

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "SMC", MUMBAI**

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER

**ITA No.7616/MUM/2019
Assessment Year: 2009-10**

Income Tax Officer – 12 (1)(1), Room No. 129, 1 st Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s Aruns Housing Remedies Ltd., 316-317, Highway Commerce Centre, Jn. Of I.B. Patel Road, & W.E. Highway, Goregaon (East), Mumbai - 400063 PAN: AAGCA0421J
(Appellant)		(Respondent)

Revenue by : Shri Shiddramappa (DR)

Assessee by : None

Date of Hearing : 27/05/2021
Date of Pronouncement: 25/06/2021

ORDER

This is an appeal by the revenue against the order dated 27.09.2019 of learned Commissioner of Income Tax (Appeals)-20, Mumbai for the assessment year 2009-10.

2. The effective grounds raised by the revenue are as under:-

"1 On the facts and in the circumstances of the case, the Ld. CIT (A) erred in holding that the assessment order was bad in law on the ground that notice u/s 143 (2) had not been served on the assessee in time without appreciating the fact that the assessee has responded to the notices issued and also filed its submissions in response to the notices issued.

2. On the facts and in the circumstances of the case, the Ld. CIT (A) erred in deleting the additions made by the AO on account of

bogus purchases Rs. 25,19,878/- merely on the ground that the assessment order was bad in law without going into the facts of the case.

3. *On the facts and circumstances of the case, the Hon'ble ITAT is requested to entertain this appeal though the tax effect is below the monetary limit prescribed in the CBDTs Circular no. 17/2019 dated 08.08.2019 read with circular no. 3/2018 dated 11.07.2018 as amended on 20.08.2018 as the case falls in the exception received from external sources in the nature of law enforcement agencies, namely, Sales Tax Authorities."*

3. When the appeal was called for hearing no one appeared on behalf of the assessee to represent the case. However, considering the nature of dispute, I proceed to dispose of the appeal ex parte qua the assessee after hearing the learned Departmental Representative and based on materials on record.

4. Briefly the facts are, the assessee is a resident company engaged in the business of installation and erection of pre-fabricated houses and other structures.

5. For the assessment year under dispute, assessee filed its return of income on 13.09.2009 declaring nil income. Subsequently, on the based on information received from Sales Tax Department through DGIT (Inv.), Mumbai that purchases worth Rs. 25,19,878/-, being in the nature of accommodation entries, are non genuine, the Assessing Officer (AO) reopened the assessment under section 147 of the Act. After calling for details/supporting evidences from the assessee to prove the genuineness of the disputed purchases, the AO ultimately held the purchases to be non-genuine and added back to the income of the assessee. Against the assessment order so passed assessee preferred appeal before learned Commissioner (Appeals). Before the First Appellate Authority, the assessee inter alia challenged the validity of the

assessment order on the ground that the AO had not served the notice under section 143(2) of the Act within the period of limitation. After considering the submissions of the assessee in the context of facts and material on record, learned Commissioner (Appeals) being convinced that no notice under section 143(2) of the Act was served on the assessee within the prescribed period, held the assessment order passed as invalid. While doing so, learned Commissioner (Appeals) held that the case of revenue will not be protected under section 292BB of the Act as the assessee had raised objection during the assessment proceedings. Accordingly, he annulled the assessment order.

6. The learned Departmental Representative submitted, in course of appellate proceedings, the AO had filed a report stating that notice under section 143(2) and 142(1) of the Act issued in the name of the assessee were handed over to the postal authority on 30.04.2014, within the period of limitation. Thus, he submitted, once the notices were handed over to the postal authorities for service on the assessee within the period of limitation, it would amount to proper service of notice in terms of business post management between the Income Tax Department and Department of Post. In support of such contention, he relied upon the decision of the Hon'ble Madras High Court in case of M/s Abad Offshore Ltd. vs. DCIT WP No. 29643 of 2015 judgment dated 08.11.2016.

7. I have considered submissions of learned Departmental Representative and perused the material on record. A reading of the observations of learned Commissioner (Appeals) in paragraph 4.4.1 and 4.4.2 would reveal that in reply to assessee's challenge regarding validity of the assessment order due to non service of notice under section 143(2) of the Act, the AO had furnished letter dated 23.02.2017 stating that notice under section 143(2) and 142(1) of the Act dated 28.04.2014 were handed over to the postal authority on 30.04.2014 for onward service on the assessee. Thus, it is the contention of the revenue that once the notice issued under section 143(2) of the Act was

handed over to the postal authority, it would amount to valid service on the assessee as per the business post management. However, the following observations of Commissioner (Appeals) will have crucial bearing in deciding the issue:

“4.4.3 In course of the appellate proceedings, by this office letter dated 06.05.2019 the AO was requested to furnish the proof of service indicating the date of service. The relevant portion of the letter is reproduced below:

“In this case, the appellant has filed an affidavit on 06.05.2019 stating that the notice u/s 143 (2) was not received by it. As per proviso to section 143 (2), the notice under that section is to be served on the assessee within 6 months from the end of the financial year in which the return of income is filed. Therefore, it is not sufficient to prove that the notice was issued. The date of service of the notice is crucial.

2. In this regard, you are requested to rebut the appellant’s claim with proof of service indicating the date of service. Please furnish certified copy of document relied upon by you (such as acknowledgment).

3. The appellant has contended that in the course of reassessment proceedings by its letter dated 16.03.2015 it had informed the AO that notice u/s 143 (2) had not been served upon it. Please comment on appellant’s claim.

4.4.4 The AO was requested to submit the report in this office on or before 25.05.2019. However, no reply has been received from the AO. Therefore, a reminder letter dated 14.06.2019 was sent to the AO requiring the AO to submit his report by 25.06.2019. In response, the AO by his letter dated 17.06.2019 has mentioned that the assessment records to old period and the same are not traceable his office. Therefore, he requested to grant the time upto 04.07.2019. However, no reply was received from the AO even after 04.07.2019. Thereafter, a fresh reminder letter dated 26.08.2019 was sent to the AO requiring the AO to submit his reply by 05.09.2019. Again another reminder letter dated 29.08.2019 was issued to the AO requiring the AO to submit the report by 11.09.2019. However, there was no response from the AO. Therefore, a final reminder letter dated 18.09.2019 was issued to the AO requiring

him to submit his reply by 25,09.2019. However, till date no reply has been received from AO.

4.4.5 In view of the above, it is presumed that the AO has nothing to say in this regard. The AO has failed to controvert the contention of the appellant that no notice u/s, 143(2) was served on the appellant within six months from the end of the financial year in which the return of income was filed- The onus in this case was on the AO to controvert the contention of the appellant by producing evidence to show that the notice u/s.143(2) was indeed served upon the appellant. The AO has furnished evidence to prove that notice u/s.143(2) dated 28.04.2014 was issued and the same was handed over to the postal authorities on 30.04.2014. However, as per the proviso to Section 143(2), it is necessary not only to issue the notice but also to serve the same on the appellant within six months from the end of the financial year in which the return was filed.

4.4.6 As mentioned in para 4.4.2 above, the appellant had raised objection to the reassessment proceedings on the ground that notice u/s.143(2) was not served within the stipulated time. In view of the objections raised by the appellant in the course of assessment proceedings, the provisions of section 292BB cannot save the assessment order.”

8. As could be seen from the aforesaid extracts from the impugned order of learned Commissioner (Appeals), while dealing with specific contention of the assessee that no notice under section 143(2) was ever received by it, learned Commissioner (Appeals) had called upon the AO to furnish a report as to whether the notice issued under section 143(2) was actually served upon the assessee. However, inspite of repeated reminder and request by learned Commissioner (Appeals), no response from the AO was forthcoming. Thus, in absence of any reply from the AO, learned Commissioner (Appeals) was convinced that the notice under section 143(2), alleged to have been issued, was never served on the assessee within the period of limitation. Thus, he quashed the assessment order. Thus, keeping in view the provisions of section 143(3) read with its proviso, I am convinced that no notice under section 143(2) of the Act was served on the assessee as mandated by the statute. That being

the case, assessment order was rightly held as invalid. I also agree with the view of learned Commissioner (Appeals) that the assessment order would not be protected under the exceptions provided under section 292BB of the Act as the assessee had objected to the proceedings.

9. As regards, the decision relied upon by the learned Departmental Representative as noted above, in my considered opinion, due to factual distinction the aforesaid decision would not apply. As could be seen from facts of the case relied upon by the learned Departmental Representative, the notice issued under section 143(2) of the Act was actually served upon the assessee, though, the assessee claimed that it was not served within the period of limitation. However, in the facts of the present case, the assessee from the very beginning has stated that no notice under section 143(2) of the Act was ever served on it. In fact, in course of proceedings before the First Appellate Authority, the assessee had furnished an affidavit reiterating the aforesaid claim.

10. In view of the aforesaid, I uphold the decision of learned Commissioner (Appeals) by dismissing the grounds raised.

11. In the result, appeal is dismissed.

Order pronounced in the open court on 25th June, 2021.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 25/06/2021

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.
सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai