

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'G' BENCH
MUMBAI**

**BEFORE: SHRI SAKTIJIT DEY, JUDICIAL MEMBER
&**

SHRI M.BALAGANESH, ACCOUNTANT MEMBER

**ITA No.222/Mum/2020
(Assessment Year :2010-11)**

M/s. Gemsons Precision Engineering Pvt. Ltd., Plot No.AF-1, Cama Industrial Estate Walbhat Road Goregaon (E) Mumbai-400 063	Vs.	ACIT-12(2)(2) Ayakar Bhavan Mumbai – 400 020
PAN/GIR No.AABCG0333J		
(Appellant)	..	(Respondent)

**ITA No.1442/Mum/2020
(Assessment Year :2010-11)**

ACIT / DCIT-12(2)(2), Room No.128F, 1 st Floor Ayakar Bhawan Churchgate Mumbai – 400 020	Vs.	M/s. Gemsons Precision Engineering Pvt. Ltd., Plot No.AF-1, Cama Industrial Estate Walbhat Road Goregaon (E) Mumbai-400 063
PAN/GIR No.AABCG0333J		
(Appellant)	..	(Respondent)

Assessee by	Shri Bharat Shah
Revenue by	Shri T.S. Khalsa
Date of Hearing	29/09/2021
Date of Pronouncement	30/09 /2021

आदेश / ORDER**PER M. BALAGANESH (A.M.):**

These cross appeals in ITA No.222/Mum/2020 & 1442/Mum/2020 for A.Y.2010-11 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-20, Mumbai in appeal No.CIT(A)-20/IT-10274/2016-17 dated 03/12/2019 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 14/03/2016 by the Id. Asst. Commissioner of Income Tax-12(2)(2), Mumbai(hereinafter referred to as Id. AO).

2. At the outset, we find that assessee has raised a preliminary ground in its appeal that assessment was framed by the Id. AO without issuing notice u/s.143(2) of the Act. In fact, this ground was also raised by the assessee before the Id. CIT(A) and the Id. CIT(A) had adjudicated the same in his order as under:-

"4.4.3 With regard to non issue of the notice u/s.143(2) of the Act, I find that the appellant had received a communication from the Central Public Information Officer Circle - 12(2)(2) that notice u/s 143(2) for A.Y. 2010-11 is not available on record. In the course of the appellate proceedings, by this office letter dated 12.04.2018, the AO was requested to furnish proof of service of the notice u/s.143(2) of the Act. Subsequently, another letter dated 25.06.2019 was issued to the AO requesting the AO to furnish the proof of service. In response, the AO submitted a letter 09.07.2019. In that letter, the AO submitted, inter alia, as under:

"4. Further, the clarification sought by your good office with regard to proof of services of notices u/s. 143(2)/142(1) of the Act; in this context, it is submitted that on verification of records, there is no proof of services of notices u/s. 143(2)/142(1) of the Act is placed on record. However, it is established in assessment proceedings that the assessee has taken accommodation entries by way of bogus purchases. Furthermore, it is submitted that the compliance of the assessee received at the fag end of time "

4.4.4 Thereafter, another letter dated 07.11.2019 was sent to the AO. In that letter, it was mentioned that as per the reply dated 19.04.2018 received by the appellant under the RTI Act, 2005, no copy of notice u/s 143(2) was available in the AO's records. By that letter, AO was requested to furnish his comments in respect of the appellant's claim that no copy of notice u/s 143(2) was available in the AO's records. The AO has not responded to the aforesaid letter till now.

4.4.5 In view of the above, I hold that in this case no notice was issued by the AO.

4.4.6 In this ground of appeal, the appellant did not seek any remedy. Therefore, I am not issuing any direction to the AO.

4.4.7 In the result, ground of appeal No. 1 is disposed as above.”

3. From the above findings of the Id. CIT(A), it is clearly evident that notice u/s.143(2) of the Act was not issued in the instant case. We hold that non-issuance of notice u/s.143(2) is the jurisdictional defect and cannot be cured by the provisions of Section 292BB of the Act. The said defect would not get altered or cured merely because the assessee had participated in the assessment proceedings. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of CIT vs. Laxman Das Khandelwal reported in 266 Taxmann. 171 (SC) wherein it was held as under:-

“7. A closer look at Section 292BB shows that if the assessee has participated in the proceedings it shall be deemed that any notice which is required to be served upon was duly served and the assessee would be precluded from taking any objections 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. According to Mr. Mahabir Singh, learned Senior Advocate, since the Respondent had participated in the proceedings, the provisions of Section 292BB would be a complete answer.

On the other hand, Mr. Ankit Vijaywargia, learned Advocate, appearing for the Respondent submitted that the notice under Section 143(2) of the Act was never issued which was evident from the orders passed on record as well as the stand taken by the Appellant in the memo of appeal. It was further submitted that

issuance of notice under Section 143(2) of the Act being prerequisite, in the absence of such notice, the entire proceedings would be invalid.

8. The law on the point as regards applicability of the requirement of notice under Section 143(2) of the Act is quite clear from the decision in Hotel Blue Moon's case (supra). The issue that however needs to be considered is the impact of Section 292BB of the Act.

9. According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.

10. Since the facts on record are clear that no notice under Section 143(2) of the Act was ever issued by the Department, the findings rendered, by the High Court and the Tribunal and the conclusion arrived at were correct. We, therefore, see no reason to take a different view in the matter.

11. These Appeals are, therefore, dismissed. No costs.”

3.1. We find that the Id. CIT(A) in his order had categorically observed that notice u/s.143(2) was not issued at all in the instant case. Against this finding, we find that the Revenue had not preferred any ground before us in its appeal and that the Revenue had merely raised the grounds only on the merits of the addition. Hence this aspect of the issue had attained finality.

3.2. In view of the aforesaid observations in the facts and circumstances of the instant case and respectfully following the decision of the Hon'ble Apex Court referred to supra, we have no hesitation in quashing the entire assessment framed by the Id. AO. Since the entire assessment is quashed for non-issuance of notice u/s.143(2) of the Act, the other grounds raised by the assessee as well as by the Revenue both on validity

of reopening as well as the addition on merits need not be gone into at all as the adjudication of the same would be infructuous.

4. In the result, appeal of the assessee is allowed and appeal of the Revenue is dismissed.

Order pronounced on 30/09/2021 by way of proper mentioning in the notice board.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 30/09/2021

KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai