A.F.R.

Chief Justice's Court

Case :- INCOME TAX APPEAL No. - 24 of 2014

Appellant :- Commissioner Of Income Tax-II Lucknow
Respondent :- M/S Salarpur Cold Storage (Pvt.) Ltd. Barabanki
Counsel for Appellant :- Manish Misra

Hon'ble Dr. Dhananjaya Yeshwant Chandrachud,Chief Justice
Hon'ble Devendra Kumar Upadhyaya,J.

The appeal by the Revenue under Section 260A of the Income Tax Act, 1961[1] arises from a decision of the Income Tax Appellate Tribunal[2] dated 28 February 2014. The assessment year to which the appeal relates is AY 2008-09. In support of the appeal, the Revenue has pressed the following questions of law at the hearing of the appeal :-

> **"**1) Whether the Income Tax Appellate Tribunal was justified under the facts and circumstances of the case in confirming the order of CIT (A) ignoring the effect of Section 292 BB specially when the assessee had cooperated with the proceedings.
>
> 2) Whether the Income Tax Appellate Tribunal was justified under the facts and circumstances of the case in confirming the order of CIT (A) that annulled the assessment order passed U/s 143(3) holding it void-ab-initio.
>
> 3) Whether the Income Tax Appellate Tribunal was justified under the facts and circumstances of the case in setting aside the assessment order and confirming the CIT

1. the Act
2. Tribunal

(A) order without considering that where no objection regarding valid service has been taken before the completion of assessment, provisions of sec. 292 BB will be applicable or not; to the assessments on or after 01.04.2008.**"**

The assessee filed its return of income for AY 2008-09 on 30 September 2008. The Assessing Officer issued a notice under Section 143(2) of the Act on 6 October 2009. The assessment proceedings were completed and an order of assessment was passed under Section 143(3) of the Act on 24 December 2010. In appeal, the Commissioner of Income Tax (Appeals) – II, Lucknow held that the notice under Section 143(2) of the Act was not issued within the period stipulated in that provision. Hence, the question of its service either within or beyond the time permitted or its improper service within the meaning of Section 292 BB of the Act would not according to the CIT (A) arise. In the view of the CIT (A), Section 292 BB of the Act operated to debar any challenge by the assessee, who appears before the Assessing Officer with respect to non-service, service within time or improper service of a notice, if the assessee had not raised such an objection before the completion of assessment or reassessment proceedings. In this view, it was held that Section 292 BB of the Act would not save a situation where the notice itself had not been issued before the expiry of the period of limitation since it could only cure a defect of service within the stipulated period.

This view of the CIT (A) has been confirmed in appeal by the

Tribunal. The Tribunal observed that time has been specified for the issuance of a notice under Section 143(2) of the Act, for assuming jurisdiction over the assessee to complete the assessment. The Tribunal held that a notice under Section 143(2) of the Act is of a statutory nature through which the Assessing Officer assumes jurisdiction over the assessee to frame an assessment under Section 143(3) of the Act. If the jurisdiction was not properly assumed by the Assessing Officer by issuing a valid notice under Section 143(2) of the Act, the assessment so framed would be without a valid assumption of jurisdiction and would be invalid.

In the present case, it was noted by the Tribunal that the Assessing Officer had recorded in the order of assessment that a notice under Section 143 (2) of the Act was issued on 6 October 2009 much beyond the period prescribed under Section 143(2) of the Act which was till 30 September 2009. Since no notice under Section 143(2) of the Act was issued within the prescribed period, the Tribunal held that the assessment was not valid. The appeal by the Revenue was consequently dismissed.

The submission which was urged on behalf of the Revenue is that the CIT (A) as well as the Tribunal have failed to consider the provisions of Section 292 BB of the Act. That is the submission which falls for consideration in these proceedings.

Section 143(2) of the Act provides as follows :-

> **"**(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 (i), 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."

Under clause (ii) of sub-section (2) of Section 143, the Assessing Officer is required to serve, on the assessee, a notice requiring him to attend the office or to produce evidence on which the assessee may rely in support of the return, 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 under-paid the tax in any manner. Under the proviso to clause (ii), it has been specified 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. Service on the assessee of a notice within the period prescribed by the proviso presupposes the issuance of a notice for, it is only when a notice is issued, that it can be served. Thereafter, the provisions of sub-section (3) of Section 143 of the Act stipulate that on the date specified in the notice issued under clause (ii) of sub-section (2) of Section 143 of the Act, the Assessing Officer shall, after hearing the evidence as the assessee may produce and considering such other evidence as he may require and upon taking into account all relevant material, by an order in writing make an assessment of the total income or loss of the assessee. The jurisdiction of the Assessing Officer to make an assessment under Section 143(3)(ii) of the Act is premised on the issuance of a notice under clause (ii) of Section 143(2) of the Act. The proviso to clause (ii) of sub-

section (2) of Section 143 of the Act stipulates that a notice must be served on the assessee no later than the expiry of six months from the end of the financial year in which the return has been furnished. If a notice is not even issued within the period of six months from the end of the financial year in which the return is furnished, there would be no occasion to serve it upon the assessee within the stipulated period.

In the present case, the facts which are not in dispute are that the assessee had filed its return of income on 30 September 2008 for AY 2008-09. The notice under Section 143 (2) of the Act ought to have been issued by 30 September 2009 which was the date of the expiry of the period of six months from the end of the financial year in which the return was furnished. A notice was, however, issued on 6 October 2009 much beyond the period of six months. In such a situation, there could be no occasion to serve the notice within six months since the very act of issuance was beyond six months.

Now, it is in this background that it would be necessary to consider the provisions of Section 292 BB of the Act. Section 292 BB provides as follows:-

> **"292 BB.** 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."

Section 292 BB of the Act was inserted by the Finance Act, 2008 with effect from 1 April 2008. Section 292 BB of the Act provides a deeming fiction. The deeming fiction is to the effect that once the assessee has appeared in any proceeding or cooperated in any enquiry relating to an assessment or reassessment, it shall be deemed that any notice under the provisions of the Act, which is required to be served on the assessee, has been duly served upon him in time in accordance with the provisions of the Act. The assessee is precluded from taking any objection in any proceeding or enquiry that the notice was (i) not served upon him; or (ii) not served upon him in time; or (iii) served upon him in an improper manner. In other words, once the deeming fiction comes into operation, the assessee is precluded from raising a challenge about the service of a notice, service within time or service in an improper manner. The proviso to Section 292 BB of the Act, however, carves out an exception to the effect that the Section shall not apply where the assessee

has raised an objection before the completion of the assessment or reassessment. Section 292 BB of the Act cannot obviate the requirement of complying with a jurisdictional condition. For the Assessing Officer to make an order of assessment under Section 143 (3) of the Act, it is necessary to issue a notice under Section 143 (2) of the Act and in the absence of a notice under Section 143(2) of the Act, the assumption of jurisdiction itself would be invalid.

This principle is no longer in doubt having due regard to the law laid down by the Supreme Court in the decision in **Assistant Commissioner of Income Tax & Another Vs. M/S Hotel Blue Moon**[3]. While construing the provisions of Chapter XIV-B of the Act in relation to block assessments, the Supreme Court in that decision considered the effect of Section 143 (2) of the Act. The Supreme Court held as follows:-

> "...But Section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under Section 143(2). However, if an assessment is to be completed under Section 143(3) read with Section 158-BC, notice under Section 143(2) should be issued within one year from the date of filing of block return. 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

3. (2010) 321 ITR 362 (SC)

dispensed with.

The Supreme Court has, therefore, clearly held that the omission on the part of the Assessing Officer to issue a notice under Section 143(2) of the Act is not a procedural irregularity and is not curable. The requirement of a notice under Section 143(2) of the Act cannot be dispensed with.

In our view, where the Assessing Officer fails to issue a notice within the period of six months as spelt out in the proviso to clause (ii) of Section 143 (2) of the Act, the assumption of jurisdiction under Section 143 (3) of the Act would be invalid. This defect in regard to the assumption of jurisdiction cannot be cured by taking recourse to the deeming fiction under Section 292 BB of the Act. The fiction in Section 292 BB of the Act overcomes a procedural defect in regard to the non-service of a notice on the assessee, and obviates a challenge that the notice was either not served or that it was not served in time or that it was served in an improper manner, where the assessee has appeared in a proceeding or cooperated in an enquiry without raising an objection. Section 292 BB of the Act cannot come to the aid of the revenue in a situation where the issuance of a notice itself was not within the prescribed period, in which event the question of whether it was served correctly or otherwise, would be of no relevance whatsoever. Failure to issue a notice within the prescribed period would result in the Assessing Officer assuming jurisdiction contrary to law.

The judgment of a Division Bench of the Punjab and Haryana High Court in **Commissioner of Income Tax Vs. Panchvati Motors (P) Ltd.**[4], which was relied upon by the learned counsel for the Revenue would not to carry the case any further. In that case, a notice was issued under Section 148 of the Act. The assessee filed a return in pursuance of the notice without raising any objection in regard to the valid service of a notice. The Punjab and Haryana High Court held that once that was so, the argument of the assessee that there was no valid service of the notice under Section 148 of the Act would fail particularly having due regard to the provisions of Section 292 BB of the Act. These facts are clearly distinguishable.

For the aforesaid reasons, we find no error in the view which was taken by the Tribunal. The appeal would not give rise to any substantial questions of law. It is, accordingly, dismissed.

Order Date :- 19.8.2014
VMA

(Dr. D.Y. Chandrachud, C.J.)

(D.K. Upadhyaya, J.)

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