IN THE INCOME TAX APPELLATE TRIBUNAL,'A' BENCH KOLKATA

Before : **Shri M.Balaganesh, Accountant Member and**
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No. 181/Kol/2013 A.Y 2008-09

D.C.I.T, Cir-53, Kolkata	**Vs.**	**M/s. M.K Enterprise** PAN: AAHFM-4467G
[Appellant]		[Respondent]

ITA No. 426/Kol/2013 A.Y 2008-09

M/s. M.K Enterprise	**Vs.**	**A.C.I.T, Cir-53, Kolkata**
[Appellant]		[Respondent]

Appellant Revenue by	:	Shri Debasish Lahiri, JCIT, Ld.DR
Respondent Assessee by	:	S/Shri Sugata Shankar Roy & Pradyut Kr. Mondal, Advocate, Ld.ARs
Date of Hearing	:	18-10-2016
Date of Pronouncement	:	30-11-2016

ORDER

Shri S.S.Viswanethra Ravi, JM:

Both these appeals filed by the Revenue and Assessee are arising out of common order dated 26-11-2012 passed by the Commissioner of Income Tax(Appeals), XXXII, Kolkata for the assessment year 2008-09.

2. First we shall take up ITA No. 181/Kol/2013 for the A.Y 2008-09 by the Revenue

ITA No. 181/Kol/2013 A.Y 2008-09-Tax Effect

3. It is seen from the perusal of the records that the total tax effect on the additions disputed before us is admittedly below the tax effect limit prescribed by CBDT vide Circular No. 21/2015 dated 10.12.2015 for preferring appeal(s) before Tribunal by the revenue. It will be pertinent to

reproduce the relevant portion of the said Circular No. 21 / 2015 dated 10.12.2015 :-

3. Henceforth, appeals / SLPs shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder:-

S.No.	Appeals in Income Tax matters	Monetary Limit (in Rs)
1	Before Appellate Tribunal	10,00,000/-
2	Before High Court	20,00,000/-
3	Before Supreme Court	25,00,000/-

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case.

4. For this purpose, "tax effect" means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as 'disputed issues'). However, the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

5. The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year , appeal, can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified in para 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3. In other words, henceforth, appeals can be filed only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one assessment year, appeal shall be filed in respect of all such assessment years even if the 'tax effect' is less than the prescribed monetary limits in any of the year(s), if it is decided to file appeal in respect of the year(s) in which 'tax effect' exceeds the monetary limit prescribed. In case where a composite order / judgement involves more than one assessee, each assessee shall be dealt with separately.

8. Adverse judgements relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect:

(a) Where the Constitutional Validity of the provisions of an Act or Rule are under challenge, or
(b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires, or
(c) Where Revenue Audit Objection in the case has been accepted by the Department, or
(d) Where the addition relates to undisclosed foreign assets / bank accounts.

10. This instruction will apply retrospectively to pending appeals and appeals to be filed henceforth in High Courts/ Tribunals. Pending appeals below the specified tax limits in para 3 above may be withdrawn / not pressed. Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time when such appeal was filed.

4. We find that intention behind the Circular No.21/2015 dated 10-12-2015 needs to be understood in the following perspective:-

5. On perusal of the Circular No. 21/2015 dated 10.12.2015 and the materials available on record, we could not see whether the impugned case falls under any of the exceptions contemplated in the said Circular. We also find that the Circular makes it very clear that the revised monetary limits shall apply retrospectively to pending appeals also. We find that the Circular is binding on the tax authorities. This position has been confirmed by the ***Hon'ble Apex Court in the case of Commissioner of Customs vs Indian Oil Corporation Ltd reported in 267 ITR 272 (SC)*** wherein their Lordships examined the earlier decisions of the Apex Court with regard to binding nature of the Circulars and laid down that when a Circular issued by the Board remains in operation then the revenue is bound by it and cannot be allowed to plead that it is not valid or that it is contrary to the terms of the statute. Hence we hold that the appeal(s) of the revenue deserve to be dismissed in terms of low tax effect vide Circular No.21 / 2015 dated 10.12.2015. Accordingly, this being a low tax effect case, we dismiss the appeal of the revenue in limine, as unadmitted, without going into the merits of the case. The appeal of the revenue is dismissed.

6. This appeal of the revenue is dismissed.

7. Now, we shall take up ITA No. 426/Kol/2013 for the A.Y 2008-09 by the assessee.

ITA No. 426/Kol/2013 A.Y 2008-09

8. In this appeal the assessee has raised as many as eleven grounds of appeal, but during the course of hearing before us the Ld.AR of the assessee

argued only to the extent that the CIT-A erred in holding the notice issued u/s. 143(2) of the Act was properly not served on the assessee. Therefore, with the consent of both the parties, we dispose off such issue on merits.

9. Brief facts of the case are that the assessee is a firm and engaged in the business of organizing of fairs and touring jobs. The assessee conducts its business under the name and style M/s. M.K Enterprise. The assessee filed its return of income through online declaring total income at Rs.9,89,035/-. Under scrutiny notices u/s 143(2) and 142(1) of the Act were issued. According to AO there was no compliance from the assessee. Thereafter, the AO initiated penalty proceedings u/s. 271(1)(b) of the Act for non compliance of the procedure as contemplated u/s. 143(2) and 142(1) of the Act. According to AO, Shri Sanjib Sarkar, stated to be one of the partners appeared on 10-12-2010 for the first time and produced before him the auditor's report , P & L account and balance sheet. The AO further observed that inspite of affording several opportunities to the assessee, the assessee could not produce the books of account and other evidences in support of expenses as claimed by it. Considering the same, the AO made disallowances/additions u/s. 40(a)(ia) for violation of section 194I and 194C and other disallowances towards claim on payment of remuneration to partners and for non production of details of transactions in respect of sale of assets of Rs.41,07,070/- as against Rs.9,89,035/- as returned by the assessee and to that effect an order u/s. 144 of the Act passed on 30-12-2010.

10. Aggrieved by such order of the AO, the assessee preferred an appeal before the CIT-A. The CIT-A modified his order and reduced the disallowances as made by the AO u/s. 40(a)(ia) of the Act and confirmed the additions made on account of claim of remuneration and interest paid to partners and claim of loss on sale of assets.

11. Before the CIT-A the assessee raised a ground questioning the validity of notice issued u/s. 143(2) of the Act was not properly served on the assessee. The CIT-A observed that the assessee has raised this ground for the first time before him and could not produce any evidence to show that the service of said notice was not properly served on the assessee and held that the assessee is not entitled to raise any objection on the ground of improper/belated service of notice. Relevant portion of which is reproduced herein below:-

> *10. Ground No. 8 states that notice under section 143(2) was not served to the partner or authorized person within the specified date as provided in law. When the matter came up for hearing, it was stated that the notice under section 143(2) was served on 30.9.2009 purportedly upon some staff person. It was stated that, service was not to any authorized person.*
>
> *10.1. As can be seen from the assessment order, the partner / authorized representative of appellant appeared on some of the dates before the assessing officer and partial compliance to the notices issued under section 142(1) and 143(2) was made. Therefore, it is clear that notice under section 143(2) was, at some point of time, received by the appellant who also cooperated (partially) in the assessment proceedings. The appellant has not brought on record any material to suggest that it had raised issue of improper service of notice before the assessing officer. In this regard, it may be noted that Finance act 2008 has introduced section 292B w.e.f 01.04.2008 which reads as under:-*
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> *Where an assessee has appeared in any proceedings or cooperated in any enquiry relating to an assessment or re-assessment, it shall be deemed that any notice under any provisions 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 proceedings or inquiry under this act that the notice was-*
>
> *(a) not served upon; or*
> *(b) not served upon on time; or*
> *(c) served upon him in an improper manner*
> *Provided. nothing contained in this section- shall apply where the assessee has raised such objection before completion of assessment pr re-assessment",*
>
> *As stated earlier, the appellant has not brought any material on record to establish that it _ had raised any objection regarding delay in service- or improper service of notice under section 143(2) before completion of assessment. It had also participated in the assessment proceedings. Therefore at this stage it is not entitled to raise any objection regarding validity of assessment- on ground of improper/belated service of notice. The ground is accordingly rejected."*

12. Before us the Ld.AR of the assessee filed three sets of paper books, two of such paper books specifically on the direction of the Bench containing copies of pay register of the assessee for the FY's 2007 to 09 and copies of Debit Voucher of salary for the FY's 2007 to 09 and another with the details of Short Synopsis, order sheet, notice u/s. 143(2) etc.. from Page No's 1 to 220. He submits that the notice issued u/s. 143(2) of the Act was not properly served on the assessee and in absence such service which is mandatorily as required to be served u/s. 143(2) of the Act, the assessment is to be declared as invalid. He referred page-1 to 3 of the paper book, which is an order sheet and stated that the AO claimed to have issued notice u/s. 143(2) for fixing the date of hearing on 23-11-09 and argued that such notice was served on a person by name Sh. M. Sankar who is neither authorized nor concerned person to receive on behalf of assesse and also referred to the copies of pay register and debit voucher of salary details for the FY's 2007-09 as provided in paper books, wherein he drew our attention that no such person by that name was ever worked or employed with the assessee and the said notice was not properly served on assessee as contemplated and required u/s. 143(2) of the Act and urged to quash the assessment order and as confirmed by the CIT-A. The Ld. AR further relied on the decision of the Hon'ble Gujarat High Court in the case of *DCIT v Mahi Valley Hotels* and Resorts [2006] 287 ITR 360 (Guj).

13. The Ld.DR submits that the assessee participated in the assessment proceedings and did not raise such ground questioning the validity of notice issued u/s. 143(2) before the AO. The assessee raised such ground before the CIT-A for the first time. He further submits that with regard to filing of additional evidence as filed before us for the first time and these documents were not before the AO and the CIT-A. Therefore, he argued that the issue on hand may be sent to the file of the AO for verification of such documents as filed before us.

14. Heard rival submissions and perused the material available on record. We find that the ld.AR of the assessee filed before us two sets of paper books vide direction dated 06-10-2015. We find that the main issue involves questioning the validity of notice issued u/s. 143(2) of the Act was not properly served on the assessee. The submissions of the Ld.DR was to remand the issue to the AO for verification of the documents as filed before us by way of 2 sets of paper book as discussed above. We find that the ld.AR of the assessee filed pay register for its employees from April 2008 to March 2009. On perusal of the same, we find that no such person by name Shri M.Shankar, who said to have been received said notice issued u/s. 143(2) of the Act. The pay register as in paper books shows that the assessee has more or less seven employees for the said FY's except for the months of Nov '07 to March, 2008 the assessee has nine employees, except such minor changes found no change in strength of employees of assesse FY's 2007-09. We find from the order sheet of AO, that he recorded the issuance of notice issued u/s. 143(2) on 14-09-2009 which is at page no-4 of the paper book fixing the hearing on 23-11-09 and it was served admittedly on a person by name Shri M.Sankar on 30-09-2009 who is neither an employee nor concerned person representing the Assessee as evidently proved by the evidence as provided in paper books in the form of pay registers for FY's 2007 to 2009. The contention of the Ld.AR was that Shri M.Sankar is not a concerned person representing the assessee to receive such notice and the notice was served on improper person. We also find from the assessment order that Shri Sanjib Sarkar being one of the partners appeared on 10-12-2010 before the AO for first time and the order sheet at page no-1 of paper book supports the same. We further find that the AO recorded the issuance of notice u/s. 142(1) on 19-7-2010 for fixing the hearing on 02-08-2010 and thereafter, according to assessment order, probably, after 26-08-2010 another notice for initiation of penalty proceedings u/s. 271(1)(b)of the Act was issued. Therefore, it goes to show that a person claiming to be representing the assessee as partner appeared before the AO for the first time on 10-12-2010 in response to notice issued u/s. 271(1)(b) of the Act

and it concluded that the service of notice u/sec 143(2) on 30-09-09 and issuance of notice thereafter u/sec 142(1) of the Act was not in the knowledge of the assessee and as rightly contended by the Ld.AR notice u/sec 143(2) of the Act was not properly served on the assessee. We also find that there is a gap of one year between issuance of notice u/s. 143(2) and appearance of partner representing Assessee before the AO. Therefore, the order sheets of assessment record as filed by the assessee by way of paper book suggests that the assessee was not appeared before the AO in response to notice issued u/s. 143(2) of the Act as it was not in the knowledge of Assessee. Therefore, we hold that the statutory notice issued u/s. 143(2) of the Act was not properly served on the assessee, which is mandatory as per section 143(2) of the Act.

15. With regard to the decision as relied on by the ld.AR of the assessee before us in the case of *DCIT v Mahi Valley Hotels* and Resorts *supra,* we find the facts and circumstances of the case is different from the present case. In that case the contention of the Revenue was that the plea of notice u/sec 143(2) was invalid as it was issued beyond statutory period was raised for the first time by the assessee having participated in the assessment proceedings. The Hon'ble Gujarat High Court held that the CIT-A has the same power as that of AO and such powers is co-existence with that of AO and it is a legal issue can be raised at any stage and held that the notice issued beyond the statutory period of limitation is invalid. Thus, it is clear that the Hon'ble High Court was pleases to decide an issue, whether the statutory notice issued during the limitation period as prescribed under the provision to sub section (2) of Section 143 of the Act or not. The relevant portion is reproduced herein below:

> *"The scheme of the Income-tax Act, 1961 broadly permits assessment in three formats ; (i) acceptance of the returned income ; (ii) acceptance of the returned income subject to permissible adjustments under section 143(1) of the Income-tax Act, 1961, by issuance of intimation ; and (iii) scrutiny assessment under section 143(3) of the Act. This scheme was originally introduced by the Direct Tax Laws (Amendment) Act, 1989, with effect from April 1, 1989. The issuance of notice under section 143(2) of the Act is in the course of assessment in the third mode, namely, scrutiny assessment. Section 143(2) of the Act requires that where a return has been made by an assessee, if the Assessing Officer considers it necessary or expedient to ensure that the assessee has not understated the income, or has not computed excessive loss, or has not underpaid tax in any manner, he shall serve on the assessee a notice requiring him either to*

attend his office, or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return. Therefore, the language of the main provision requires the Assessing Officer to prima facie arrive at satisfaction of existence of any one of the three conditions. Under the proviso to the said sub-section no notice is to be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished. On a plain reading of the language in which the proviso is couched it is apparent that the limitation prescribed therein is mandatory, the format of the provision being in negative terms. The position in law is well-settled that f the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, such requirements are, in all cases absolute and neglect to attend to such requirement will invalidate the whole proceeding. The departmental authorities are bound by the circulars issued by the Central Board of Direct Taxes. Circular No. 5491 dated October 31, 1989, and Circular No. 6212 dated December 19, 1991, are explanatory. They give contemporaneous exposition of the legal position. Even otherwise, on a plain reading of the section and the proviso it is more than abundantly clear that the proviso prescribes a mandatory period of limitation in the light of the scheme of assessment wherein the majority of returns are required to be accepted without scrutiny and only certain returns are taken up for scrutiny. Hence when an assessment is framed under section 143(3) of the Act by issuing statutory notice beyond the prescribed time limit, the assessment would be bad in law and has to be quashed."

16. In the present case the contention of the assessee was that the notice was not properly served on the assesse and therefore, the facts and circumstances in aforementioned case are different from the present case. In view of above detailed discussion, we find that the notice as prescribed under sub section (2) of Section 143 of the Act was not properly served on the assessee. Thus, the assessment order dt: 30-12-2010 made u/sec 144 of the Act and as confirmed by the CIT-A is held to be invalid and it is quashed.

17. In the result, the appeal of the Revenue in ITA No. 181/Kol/2013 for the AY 2008-09 is dismissed and appeal of the Assessee in ITA No.426/Kol/2013 for the AY 2008-09 is allowed.

Order pronounced in the open Court 30th November,2016

Sd/-	Sd/-
M. Balaganesh	**S.S.Viswanethra Ravi**
Accountant Member	**Judicial Member**

Dated 30 -11-2016

Copy of the order forwarded to:

1. Appellant/Assessee: M/s. M.K Enterprise, Rishi Bankim Nagar, Baruipur, Kolkata-700 144.
2 Respondent/Department : Dy. Commissioner of Income-tax, Cir-53/Asstt. Commissioner of Income Tax, Cir-53, Aaykar Bhawan (Dakshin) 2 Gariahat Road, South, Kolkata-700068.
3. CIT,
4. CIT(A),
5. DR, Kolkata Benches, Kolkata

****PP/SPS** [True Copy]

By order, Asstt Registrar