IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G' NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER

I.T.A. No.3999/DEL/2016
Assessment Year: 2010-2011

M/s. Wel Intertrade Pvt. Ltd., No.5E, Local Shopping Centre, Masjid Moth Greater Kailash Part-II, New Delhi.	vs.	DCIT, Circle-27(1), New Delhi.
TAN/PAN: AAACW0187F		
(Appellant)		(Respondent)

Appellant by:	Shri C.S. Agarwal, Sr.Adv. Shri R.P. Mall, Adv.		
Respondent by:	Shri Prakash Dubey, Sr.D.R.		
Date of hearing:	16	06	2021
Date of pronouncement:	16	06	2021

O R D E R

PER AMIT SHUKLA, JM

The aforesaid appeal has been filed by the assessee against the impugned order dated 15.05.2016, passed by Ld. Commissioner of Income Tax (Appeals)-XXII, New Delhi for the quantum of assessment passed u/s.143(3) for the Assessment Year 2010-11. In various grounds of appeal, the assessee has challenged following additions:-

"1. That the learned CIT(A) has erred both on facts and in law in only partly deleting the additions/disallowances made in the order of assessment dated 23.03.2013 passed under section 143(3) of the Act and not accepting the declared income. The

learned CIT(A) ought to have on the facts of the instant case directed the learned AO to have accepted the income returned by the assessee.

2. That the learned CIT(A) has failed to appreciate that the entire claim of interest and bank charges of Rs. 2,16,37,282/- was allowable while computing its income from business and there was no justification to have held that Rs. 41,29,095/- was not allowable while computing its business income as such interest expenditure has nothing to do with the earning of the exempt income.

2.1 That the learned CIT(A) has erred both in law and on facts in sustaining the disallowance made out of claim of interest income of Rs. 2,13,94,943/- of an unspecified sum disregarding the fact that the learned AO himself has allowed a sum of Rs. 54,79,529/- while computing income under the head Income from House Property and a sum of Rs. 1,59,15,414/- while computing the income from other sources.

2.2 The learned CIT(A) has erred in failing to appreciate that the entire interest claimed by the assessee is to be allowed while computing the income under the head income from business and profession.

2.3 In any case and without prejudice the learned CIT(A) has erred in allowing only a sum of Rs. 1,20,28,658/- and disallowing the remaining sum of Rs. 96,08,624/-. That even otherwise no justification to hold that that Rs. 41,29,095/- is disallowable by invoking section 14A of the Act and even otherwise, the disallowance made in any case cannot exceed the disallowance made by invoking Rule 8D.

2.4 That likewise the learned CIT(A) has erred in holding that out of the expenditure incurred of Rs. 6,50,580/- in respect of employee cost, a sum of Rs. 1,93,445/- being the estimated sum

represented employees cost towards earning of dividend income as the said finding is not only arbitrary but is based on no material and hence disallowance of Rs. 1,93,445/- deserves to be deleted.

2.5 That further the learned CIT(A) has erred in holding that out of the expenditure incurred under the head "other cost" of Rs. 1,57,85,280/-, only a sum of Rs. 35,81,405/- is to be allowed.

2.6 That the learned CIT(A) has thus erred in holding that out of total expenditure incurred of Rs. 4,01,81,122/- only an expenditure aggregating to Rs. 1,62,85,777/- could be held allowable to the appellant.

2.7 That the learned CIT(A) has erred in failing to appreciate that having accepted that the expenditure have genuinely been incurred and same is not found to be bogus or otherwise, as such, no part of the expenditure incurred and debited in the profit and loss Account could have been held disallowable on the ground that the same is disproportionate to the income.

2.8 The learned CIT(A) ought to have held that the assessee carried on the business of running business centre when it had been deriving income from running a business centre, and hence the expenditure having been incurred in the course of business ought to have been allowed.

3. That the learned CIT(A) has grossly erred in sustaining the disallowance made u/s 14A of the Income Tax Act, 1961 of Rs. 41,29,095/- on arbitrary grounds and disregarding the fact that no satisfaction has been recorded vis a vis books of the account of the assessee that any particular expenditure has been incurred by the assessee for earning the exempt income.

3.1 That the learned CIT(A) has grossly erred in failing to appreciate that investment has been made by the appellant out of

the own funds and no nexus has been established by the revenue that interest bearing funds have been utilized for earning the exempt income.

3.2 Without prejudice and in the alternative, learned CIT(A) has grossly erred in failing to appreciate that for the purpose of making disallowance under section 14A of the Act only such investment can be taken into consideration on which assessee has earned exempt income and such investment on which no exempt income has been earned cannot be taken into consideration for making the disallowance.

3.3 Without prejudice and in the alternative, learned CIT(A) has grossly erred in failing to appreciate that disallowance u/s 14A of the Act cannot exceed the exempt income as such, sustainence of disallowance of Rs. 41,29,095/- in excess of the exempt income of Rs. 6,62,633/- in any case is highly arbitrary and liable to be deleted.

4. That the learned CIT(A) has erred in upholding the finding that the compensation received from running of Business Centre of Rs. 60,04,300/- is income from house property and not as business income as has been offered by assessee by failing to appreciate that the assessee had earned business income when it had derived income from business centre which is in fact the business of the assessee, and hence income derived represented as business income and not as income assessable under the head income from house property.

5. That the learned CIT(A) has erred in upholding the order of assessment in treating the profit arising from the sale of flats as short term capital gain as against business income offered by the assessee failing to appreciate that the assessee had been since engaged in the Real Estate and was trading in the Real Estate, the income from the sale of flat has rightly been offered as

business income as against short term capital gain computed by the assessing officer.

5.1 Without prejudice and even otherwise, learned CIT(A) has failed to appreciate that flat was allotted to the appellant more than three years from the date of sale of flat as such, such flat is long term capital asset and thus profit arising from the sale of flat should have been taxed as Long Term Capital gain and benefit of indexation should also be granted to the appellant.

6. That the learned CIT(A) has erred in upholding the addition of Rs. 5,82,41,778/- under the head 'Business Income' by treating the agricultural land as stock in trade of the assessee as against long term capital asset held by the learned AO.

6.1 That the learned CIT(A) has erred in failing to appreciate that agricultural land situated at village Bhondsi is not stock in trade of the assessee and further, failing to appreciate that such agricultural land is not a capital asset in view of section 2(14)(iii) of the Act and thus there was no capital gain.

7. That further the learned CIT(A) erred in upholding the addition of Rs. 1,63,00,000/- made by the learned AO as deemed dividend u/s 2(22)(e) of the Act, failing to appreciate that the amount was received by the appellant in the course of business for purchase of property and was not an advance or loan.

7.1 That in any case and without prejudice the provisions of section 2(22)(e) of the Act were inapplicable and the learned CIT(A) ought to have held that the learned A.O. has erred in invoking the provisions of section 2(22)(e) of the Act.

8. That the learned CIT(A) ought to have directed the A.O. to have granted the refund to the assessee of Rs. 44,97,694/- and consequently interest u/s 244A of the Act of Rs. 2,91,194/- should have been allowed."

2. The assessee besides various grounds of appeal has raised additional ground that notice u/s. 143(2) has not been served within the statutory period, and therefore, the entire assessment order is bad in law. Various issues which has been raised in the appeal before us can be summarized in the following manner:

(i) Whether, the assessment made without serving a notice u/s 143(2) of the Income Tax Act within the statutory period, is a valid assessment?

(ii) Whether, the income of Rs. 60,04,300/- from running the Business Centre is business income or is income from property, despite the fact the said income has throughout been declared and assessed as income from business since AY 2002- 2003?

(iii) Whether, the 'other income' of Rs. 13,32,329/- as shown at page 15 of Final Accounts, having nexus with the business income, is income from property or represents business income as claimed by the assessee?

(iv) Whether, the gain of Rs. 27,50,349/- from sale of stock in trade (sale of flat) is a short term capital gain or is business income. In the alternative, if it is held to be capital gain, whether the said sum is long term capital gain or represents a short term capital gain?

(v) Whether, the disallowance sustained u/s 14A of the Act of Rs. 43,22,018/- is correct sum disallowed as against a sum of Rs. 16,723/- as calculated by the assessee for disallowance and in any case and without prejudice the said disallowance being in excess of the income from the dividend i.e. Rs. 6,62,633/-?

(vi) Whether, a sum of Rs. 1,63,00,000/- received as advance against sale of its property from Rose Service Apartments Pvt. Ltd. could be treated as advance to be assessed as deemed dividend

within the meaning of section 2(22)(e) of the Act and whether the provisions of section 2(22)(e) of the act could at all be invoked.

(vii) Whether a sum of Rs. 5,82,41,778/- represents an income chargeable to tax despite the fact, it is income from sale of agricultural land though held as other investment.

(viii) Whether the disallowance sustained u/s.37(1) of the Act of Rs.1,65,25,893/- (which includes a disallowance of Rs.41,29,095/- and accepted by the Assessing Officer as business expenditure) could be held as a disallowable expenditure u/s.37(1) of the Act.

3. The brief facts qua the issue involved are that assessee-company had furnished its return of income on 14.10.2010 declaring total income of Rs.1,16,05,402/-. Thereafter, the Assessing Officer had completed the assessment vide order dated 23.02.2013 determining the total income of the assessee at Rs.10,64,22,580/-. After making various additions and computed the income in the following manner:

INCOME FROM HOUSE PROPERTY		
Net Rent i.e. reduced by Property Tax (as per computation)		
From Capital Court	Rs. 3,40,30,277/-	
From Greater Kailash	Rs. 6,45,008/-	
From Business Centre	Rs. 1,18,54,200/-	Rs. 4,65,29,485/-
Less: Deduction u/s 24(a) @ 30% of Net Rent		Rs. 1,39,58,845/-
		Rs. 3,25,70,640/-
Less: deduction u/s 24(b) for interest (as per computation)		Rs. 54,79,529/-
Income from house property (A)		Rs. 2,70,91,111/-
INCOME FROM CAPITAL GAINS		
STCG oh sale of flat (as discussed in para 4.1)		Rs. 27,50,349/-
LTCG on sale of Bhondsi Land (Para 4.2)		Rs. 5,82,41,778/-
Income from capital gains (B)		Rs. 6,09,92,127/-
INCOME FROM OTHER SOURCES		
Interest (as per computation)	1,25,93,330	
Other income (as per para 4.1)	13,32,329	
Add: Disallowance u/s 14A r.w.s. 8D	41,29,095	
Add: Deemed Dividend (para 4.3)	1,63,00,000	
Sub – total	3,42,54,754	
Less: Balance Interest & Expenses (as discussed in para 4.1)	1,59,15,414	
Income from Capital Gains (C)		Rs. 1,83,39,340/-
Total income (A+B+C)		Rs. 10,64,22,578/-
Rounded off		**Rs. 10,64,22,580/-**

Totalling Mistake should be 3,43,54,754

Should be Income from Other Sources (Typing Mistake in Ass. Order

4. Before us, ld. Senior Counsel at the outset pointed out that the assessment order dated 23.02.2013 passed u/s. 143(3) is without jurisdiction as no notice u/s.143(2) has been served within a period of six months from the end of the financial year ending 31.03.2011, because here in this case the return of income was filed on 14.10.2010 u/s.139(1), whereas the first notice u/s.143(2) itself has been issued on 01.05.2012. Prior to notice dated 01.05.2012, no notice have either been issued or have been served upon the assessee. The only notice which has been served u/s.143(2) was on 07.05.2012. This issue has been challenged by way of separate petition for admission of additional ground for which the prayer was made along with affidavit of the Director of the Company Mr. Narottam Sharma.

5. After considering the submissions made by both the parties, the additional ground raised by the assessee vide petition dated 27.06.2019 wherein following grounds and the prayer have been made:

> *Subject:* ***An application seeking admission of Additional Ground of Appeal***
>
> *Hon'ble Sir(s),*
>
> *1. A captioned appeal is fixed for hearing on 11.07.2019. The appellant prays by this instant application, that it, be permitted to urge the following ground of appeal as an additional ground of appeal.*
>
> ***Additional Ground of appeal***
>
> *"That the assessment framed by the AO u/s 143(3) of the Income Tax Act is without jurisdiction in as much as the statutory notice u/s 143(2) of the Income Tax Act had been served beyond a period of six months from the end of the financial year in which the appellant had furnished its return of income. The*

aforesaid notice stated to have been issued u/s 143(2) of the Act is dated 01.05.2012 and had been served on 07.05.2012 which is beyond the period of six months from the end of the financial year 31.03.2011, since the return of income had been furnished on 14.10.2010.

2. The appellant submits that the aforesaid additional ground of appeal since pertains to assumption of jurisdiction to frame assessment u/s 143(3) of the Act, it be permitted to urge the aforesaid ground of appeal. It is submitted all the facts are on record of the learned Assessing Officer who has to establish that any notice u/s 143(2) had been served prior to 01.10.2011.

3. It is submitted that the aforesaid ground had not been raised by the appellant either before the learned CIT(A) or before the Hon'ble Tribunal in the memo of appeal filed on account of its lack of legal knowledge and its unawareness of the statutory provisions contained in section 143(2) of the Income Tax Act.

4. The appellant is also filing an affidavit of Shri Narottam Sharma in support of the fact that the only notice received u/s 143(2) of the Act by it is dated 01.05.2012 and had been received on 07.05.2012 and in fact the assessee had received further notices u/s 143(2) of the Act dated 17.08.2012 and also a notice dated 22.02.2013. In all the assessee had been served with three notices u/s 143(2) the first one being dated 01.05.2012. No other notice had been served prior to 07.05.2012 and issued on 01.05.2012.

It is therefore prayed that the appellant be permitted to urge the said additional ground of appeal"

6. Since this is purely a legal ground which does not require any investigation of facts and is fully discernible and verified from the material placed on record, therefore, we are admitting the said additional ground and also adjudicating the same. Here, in this case, it appears that return of income was electronically filed on 14.10.2010 declaring income of Rs.1,16,05,402/-. In the assessment order, though there is mention of notice u/s. 143(2) issued and duly served upon the assessee. However, there is no mention about the date

and service of issuance of notice u/s. 143(2). In support, the Director of the Company has also filed an affidavit, wherein it has been duly affirmed on oath that no notice u/s.143(2) was served upon the company or any authorized representative on or prior to 30.09.2011 which was the statutory time limit within which a notice u/s.143(2) should have been issued. In the paper book, there is one notice dated 01.05.2012 wherein the Assessing Officer had asked various queries, the copy of which has been placed in the paper book from pages 41 to 44. At page 45 of the paper book, there is a notice u/s.143(2) of the Act dated 07.08.2012 wherein the Assessing Officer had required the assessee to attend the office on 24th August, 2012 in connection with certain points in return of income submitted for Assessment Year 2010-11. The said notice is captioned as notice u/s. 143(2) of the Income Tax Act 1961 signed by Assistant Commissioner of Income Tax, Circle-18(1), New Delhi. Thereafter, other various notices have issued by the Assessing Officer. In response to which, assessee had filed various submission and reply. Prima facie it appears that prior to 01.05.2012, there is no such notice which has been issued and served upon the assessee, at least it is not discernible from the assessment order or appellate order or documents placed before us. Undisputedly statutory time limit of issuance and service of notice u/s. 143(2) i.e., within the statutory time period of six months from the end of the relevant financial year in which the return was filed had expired on 30.09.2011.

7. Now it is well settled law that if no notice u/s.143(2) has been issued and served within statutory time period provided in the Act, then no assessment can be passed u/s.143(3) and the return of income is liable to be accepted as such.

7. Before us, ld. DR submitted that assessee has co-operated with the proceedings before the Assessing Officer and no prejudice is caused, therefore, late issuance of notice beyond statutory time limit is covered by Section 292 BB. However, the said contention of the ld. DR cannot be accepted in view of the judgment of **Hon'ble Supreme Court in the case of CIT vs. Laxman Das Khandelwal [CIVIL APPEAL NOS. 6261, 6262 OF 2019], order dated 13.08.2019**, wherein the Hon'ble Supreme Court has observed and held as under:

> *"4. In said appeal arising from the decision of the Income Tax Appellate Tribunal ('the Tribunal', for short), the issue that arose before the High Court was the effect of absence of notice under Section 143(2) of the Income Tax Act, 1961 ('the Act', for short). The Respondent-Assessee relied upon the decision of this Court in Assistant Commissioner of Income Tax and Another vs. Hotel Blue Moon2. On the other hand, reliance was placed by the Appellant on the provisions of Section 292BB of the Act to submit that the Respondent having participated in the proceedings, the defect, if any, stood completely cured.*
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> *5. At the outset, it must be stated that out of two questions of law that arose for consideration in Hotel Blue Moon's case2 the first question was whether notice under Section 143(2) would be mandatory for the purpose of making the assessment under Section 143(3) of the Act. It was observed:-*

"3.The Appellate Tribunal held, while affirming the decision of CIT (A) that non-issue of notice under Section 143(2) is only a procedural irregularity and the same is curable. In the appeal filed by the assessee before the Gauhati High Court, the following two questions of law were raised for consideration and decision of the High Court, they were:

"(1) Whether on the facts and in circumstances of the case the issuance of notice under Section 143(3) of the Income Tax Act, 1961 within the prescribed time limit for the purpose of making the assessment under Section 143(3) of the Income Tax Act, 1961 is mandatory? And

(2) Whether, on the facts and in the circumstances of the case and in view of the undisputed findings arrived at by the Commissioner of Income Tax (Appeals), the additions made under Section 68 of the Income Tax Act, 1961 should be deleted or set aside?"

4. The High Court, disagreeing with the Tribunal, held, that the provisions of Section 142 and subsections (2) and (3) of Section 143 will have mandatory application in a case where the assessing officer in repudiation of return filed in response to a notice issued under Section 158-BC(a) proceeds to make an inquiry. Accordingly, the High Court answered the question of law framed in affirmative and in favour of the appellant and against the Revenue. The Revenue thereafter applied to this Court for special leave under Article 136, and the same was granted, and hence this appeal. ... ...

13. The only question that arises for our consideration in this batch of appeals is: whether service of notice on the assessee under Section 143(2) within the prescribed period of time is a prerequisite

for framing the block assessment under Chapter XIV-B of the Income Tax Act, 1961? ... .

27. The case of the Revenue is that the expression "so far as may be, apply" indicates that it is not expected to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143 strictly for the purpose of block assessments. We do not agree with the submissions of the learned counsel for the Revenue, since we do not see any reason to restrict the scope and meaning of the expression "so far as may be, apply". In our view, where the assessing officer in repudiation of the return filed under Section 158- BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143."

6. The question, however, remains whether Section 292BB which came into effect on and from 01.04.2008 has effected any change. Said Section 292BB is to the following effect:-

"292BB. Notice deemed to be valid in certain circumstances. - Where an assessee has appeared in any proceeding or cooperated 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."

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 Blue Moon's case2. 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."

8. Thus in view of the principle laid down and reiterated by the Hon'ble Apex Court, it is well settled now that in absence of any issuance and services of notice within the statutory time period the impugned assessment order itself is bad in law and no variation in the return of income can be made and consequently the said assessment order is liable to be quashed. Here, in this case, at the time of hearing, it was pronounced in the open court that though we are going by the submissions and the material placed before us that there was no notice u/s.143(2) issued and served upon the assessee within the statutory time limit. However liberty would be given to the Assessing Officer in case if there is any such notice u/s.143(2) which was served upon the assessee in accordance with law within the statutory time lime then Assessing Officer would be at liberty to take appropriate action and may seek for recall of the appeal. With this observation and without

going into merits of other additions, the appeal of the assessee is allowed.

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

Above decision was announced on conclusion of Virtual Hearing in the presence of both the parties on 16th June, 2021. However, order was reserved.

Sd/-	Sd/-
[N.K. BILLAIYA]	**[AMIT SHUKLA]**
[ACCOUNTANT MEMBER]	**JUDICIAL MEMBER**

DATED: 16/09/2021

PKK: