMMISSIONER OF INCOME-TAX v. GITSONS ENGINEERING CO. reported in [2015] 370 ITR 87, wherein it is held that, *"the word "shall" employed in section 143(2) of the Income tax Act, 1961, 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 is, therefore, clear 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."*

Again, at this juncture attention is invited to the definition of "Assessing Officer" as contained in section 2(7A) of the Income Tax Act, 1961, reproduced as under:

> *"Assessing officer" means 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 this 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 that section to exercise or perform all or any of the powers and functions conferred on, or assigned to, an Assessing Officer under this Act."*

As apparent from above, the Assessing Officer in relation to an assessee means the AO, who is entrusted with the relevant jurisdiction as per the directions issued in this regard. There is no denying fact that the jurisdiction of the appellant was with DCIT, Central Circle till 06/04/2009. Return of income was filed on 17/01/2009 with Central Circle AO. Again, there is no denying the fact that the jurisdiction was transferred to ITO, Ward- 56(4), pursuant to the transfer order dated 06/04/2009. This is also a fact that both the AO's have never issued any notice u/s.143(2) within the prescribed period of six months from the end of the financial year in which the return was filed. In the present case, the ITO, Ward 3(1), having no jurisdiction over the appellant issued the notice u/s.l43(2). It is relevant to note here that the Hon'ble jurisdictional High Court in the case of Income-Tax Officer and Others v. Santosh Kumar Dalmia, [1994] 208 ITR 337 (Cal), has held that, *"if the Income-tax Officer did not have any jurisdiction to issue the impugned notice, the writ court can always interfere irrespective of the fact whether the assessment pursuant to such notice has been made or not. If the notice issued under section 148 of the said Act, which is / the condition precedent for making reassessment is quashed, then the reassessment cannot stand and that is why the learned judge after quashing the notice under section 148 of the said Act also directed that if any assessment order has been passed pursuant to the said notice, the same would also be set aside and quashed....".*

7.1 Further, in the case of Pravin Balubhai Zala v.ITO (2010) 129 TTJ 373 (ITAT [Mum], the assessee filed its return on 31st Oct., 2005 vide acknowledgement receipt No.. 2302008916. It was explained that in response to notice under s. 142(1), the assessee vide letter dt. 4th Sept. 2007 filed acknowledgement receipt of the return. It was further explained that the assessee is assessed to tax and returns have been filed regularly in Ward 3(2), Thane. Therefore, the ITO-(HQ) CIB, Pune, has no jurisdiction to pass an assessment that too without complying with the necessary procedure laid down for completing assessment under s/u 143(3). In this case, Mumbai ITAT held as under:

*" 6. After hearing the rival submissions and perusing the relevant material on record, we find that the assessment order passed by the ITO-(HQ) CIB is null and void; therefore, liable to be quashed. The ITO-(HQ) CIB, Pune, is not an AO having jurisdiction over the assessee. The TO- (HQ) CIB has different functions in different capacity other than the functions of an ITO who is having jurisdiction over a particular assessee or other assessees fall under his jurisdiction .*

*9. In the present case, the ITO-(HQ) CIB, Pune, has no jurisdiction, even to issue notice under s. 142(1). Of course, he can call for information in respect to filing of return or in respect to PAN etc., of a particular assessee. After receiving the required information, if the ITO feels it necessary, can send the details to the ITO, who has the jurisdiction over a particular assessee. Therefore, in our considered view, issuance of notice under s. 142(1) itself is without jurisdiction. The ITO-(HQ) CIB, Pune, has completed the assessment under s. 144 even without issuing statutory notice under s. 143(2), which is mandatory for allowing opportunity of being heard to the assessee for completion of assessment under s. 143(3) or under s. 144. No such notice has been issued; therefore, for this reason also the assessment so completed by the ITO-(HQ) CIB, Pune, is null and void; therefore, liable to be quashed.*

*10. It is a matter of fact that the areas of jurisdiction of the AO are earmarked and as per area / earmarked, the assessees who belong to that area files their return with their respective ITOs. As no area has been earmarked to the ITO-(HQ) CIB, Pune, for completion of assessment, therefore, the ITO-(HQ) CIB, Pune, is not having jurisdiction to pass any assessment order. In view of these facts and circumstances, we hold that the order passed under s. 144 is bad in law and therefore, we quash the assessment.*
*11. Since we have allowed the legal issue in favour of the assessee, therefore, the issue on merit has become academic in nature which does not require any adjudication upon at this point of time. "*

Applying the above ratio, it is well established that the notice served as above is invalid and therefore, the assessment completed u/s.143(3) of the IT Act, is null and void and thus, liable to be quashed. In the instant case, the facts clearly show that no notice was served u/s 143(2) by both the AO's viz. DCIT, Central Circle & ITO, Ward- 56(4), having jurisdiction over the appellant. Therefore, in absence of valid notice u/s143(2), which is a mandatory requirement, the assessment order passed uls.143(3) of the Act dated

31/12/2009, is not as per law and is liable to be quashed. In support of the above, reliance is placed on the following judgments:

• Asst. CIT v. Hotel Blue Moon [2010] 321 ITR 362 (SC):

In the said case, the Hon 'ble Apex Court observed as under (page 369):

> *"Omission on the part of the assessing authority 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."*

• Commissioner of Income-Tax and Another v. Mukesh Kumar Agrawal [IN THE ALLAHABAD HIGH COURT] [2012] 345 ITR 29 (All): In this case, the Hon'ble Allahabad High Court held as under:

> *"The Tribunal returned the findings that the assessing authority did not have jurisdiction / to proceed further and make assessment since notice under section 143(2) of the Income- tax Act, 1961, was admittedly not issued. On appeal contending that the Commissioner (Appeals) and the Tribunal decided the issue in favour of the assessee relying upon a judgment of the Supreme Court but that judgment was not applicable to the facts of the present case as the judgment had not taken into consideration the provisions of section 292BB of the Act:*
> *Held, dismissing the appeal, that the very foundation of the jurisdiction of the Assessing Officer was on the issuance of the notice under section 143(2) of the Act."*

In the case of Romi vs. Commissioner of Income Tax [2014J 363 ITR 311 (Ker), the Hon'ble Kerala High Court has held that *"where no notice was issued under section 143(2) to assessee, assessment made under section 143(3) was to be set aside."*

• In the case of Commissioner of Income Tax vs. Salarpur Cold Storage Private Limited [2015J 228 Taxman 48 (Mag.) (Allahabad), the Hon'ble Allahabad High Court has held that, *"where there is a failure apparent to issue a notice under section 143(2) within prescribed period, it cannot be cured by taking recourse to section 292BB of the Income Tax Act 1961*".

More so, at this juncture, reference is invited to the decision of the Hon'ble Kolkata Tribunal in the , case of M/s. Nemchand Jain & Sons vs. DCIT, ITA

No.1874/Kol/2012, [order copy enclosed at page nos. 60-65 of the P/B] wherein it was held that, *"as the notice has been served beyond the specified period of twelve months, respectfully following the decision of the hon 'ble Gujarat High Court in the case of Maxima Systems Ltd. as also the decision of the Hon 'ble jurisdictional \ High Court of alcutta in the case of Amal Kumar Ghosh, the notice issued under section 143(2) 'Is held to be invalid and the consequential assessment also as invalid."*

7.2 Apart from the above, it would not be out of place to mention here that even the provisions of section 292BB will not come to the rescue of the AO for failure to serve valid notice u/s 143(2) of the Act. In this context, it is of utmost importance to look into the provisions of section 292BB of the Income Tax Act, 1961 the bare language of which reads as under:

> *"292BB. Notice deemed to be valid in certain circumstances> 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 o(such assessment or reassessment. "*

On a perusal of the foregoing provision it is evident that Section 292BB is a rule of evidence, which validates the notice in certain circumstances. The newly inserted 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 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 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. It is relevant to note here that the aforesaid amendment was introduced in the Income Tax Act 1961 by the Finance Act, 2008, with effect from 01st April, 2008. However, as the present case of the appellant relates to AY 2007-08, the aforesaid provision shall have no effect in the instant case of the appellant since it is applicable only from A. Y. 2008-09 onwards.

7.3 The aforesaid contention of the appellant is supported by the Hon 'ble Delhi decision in the case of KUBER TOBACCO PRODUCTS (P) LTD. v. COMMISSIONER OF INCOME TAX (2009) reported in 120 TTJ 577. In the said case, the Special Bench of Delhi Tribunal placing reliance on the decision of the Apex. Court in the case of KARIMTHARUVI TEA ESTATE LTD. v. STATE OF KERALA [1966]60 ITR 262 (SC) observed as under:

> *"If the present issue is considered in the light 0/ the above decision 0/ Hon'ble Supreme Court, then, it has to be held that s.292BB is applicable to asst. yr. 2008-09 and subsequent years. Therefore, answer to the second aspect of the question is that assessee is precluded from taking such objection/or and from asst. yr. 2008-09.*
> *45. Summarising our findings, we hold as follows:*
> *(i) Sec. 292BB even if it is procedural it is creating a new disability as it precludes the assessee from taking a plea which could be taken as a right, cannot be construed retrospectively as the same is made applicable by the statute w.e.j. 1st April, 2008.*
> *(ii) Sec. 292BB is applicable to the asst. yr. 2008-09 and subsequent assessment years. "*

Again, even otherwise also, in view of the objection filed by the appellant before ITO, Ward- 56(4), vide letter dated 16/11/2009 [copy of which is enclosed at page no. 81 of the P/b], against issuing of notice u/s 142(1) without valid service of notice u/s 143(2), the aforementioned provision will have no application in the case of the appellant in terms of the Proviso to sec.292BB, as stated above. Perusal of the said letter reveals that the appellant had challenged the issue of notice u/s.142(1) without the issue of notice u/s.143(2) by the AO, ITO, Ward- 56(4), having jurisdiction over the appellant vide transfer order dated 06/04/2009. Therefore, the appellant having objected in course of assessment proceeding, the Proviso to

sec.292BB gets attracted according to which the said section will have no application in the event of objection raised by the assessee before completion of assessment and accordingly, the said section will not apply in the case of the appellant. To sum up, it is concluded that even sec.292BB of the IT Act will not come to the rescue of the AO, to cure the defect of non-issuance of notice u/s 143(2), by the AO, having jurisdiction over the appellant. In addition to what has been submitted above, at this juncture, the appellant would like to invite attention to the relevant portions of the Remand Report [copy enclosed at page nos. 82-90 the P/b] wherein the AO has held as under:

> *"notice u/s.143(2) was duly served by the previous AO from whom the jurisdiction was succeeded by Ward -56(4), the notice u/s.142(l) was issued simultaneously on 06/11/2010. Keeping in mind the urgency of disposing the assessment in time the pending proceeding was reheard at the stage left by the previous AD who after ensuring the service of the computer generated notice through CASS, caused the proceedings to be taken by the officer vested with the new jurisdiction in terms of provision of sec. 129 of the IT Act, 1961. Hence, the notice u/s.143(2) issued by the ITD, Ward- 3(1) who was holding the PAN at the time of selection of case through CASS, was valid."*

In this regard, it is submitted that unlike as pointed out by the AO that notice u/s.143(2) was duly served by the previous AO from whom the jurisdiction was succeeded by Ward -56(4), in actual, notice u/s.143(2) was issued by ITO, Ward 3(1) having no jurisdiction over the appellant. It is a blatant fact that previous jurisdiction of the AO vested with DCIT, CC-XI, Kolkata and was subsequently transferred to ITO, Ward 56(4). The transfer order dated 06/04/2009 passed u/s 127 of the Act [copy enclosed at page no. 28-29 of the P/b], in itself evidences the above fact. Again, the contention of the AO that the notice u/s 143(2) has been validly issued by ITO, Ward- 3(1) who was holding the PAN at the time of selection of case through CASS, is also having no basis. This is because it is clear from the above-referred transfer order that the jurisdiction of the appellant never vested with ITO, Ward 3(1), even before the order of transfer or at any time thereafter. There is no doubt that the jurisdiction of the appellant as per PAN was with DCIT, CC-XI, Kolkata, till the point of transfer to ITO, Ward -56(4). Therefore, on what basis the AO claimed

that previous jurisdiction of the appellant vested with ITO, Ward - 3(1), is known best to the AO himself, especially in view of the fact that no reply was given by ITO, Ward - 3(1) when the appellant at the very outset challenged the issue of notice u/s 143(2) by the AO, ITO, Ward - 3(1), vide letter dated 01/10/2009. Further, it is relevant to note here that CASS, on which reliance has been placed by the AO in support of the issue of notice u/s.l43(2), has not been authorized under any provisions of the Income Tax Act to determine the jurisdiction in respect of any assessee nor it has been authorized under the IT Act to direct anybody, other than the AO having proper jurisdiction, to issue notice u/s.l43(2). Besides, at this juncture, attention is invited to the fact that as per jurisdiction manual, copy of relevant pages of which is enclosed at page nos. 91-94 of the P/b, jurisdiction of ITO, Ward - 3(1) vested with corporate assesses only, whereas it is a clear fact that the appellant is a partnership firm and not a body corporate. Therefore, even otherwise also, ITO, Ward - 3(1) can have no jurisdiction over the appellant being a partnership firm. More so, in view of the fact that soon after the issue of notice u/s.143(2) by the AO, ITO, Ward - 3(1), the appellant filed an objection vide letter dated 01/10/2009, wherein the appellant specifically pointed out that presently it is being assessed by ITO, Ward -56(4), pursuant to the transfer order passed by the CIT (C ) -I, Kolkata and that the AO, ITO, Ward - 3(1), is having no jurisdiction over the appellant to issue the notice u/s143(2) and that the appellant received no reply in this regard before the assessment was completed u/s.143(3) of the Act, it clearly follows that such failure results in breach of principles of natural justice, which is a serious flaw, rendering the order a nullity. Reliance in this connection is placed on the decision of the Hon'ble Apex Court in the case of Andaman Timber Industries vs. CCE, CA No. 4228 of 2006, order copy enclosed at page nos. 95-101 of the P/b. In the said case, the Hon'ble Supreme Court held as under:

> *"Not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of*

*natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross- examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them."*

7.4 Finally, when the Ld.CIT itself in his appellate order dated 07/0912011 has acknowledged the fact that at the time of filing of return, the DCIT, CC-XI, Kolkata, was the jurisdictional Assessing Officer and that subsequent to the transfer order passed u/s.127 of the Act by the Ld.CIT, Central-I, Kolkata, on 06/04/2009, the jurisdiction of the appellant was transferred to ITO, Ward - 56(4), there remains no iota of doubt that indeed ITO, Ward - 3(1) was not the previous AO of the appellant, as claimed by the Department. Relevant portion of the order, copy of which is enclosed at page nos. 102-128 of the P/b, is reproduced hereunder:

*"It appears from the record that the appellant firm had filed its return belatedly u/s.139(4) of the Act, on 1710112009. The return was filed electronically with digital signature. At the time of filing return, the DCIT, Central Circle- XI, Kolkata was the jurisdictional Assessing Officer. Subsequently, the Ld.CIT, Central-I, Kolkata passed an order uls.127 of the Act on 0610412009, transferring the jurisdiction of the appellant to ITO, Ward- 56(4), Kolkata."*

As such, taking into consideration all the above, it is concluded that notice issued u/s 143(2) by the non-jurisdictional AO, ITO, Ward - 3(1), being illegal, invalid and bad in law, the assessment framed u/s.143(3) of the Act becomes null and void and the same is not a curable defect u/s 292BB of the Income Tax Act, 1961.

On the other hand, the Ld DR has brought Instruction 137 issued by the Director of Income Tax (Systems) ARA Centre, Ground Floor, E-2, Jhandewalan Extension, New Delhi-110055 F.No.DIT(S)-2/CASS/2014-15/986 dated 28.08.2015 which states as under:-

> *"2….*
> *3. … .*
> *4. ….*
> *5. It has been noticed that sometimes the returns are received by Assessing Officer who is not a jurisdictional Assessing Officer as per PAN. The returns receiving Assessing Officer in such case immediately transfer the return to PAN-Assessing Officer, as the notice u/s. 143(2) can only be generated by PAN-Assessing Officer under CASS. At the time of CASS run, the data of returns selected in CASS, which are filling in category of mismatch of PAN AO Code and Bundle AO code will be auto-transferred to PAN Assessing Officer though a scheduler.*
>
> *6. Notices u/s. 143(2) will be generated from the system by the Assessing Officer having PAN in his/her jurisdiction. After this, Assessing Officer is required to enter service date of notice in AST (As per the procedure given in the user manual of scrutiny assessment)."*

The ld. DR vehemently supported the order of the lower authorities.

In rejoinder the Ld AR challenged the Instruction issued by the INCOME TAX Authority by stating that the Instructions are binding to the Officers of Income Tax and for internal purpose only. This Instruction cannot overrule the provision of Income Tax Act. He further submitted that assessee in the present case is a partnership firm and has never filed any income-tax return to ITO Ward-3(1). Further submitted that ITO Ward-3(1) is a Corporate Ward where only returns of corporate can be filed and processed. So in support of its claim Ld. AR submitted the list of Words having jurisdiction over different assessee which are placed on pages 91 to 94 of the Paper Book.

8. We have heard the rival parties and perused the materials available on record. From the foregoing discussion, we find that assessee has been filing its income tax return with DCIT Circle-XI in the earlier years including for the year under consideration. Thereafter the case was transferred to ITO Ward-

56(4) by the order of Commissioner of Income Tax passed u/s 127 of the Act. However for the year under consideration a notice under section 143(2) of the Act was issued by the ITO of ward 3(1) for scrutiny assessment. The assessee challenged the validity of the notice on the ground that the jurisdiction on the assessee vests with the ITO of ward 56(4). On bringing this anomaly to the notice of the income tax authorities, the lower authorities rejected the same and framed the assessment u/s 143(3) of the Act by observing that the e-return was filed and the case was selected for selected on the basis of CASS system. Now the question before us arises so as to whether the non-issue of notice under section 143(2) of the Act by the competent authority shall make the assessment invalid. At this juncture, we want to produce the relevant portion 143(2) of the Act.

*"[Assessment*
*143.[(1)…..*

*[(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 shall,-*

*(i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claimed of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:*

*[**Provided** that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003;]*

*(ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessee has not under stated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the as may rely in support of the return:*

*[**Provided** that no notice under clause (ii) shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished.]]*

From a plain reading, we find that it is mandatory for the Assessing Officer having jurisdiction over the assessee to serve the notice on assessee. So from the above provision, we find that it is mandatory for Competent Authority before making the scrutiny assessment to issue notice u/s. 143(2) of the Act. In the instant case, we find that notice has not been issued by the Competent Authority as required in the Statute. In this connection, we are putting our reliance in the judgment of Hon'ble High Court of Delhi in the case of Principal Commissioner of Income Tax vs. Silver Line (2016) 283 CTR 148 (Del), wherein the extract portion reproduced below:-

> *"With the legal position being abundantly clear that a reassessment order cannot be passed without compliance with the mandatory requirement of notice being issued by the AO to the Assessee under Section 143(2) of the Act, the ITAT was in the present case right in concluding that the reassessment orders in question were legally unsustainable.*
>
> *In view of the settled legal position on all the issues raised by the Revenue in these appeals, HIGH Court was of the view that no substantial question of law arises for determination. Revenue's Appeal was thus dismissed.*
>
> *A reassessment order cannot be passed without compliance with mandatory requirement of notice being issued by AO to assessee u/s 143(2).*

In support of the above, reliance is placed on the judgments of Hon'ble Supreme Court in the case of ACIT v. Hotel Blue Moon (2010) 321 ITR 362 (SC) in the said case, the Hon'ble Supreme Court observed as under (page 369)

> *"Omission on the part of the assessing authority 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 the Hon'ble Allahabad High Court in the case of *CIT And Another vs. Mukesh Kumar Agrawal* (2012) 345 ITR 29 (All), in this case, the Hon'ble Allahabad High Court held as under *:*

> *"The Tribunal returned the findings that the assessing authority did not have jurisdiction to proceed further and make assessment since notice under section 143(2) of the Income-tax Act, 1961, was admittedly not issued. On appeal contending that the Commissioner (Appeals) and the*

*Tribunal decided the issue in favour of the assessee relying upon a judgment of the Hon'ble Supreme Court but that judgment was not applicable to the facts of the present case as the judgment had not taken into consideration the provisions of section 292BB of the Act:*

*Held, dismissing the appeal, that the very foundation of the jurisdiction of the Assessing Officer was on the issuance of the notice under section 143(2) of the Act."*

Again Hon'ble Allahabad High Court in the case of *CIT vs. Salarpur Cold Storage Private Limited* (2015) 228 taxmann 48 (Mag.) (All), the Hon'ble Allahabad High Court has held that:-

*"Where there is a failure apparent to issue a notice under section 143(2) within prescribed period, it cannot be cured by taking recourse to section 292BB of the Income Tax Act, 1961."*

Further again Hon'ble Kerala High Court in the case of *Romi vs. CIT* (2014) 363 ITR 311 (Ker), the Hon'ble Kerala High Court has held that

*"Where no notice as issued under section 143(2) to assessee, assessment made under section 143(3) was to be set aside."*

Respectfully following the aforesaid precedents and various case laws, we find that statutory notice as required to Sec. 143(2) of the Act was to be issued by the Competent Authority and within the time. The Tax Administrators cannot confer jurisdiction on an officer which the statute itself does not confer. As per the provisions of the statute the power was vested with the ward of DC Circle XI and later transferred to Ward 56(4). The AO of Ward 3(1) was not empowered to issue the notice under section 143(2) of the Act. However the notice u/s 143(2) was issued by the AO of Ward 3(1). The AO of Ward 3(1) was having no jurisdiction over the assessee. We also find that the ld. DR also failed to bring anything contrary to the arguments advanced by the ld. AR with regard to the jurisdiction of the AO for the issue of notice. The provisions of section 292BB of the Act shall also not be applicable in the instant case as the assessee objected on the validity of the notice issued under section 143(2) of the Act. The AO has been defined u/s 2(7A) of the Act who is having

jurisdiction over the assessee by virtue of the provisions of section 120 of the Act. In the instant case, the ld. CIT(A) has clearly observed the fact that at the time of return filing, the DCIT Central Circle XI was the jurisdictional Assessing Officer and on a later date the case was transferred to Ward 56(4) in pursuance of the order passed under section 127 of the Act. The findings of the ld. CIT(A) is reproduced below:-

> "*3.3. The submission of the Ld. AR of the appellant have been considered in the light of materials brought on record and the case laws referred to. It appears form the record that the appellant firm had filed its return belatedly u/s. 139(4) of the Act, on 17/01/2009. The return was filed electronically with digital signature. At the time of filing return, the DCIT, Central Circle-XI, Kolkata was the jurisdictional Assessing Officer. Subsequently, the Ld. CIT, Crentral-1, Kolkata passed an order u/s. 127 of the Act on 06/04/2009., transferring the jurisdiction of the appellant to ITO, Ward-54(4), Kolkata."*

From the above facts, it is clear that the jurisdiction was vested with the AO of DCIT Circle XI and thereafter it was transferred to Ward 56(4) in pursuance of the order passed under section 127 of the Act. In the instant case the assessment notice has been issued by the ITO Ward 3(1) having no jurisdiction on the assessee. The Income Tax Authorities can exercise their powers within the provisions of the Act. The Income Tax Authorities cannot confer jurisdiction on an officer which the statute itself does not confer. Therefore, in view of above, we have no hesitation to reverse the orders of Authorities Below on this legal point. As the legal issue has been decided in favour of assessee, we are not adjudicating other grounds of appeal of the assessee. AO is directed accordingly.

9. Since assessee's principal issue regarding legal point has been decided in favour of assessee then remaining issues of assessee's appeal do not require separate adjudication.

10. In the result, assessee's appeal is allowed.

**Coming to Revenue's appeal in ITA No.1621/Kol/2011**.

11. The sole issue raised by Revenue in this ground is that Ld. CIT(A) erred in allowing the unexplained investments of assessee.

12. We have already allowed assessee appeal on the legal ground on account of non-issue of notice under section 143(2) of the Act. Hence, Revenue's issue does not require any adjudication.

13. In the result, Revenue's appeal is dismissed.

14. **In combined result, assessee's appeal stands allowed and that of Revenue is dismissed as infructuous.**

Order pronounced in open court on 20/07/2016

| | |
|---|---|
| Sd/- | Sd/- |
| (S.S.Viswanethra Ravi) | (Waseem Ahmed) |
| Judicial Member | Accountant Member |

*Dkp
दिनांकः- 20/07/2016 कोलकाता / Kolkata

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. आवेदक/Assessee-M/s Nopany & Sons, Chandra Kunj, 4th Fl, 3 Pretoria St, Kol-71
2. राजस्व/Revenue-ITO Ward-56(4), 3 Govt. Place, 2nd Floor, Kolkata-01
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता