IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA
आयकर अपीलीय अधीकरण, न्यायपीठ – **"A"** कोलकाता,

BEFORE SHRI MANISH BORAD, ACCOUNTANT MEMBER
AND SHRI SONJOY SARMA, JUDICIAL MEMBER
(समक्ष : श्री मनीष बोरड, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्य)

ITA No.865/Kol/2018
Assessment Year: 2012-13

m/S. Shree Shoppers Ltd., 2, Shree Arcade, Jogendra Kabiraj Row, Kolkata-700 007. (PAN:AACCC1272F)	**Vs.**	**Deputy Commissioner of Income-tax, Circle – 9(2), Kolkata.**
(Appellant)		**(Respondent)**

Present for:
Appellant by : Shri Miraj D. Shah, AR
Respondent by : Shri Biswanath Das, Addl. CIT

Date of Hearing : 14.06.2022
Date of Pronouncement : 08.09.2022

O R D E R

PER MANISH BORAD, ACCOUNTANT MEMBER:

This appeal has been preferred by the assessee against the order dated 27-02-2018 of the Ld. Commissioner of Income-tax, Appeals-3, Kolkata [hereinafter referred to as 'CIT(A)'], passed u/s. 250 of the Income-tax Act, 1961 hereinafter referred to as 'the Act' for the AY 2012-13.

2. The assessee has raised the following grounds of appeal before this Tribunal:

"1. That the order passed by the Ld. CIT(a) is bad in law as well as in facts of the case.
2. That the Ld. CIT(A) erred in law as well as in facts of the case by confirming the additions made by Ld. AO who treated the share application money including premium of Rs.5,91,00,000/- as bogus and added back the same to the total income of the appellant u/s. 68 of the Income Tax Act, 1961.
3. that the appellant craves leave to add/or amend any ground of this appeal."

3. Assessee has also raised the following additional ground of appeal:

"1. For that the assessing officer issuing the notice u/s 143(2) of the IT Act 1961 did not have jurisdiction over the case of the assessee hence the notice is bad in law and the assessment order passed on the basis of such notice is bad in law and should be quashed

2. For that the assessment order was passed without service of any valid notice u/s 143(2) of the IT Act 1961 and therefore the assessment order passed is bad in law and should be quashed

3. That in the facts and circumstances of the case, the assessment order u/s 143(3) of the IT Act1961 was without jurisdiction and bad in law and thus the entire assessment order be quashed and or cancelled.

4. Brief facts of the case as culled out from the records are that the assessee is a limited company engaged in the business of trading in textile and tyres. Income of Rs.48,47,180/- declared in the return filed on 26.09.2012. Case selected for scrutiny under CASS followed by service of notice u/s. 143(2) and 142(1) of the Act. Assessee has challenged the issuance of notice u/s. 143(2) of the Act stating that the AO issued the notice did not have jurisdiction over its case as the returned income of the assessee is Rs.48.47 lacs. During the course of assessment proceedings, Ld. AO on going through the details observed that the assessee company has received share application money and share premium from M/s. Kaushal Holdings Private Limited (in short "M/s. KHPL") and other individuals. Major investments were received from M/s. KHPL. Ld. AO called for the details about the identity and creditworthiness of the share applicant and genuineness of the transactions. Assessee filed necessary details but the same could not satisfy the Ld. AO and he treated the share capital of Rs.1,47,75,000/- and share premium of Rs.4,43,25,000/- received from M/s. KHPL as unexplained cash credit u/s. 68 of the Act and made the addition for

the same. Certain other disallowances were also made and income assessed at Rs.6,43,81,300/-.

5. Aggrieved, assessee preferred an appeal before the Ld. CIT(A) challenging the addition made u/s. 68 of the Act and also challenged the legality of the order passed u/s. 143(3) of the Act. Ld. CIT(A) did not decide the legal issue but on merits partly allowed the assessee's appeal and the addition u/s. 68 of the Act was confirmed holding that the assessee is unable to justify the amount of share premium and the assessee could not prove the genuineness of this cash credit as well as the creditworthiness of the share applicant.

6. Aggrieved, assessee is now in appeal before this Tribunal raising in the ground of appeal challenging the addition of Rs.5,91,00,000/- made u/s. 68 of the Act and also raising additional ground raising legal issue.

7. As regards the additional ground, it is submitted that as per the CBDT Instruction No. 1/2011(F. No. 187/12/2010-IT(A-1), dated 31.01.2011 in case of the corporate assessee in metro cities where the returned income is above Rs.30 lakh the jurisdiction over such assessee would lie with Dy. Commissioner of Income-tax/Assistant Commissioner of Income-tax and below such limit the jurisdiction will lie with Income Tax officer. It is further submitted that the jurisdiction in the case of the assessee was with the Dy. Commissioner of Income-tax/Assistant Commissioner of Income but the notice u/s. 143(2) of the Act was issued by ITO, Ward-9(4), Kolkata which had no jurisdiction. Since valid notice u/s. 143(2) has not been issued the assessment proceedings carried out thereafter are bad in law and to support this proposition reliance was placed on the decision of this Tribunal in the case of *Bhagyalaxmi Conclave Pvt. Ltd. & Ors. Vs. DCIT, ITA No. 2517 to 2520/Kol/2019 dated 03.02.2021 and Shivam Dhatu Udyog Ltd. Vs.*

DCIT, ITA No. 2456/Kol/2019 dated 30.03.2021. Reliance was also placed on the judgment of Hon'ble jurisdictional High Court in the case of *Pr. CIT Vs. Nopany & Sons (2022) 136 taxmann.com 414 (Cal).*

8. As regards merits of the case it was submitted that the assessee has furnished complete details of M/s. KHPL which, inter alia, includes share application from, income tax return, audited financial statement, bank statement, assessment order u/s. 143(3) of the Act for AY 2012-13 and the certificate showing non-banking financial certificate held by the alleged share applicant. It is also submitted that the directors of the assessee company and M/s. KHPL are common and the return on investment is also fair enough to explain the share premium charged by the assessee company. Reference was also made to various documents filed in the paper book containing 172 pages is on record.

9. Per contra, the Ld. DR as regards merits of the case vehemently argued supporting the detailed finding of the Ld. CIT(A) and so far as the legal issue raised in the additional ground, the ld. DR through his written submission dated 12.05.2022 stated that when the notice u/s. 143(2) of the Act was issued by ITO, Ward-9(4), Kolkata dated 23.09.2013 the PAN was lying with ITO, ward-9(4), Kolkata. Thereafter, the jurisdiction over the assessee's case was transferred to the DCIT, Circle-9(1) by order dated 04.07.2014 and after the restructuring of the department on 15.11.2014 the jurisdiction over the assessee was further transferred to DCIT, Circle-9(2), Kolkata. It was further submitted by the ld. DR that issuing of notice u/s. 143(2) of the Act does not mean the case has to be completed by the same AO. The case has to be completed by the respective AO, therefore, since the assessment is completed by DCIT, Circle-9(2), Kolkata and not ITO, Ward-9(4), Kolkata there is no question of jurisdictional issue involved in this case.

10. We have heard rival contentions and have perused the records placed before us and have also carefully gone through the judgment referred by the Ld. Counsel for the assessee. As far as the legal additional issue is concerned, we find that the assessee raised this issue before the AO in the course of assessment proceedings itself and again challenged the legality of the assessment proceedings before the Ld. CIT(A) and, therefore, the legal issue raised is not for the for the first time before this Tribunal. Even otherwise in view of the ratio laid down by the Hon'ble Supreme Court in the case of *NTPC vs.CIT 229 ITR 383 (SC)* if legal issue goes to the root of the matter and where no new facts are required to be investigated or placed on record for adjudication then such legal ground can be raised at any stage and Hon'ble court held that *"we do not see any reason to restrict the power of the Tribunal u/s. 254 of the Act to decide the grounds which arise from the order of the Commissioner of Income-Tax (Appeals)". Both the assessee as well as the department has the right to file an appeal/cross objection before the Tribunal. We fail to see why the Tribunal should be prevented from considering question of law arisen in assessment proceedings although not raised earlier.* Therefore, the legal ground stands to be admitted and the same relates to invalid notice issued u/s. 143(2) of the Act. It is a settled position of law that for carrying out the assessment proceedings u/s. 143(3) of the Act, the statutory requirement of serving of valid notice u/s. 143(2) of the Act is must and in absence thereof the subsequent proceedings become invalid. In the case of assessee, the facts are that the assessee has declared income of Rs.48,47,180/- in the e-return filed on 26.09.2012. For selecting the case for scrutiny notice u/s. 143(2) of the Act was issued by ITO, Ward-9(4), Kolkata dated 23.09.2013. The Central Board of Direct Taxes (CBDT vide Instruction No. 1/2011 (supra) revised the monetary limit for issuing notice by ITO/DCs/ACs. Through this instruction it stated that in case

of metro cities in case of corporates declare income above Rs. 30 lakh the jurisdiction of such corporate assessee will lie with the DCs/ACs. It is not in dispute that as on the date of selecting the case for scrutiny, the very basis for having jurisdiction over the assessee is the returned income which was more than Rs. 30 lakhs and the same was lying with the DCs/ACs but the notice u/s. 143(2) of the Act has been issued by ITO, Ward-9(4), Kolkata. It is true that subsequently the assessment has been framed by DCIT, Circle-9(2), Kolkata but the point in dispute is that on date of issuing a notice u/s. 143(2) of the Act, whether the ITO, Ward-9(4), Kolkata was having a valid jurisdiction to issue such notice u/s. 143(2) of the Act. We find that Hon'ble jurisdictional High Court in the recent judgment in the case of *DCIT Vs. Nopany & Sons (supra)* has decided identical issue and similar facts and decided in favour of the assessee observing as under:

> *"**6.** The short issue which falls for consideration is whether the assessing officer, who had jurisdiction over the assessee at the relevant time had issued notice under section 143(2) of the Act before taking up the scrutiny assessment under section 143(3). Before we go into the facts, we take note of the legal position as laid down by the Hon'ble Supreme Court in Asstt. CIT v. Hotel Blue Moon [2010] 188 Taxman 113/321 ITR 362, wherein the Hon'ble Supreme Court held that omission on the part of the assessing officer 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, we also take note of the decision in the case of CIT v. Gitsons Engineering Co. [2015] 53 taxmann.com 108/231 Taxman 506/370 ITR 87 (Mad.), wherein it was held that the word 'shall' employed in section 143(2) of the Act, 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 was further held 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. At this juncture, it would be relevant to take note of the definition of assessing officer as defined in section 2(7A) of the Act. The said provision defines 'assessing officer' to mean 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 the 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 section 120 to exercise or perform all or any of the powers and functions conferred on, or assigned to, an assessing officer under this Act. In the instant case, the order of assessment was challenged on several grounds and, particularly, on the ground that no notice under section 143(2) of the Act was issued within the time prescribed by the assessing officer, who had jurisdiction over the assessment file of the assessee at the relevant time. The Commissioner of Income-tax (Appeals)-XXXVII, Kolkata, (CIT(A)) did not agree with the contentions raised by the assessee that there is failure to comply with the mandatory statutory requirement. The CIT(A) opined that the assessing officer, who originally dealt with the e-return filed by the assessee had issued notice under section 143(2) of the Act. With regard to the merits of the matter, the CIT(A) held it in favour of the assessee. Therefore, the revenue was on appeal before the Tribunal and cross-objection was filed by the assessee questioning that portion of the order of the CIT(A) which held that there is no procedural irregularity committed by the assessing officer. The Tribunal considered the correctness of the finding of the CIT(A) and, on facts, found that both the assessing officers, namely, the assessing officer, who had jurisdiction over the assessee till 6-4-2009 and the assessing officer, who had jurisdiction post the said date had not issued notice under section 143(2) of the Act within the prescribed period of six months from the end of the financial year in which the return was filed. This factual position could not be controverted by the revenue before us. As pointed out by the Hon'ble Supreme Court in the case of Hotel Blue Moon (supra), non-issuance of notice under section 143(2) is not a procedural irregularity and, therefore, it is not curable. Thus, on facts, it having been established that no notice was issued under section 143(2) of the Act, the order passed by the Tribunal was perfectly legal and valid. The revenue also sought to rely upon section 292BB of the Act to justify their stand that notice is deemed to be valid and sought to bring the assessee's case under the circumstances mentioned in section 292BB. This question was considered by the Tribunal and it was pointed out that 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 of the 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 the 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. This amendment to the Act was introduced with effect from 1-4-2008 and the assessment year under consideration is AY 2007-08. In any event, the Tribunal examined as to whether at all the revenue can rely upon section 292BB of the Act and noted that the assessee has filed an objection vide letter dated 16-11-2009 objecting to the issuance of notice under section 142(1) of the Act without valid service of notice under section 143(2) of the Act. Taking note of the said letter the Tribunal, in our view, rightly held that the proviso to section 292BB would not stand attracted and the said section cannot be made applicable to the assessee's case. The Tribunal, thereafter, analysed as to the correctness of the submission of the revenue seeking to sustain their stand by referring to a notice issued by the assessing officer, who at the relevant point had no jurisdiction over the assessee and, on facts, found that there is no valid compliance of section 143(2) of the Act as the notice issued under section 143(2) of the Act by the assessing officer/Income Tax Officer, Ward-3(1) had no jurisdiction over the assessee at the relevant time. The Tribunal to support its conclusion placed reliance in the case of CIT v. Mukesh Kumar Agrawal [2012] 25 taxmann.com 112/345 ITR 29 (Allahabad), wherein it was held that the assessing officer did not have jurisdiction to proceed further and make assessment since notice under section 143(2) of the Act was admittedly not issued. As in the case on hand, the revenue sought to take coverage under section 292BB of the Act which was rejected on the ground that the very foundation of the jurisdiction of the assessing officer was on the issuance of notice under section 143(2) of the Act and the same having been complied with, the revenue cannot take shelter under the provisions of section 292BB of the Act."

11. From perusal of the above finding of the Hon'ble jurisdictional High Court and on examining the facts of the instant case, we find that the judgment of the Hon'ble High court is squarely applicable on the facts of the instant case and it can be safely concluded that ITO, Ward-9(4), Kolkata had no valid jurisdiction over the assessee on the date of

issuing notice u/s. 143(2) of the Act and revenue failed to controvert this fact by placing any other contrary material on record which could indicate that before the last day upto which a valid notice u/s. 143(2) of the Act could have been issued, which in this case is 30.09.2013, apart from the notice issued by Ito, Ward-9(4), Kolkata any other notice has been issued by the Dy. Commissioner of Income Tax having jurisdiction over the assessee. Since a valid notice u/s. 143(2) has not been issued the assessment proceeding carried thereafter deserves to be quashed. We, therefore, respectfully following the ratio laid down by Hon'ble Jurisdictional High Court in the case of *Nopany & Sons (supra)* accordingly, allow the additional ground raised by the assessee and quash the assessment proceeding carried out u/s. 143(3) of the Act vide order dated 29.03.2015.

12. So far as the merits of the case are concerned though we have quashed the assessment proceedings, dealing with the issue on merits will be merely academic in nature but still we decide to do this academic exercise. We find that the assessee company has declared income of Rs.48,47,180/- in the e-return. The turnover of the company is approximately Rs. 35 Cr., shareholder fund as on 31.03.2012 is Rs.7.27 Cr. , earning per share is Rs.16.13. As per the details filed at page 52 of the paper book the earning per share of the company before issue of shares was Rs.97/- per share and in subsequent years also the earning per share is Rs. 39/- and Rs.43/- for FY 2012-13 and 2013-14. These details indicate that the financial of the assessee company are fair enough to justify the share premium charged on each share. Now coming to the details of investor company i.e. M/s. Kaushal Holdings Private Limited, which has invested in the equity share of the assessee company towards share application and share premium of Rs. 5,91,00,000/- which has been treated as unexplained cash credit u/s. 68 of the Act by both the lower authorities. We observe that M/s. KHPL

is a non-banking finance company registered with Reserve Bank of India vide certificate dated 16.05.2011 which is issued during the year under appeal itself. For AY 2012-13 M/s. KHPL has declared income of Rs.11,21,767/- and earning per share is Rs.5.67. M/s. KHPL is regularly assessed to tax and is filing income tax return. Books of accounts are audited and the alleged transactions have been carried out through banking channel. We also note that assessment proceedings u/s. 143(3) of the Act were also carried out in the case of investor company also i.e the alleged cash creditor M/s. KHPL and on perusal of the assessment order placed at pages 170 to 171 of the paper book we find that the assessment has been framed by ITO, Ward-14(2), New Delhi on 22.01.2015 assessing income at Rs.11,27,129/- and complete details were filed during the course of assessment proceedings carried out in case of M/s. KHPL which proves the identity of M/s. KHPL and also its creditworthiness to invest in the equity shares of the assessee company. As far as the genuineness of the transaction is concerned, one of the important fact noticed by us is that the directors of both the companies are common. It is not so that M/s. KHPL is an unknown company and why a unknown company shall invest in the equity shares of the assessee company. We find that Mr. P. S. Duby and Mr. B. K. Dubey are directors in the assessee company since 2002 and they are also the directors of M/s. KHPL as on 31.03.2012. Mr. P. S. Dubey was appointed as a director in M/s. KHPL on 10.11.2010 and Mr. B. K. Dubey was appointed on 04.04.2011. So it is an evident fact that there is a clear connection between both the share applicant company and the assessee company and, therefore, the transaction of making investment in equity share of the assessee company cannot be regarded as ingenuine. We, therefore, in the facts and circumstances of the case, are of the considered view that the assessee has successfully explained the identity and creditworthiness of M/s. KHPL and genuineness of the

transaction carried on by it in the year under appeal. We would like to further make it clear that our this finding about the alleged transaction is only on the basis of the facts in the year under appeal and the same should not be taken as a precedence for any subsequent year unless the facts of the particular year/case indicate so. Therefore, this ground of appeal on merit filed by the assessee is also allowed.

13. In the result, the appeal of the assessee is allowed.

Order is pronounced in the open court on 8th September, 2022

Sd/- Sd/-

(Sonjoy Sarma) **(Manish Borad)**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Kolkata, Dated: 08.09.2022

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:
3. CIT(A)-3, Kolkata.
4. The CIT-
5. The DR, ITAT, Kolkata Bench, Kolkata.

//True Copy//

By Order

Assistant Registrar,
ITAT, Kolkata.