

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'B', NEW DELHI**

**Before Sh. Amit Shukla, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 2817/Del/2016 : Asstt. Year : 2012-13**

Amba Construction Company, C/o Sh. S.K. Gambhir, Adv., 429, 3 <sup>rd</sup> Floor, Main Road, Jagriti Enclave, Delhi-110092	Vs	ACIT, Central Circle-55(1), New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AANFA0579M</b>		

**Assessee by : Sh. C. S. Anand, Adv.**

**Revenue by : Sh. Avikal Manu, Sr. DR**

<b>Date of Hearing: 16.03.2022</b>
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<b>Date of Pronouncement: 20.04.2022</b>
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**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the assessee against the order of the Id. CIT(A)-19, Kanpur dated 11.03.2016.

2. Following grounds have been raised by the assessee:

*"1. That on the facts of the case and under the law, the assessment proceedings taken up & concluded by the Id ACIT, Circle 55(1), New Delhi, are liable to be quashed because he had illegally assumed jurisdiction to assess the assessee, merely on the basis of transfer memo issued by the Id A.O., Ward 35(4), New Delhi on her own.*

*2. That on the peculiar facts of the case and under the law, the Id. CIT(A) has erred in not quashing the assessment order, which was passed by the Id. ACIT, Circle-55(1), New Delhi on the basis of notice u/s 143(2) which was issued by the Id ITO, Ward 35(4),*

*New Delhi and which was not served upon the assessee.*

*3. That the Id. CIT(A) has erred in recording his observations/finding that since the assessee had not raised any specific ground seeking quashing of assessment proceedings / order on account of non - service of notice u/s 143(2), the submissions made in this regard during the course of appellate proceedings are to be rejected.*

*4. That the Id. CIT(A) has erred in not appreciating that "Issue of notice" and "Service of notice" are two different aspects, and also that the notice u/s 143(2) was required to be served upon the assessee.*

*5. That the Id. CIT(A) had erred in not quashing the assessment proceedings / order, particularly when he had himself noticed that the undelivered envelope containing the notice u/s 143(2) issued by the ITO, Ward-35(4), New Delhi on 16.08.2013, was found lying in the assessment folder, and also that no other notice u/s 143(2) was issued either by the Id. ITO, Ward-35(4), New Delhi or by the Id. ACIT, Circle-55(1), New Delhi during the period upto 30.09.2013.*

*6. That the Id. CIT(A) has erred in not appreciating that the provisions of section 292BB would come into play, only when there is no proof of non-service of the notice u/s 143(2).*

*7. That the Id. CIT(A) has erred in not appreciating that the provisions of section 292BB were not applicable in the case of the assessee because the assessee had raised objection vide its letter dt. 30.06.2014 on the very first occasion when the Id. ACIT, Circle-55(1), New Delhi had commenced the assessment proceedings."*

3. The assessee firm is carrying on the business of construction as builder and developer. Business is being conducted under the name and style of M/s Amba Construction Company. During the year under assessment, the assessee has

shown gross turnover of Rs.6,68,73,346/- and net profit of Rs.33,41,680/- has been declared thereon giving thereby N.P. ratio of 5.03%.

4. At the outset, the Id. AR argued on the legal issue of non-service of notice u/s 143(2) of the Income Tax Act, 1961 on the assessee by the ITO, Ward-35(4).

5. The facts reveal that the notice u/s 143(2) dated 06.08.2013 was dispatched to the assessee on 07.08.2013 through Speed Post. The notice was returned undelivered by the remarks of the Postman "Surajmal Vihar, A286 mein yeh firm nahi hai". The revenue authorities relied on the deeming provisions of Section 292BB of the Act. The revenue authorities further held and argued that the service of notice u/s 143(2) is valid based on the following grounds:

- a. The notice u/s 143(2) in the instant case was issued and served upon the assessee's last known address. Also, on perusal of records, your honour will appreciate the fact that this is the only address (A286 Surajmal Vihar, New Delhi) which is mentioned in all communications by the assessee, for instance, address mentioned on all bank accounts of the all the vouchers and bills produced by the assessee during the course of assessment proceedings, all the communications of the assessee with the department. In fact, in the submissions dated 30.12.2015 made by the assessee before your honour, this address has been mentioned. Moreover, on perusal of ITRs of subsequent years till date, this is the only address which has been mentioned by the assessee.

Thus, if this is the ONLY communication address of the assessee firm, how is it possible that the notice was returned un-served with remarks "no such firm on this address". This only shows that the assessee has deliberately returned the notice and that the intentions of the assessee are mala fide.

- b. Also, in case of notice u/s 143(2) which was returned, the remarks on the envelope stated "no such firm on this address", but subsequent notices which have been returned from this address have been returned with remarks "Left". This change of remarks only points out to only one possibility, that the notices are selectively being returned by someone on that address.
- c. Another interesting fact is that when the assessee filed the initial grounds of appeal, there is no mention of non-service of notice u/s 143(2) which clearly shows that it is just an afterthought of the assessee to deviate attention.

6. It is an undisputable fact that the notice has been issued but has not been served on the assessee and the said notice is a part of the record of the assessment folder even till today. The notice has been dispatched on 07.08.2013 and the last for issue of notice u/s 143(2) was 30.09.2013. The AO had enough time to serve the notice either by affixture or through notice server and make further field enquiries for service of the notice. Instead of that, the AO simply kept the un-served notice in the folder and proceeded with the assessment. The enquiries conducted during the remand report cannot rescue the action of the Assessing Officer for non-service of notice.

7. The provisions of Section 143(2) read as under:

"143.....

*(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 or the prescribed income-tax authority, as the case may be, if, 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, **shall serve on the assessee a notice** requiring him, on a date to be specified therein, either to attend the office of the Assessing Officer or to produce, or cause to be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return:*

*Provided that no notice under this sub-section 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."*

8. When the notice issued by the AO has returned un-served then it cannot be treated as service of notice in accordance with the provisions of Section 27 of General Clauses Act 1897 and Section 143(2) of the Income Tax Act, 1961.

9. The Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Cebon India Ltd. 347 ITR 583 held that "in the absence of notice being served, the Assessing Officer had no jurisdiction to make assessment. Absence of notice cannot be held to be curable under section 292BB of the Act.

10. The Hon'ble Gujarat High Court in the case of CIT Vs. K.M. Ravji [Tax Appeal No. 771/2010], vide order dated 18.07.2011

held that "in absence of issue of notice u/s 143(2) within the time envisaged by the legislature in the said provisions, the assessment proceedings become invalid."

11. The Hon'ble Supreme Court in the case of Hotel Blue Moon 321 ITR 362 held that "an omission on the part of the AO to issue notice u/s 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice u/s 143(2) cannot be dispensed with."

12. Placing reliance on the orders of the various Hon'ble High Courts and the Hon'ble Apex Court as mentioned above and keeping in view the undisputed fact that the envelope containing the notice dated 06.08.2013 u/s 143(2) was not served on the assessee as admitted by the AO in Para 1 (iv)b (at page 3) of her report dated 19.01.2016 [PB: 01-06] and also by the Id. CIT(A) in para 11 (at page 17) of his order dated 11.03.2016, we hold that the service of notice u/s 143(2) within the prescribed time limit is a *sine qua non* for completion of assessment u/s 143(3).

13. In the result, the appeal of the assessee is allowed.  
Order Pronounced in the Open Court on 20/04/2022.

Sd/-

**(Amit Shukla)**  
**Judicial Member**  
**Dated: 20/04/2022**

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**\*Subodh Kumar, Sr. PS\***

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**