

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "SMC" BENCH: NEW DELHI**

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

**ITA No.3731/Del/2018
[Assessment Year : 2009-10]**

National Bakery Machine, C/o-B.P.Gupta & Co., Tax Laws Consultants, 186, W.K.Road, Opp. Nagin Prakashan, Meerut, Uttar Pradesh-250001. PAN-AAEFN1513H	vs	ITO, Ward-2(1), Meerut.
APPELLANT		RESPONDENT
Appellant by	S/Shri K.Sampath & V.Rajakumar, Adv.	
Respondent by	Shri Om Parkash, Sr.DR	
Date of Hearing	22.02.2023	
Date of Pronouncement	07.03.2023	

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the assessee for the assessment year 2009-10 is directed against the order of Ld. CIT(A), Meerut dated 28.02.2018. The assessee has raised following grounds of appeal:-

1. *“That the appellant is in appeal before the Hon'ble ITAT Bench against the order of the Ld. CIT (A) bearing appeal no- 365/2011-12 dated 28.02.2018. That the sequence of facts and merits of this appeal are narrated and submitted in the following grounds of appeal.*
2. *That in this case the appellant originally had filed appeal against the order of the Ld. A.O. dated 23.12.2011 before the Ld. CIT(A), assailing on the following two issues besides other grounds of appeal.*

- a. *That the notice u/s 143(2) mentioned in the assessment order as that" notice u/s 143(2) of the Act dated 23.03.2010 was issued to the assessee" was never served or received by them.*
- b. *That the Ld. A.O. erred in making an addition of Rs. 19,90,949/- u/s 69 of the I.T.Act as alleged unexplained purchases made by the assessee.*
3. *That the Ld. CIT(A) vide his order bearing Appeal no- 365/11-12 dated 31.03.2013 held as mentioned below.*

"That the claim of the appellant of non service of notice u/s 143(2) is not tenable as it was taken first time before him during the course of appeal proceedings."
4. *That regarding other ground the Ld. CIT(A) confirmed the addition of Rs.19,90,949/- with the observations as mentioned in his Appellate Order dated 31.03.2013.*
5. *That the appellant filed appeal before the Hon'ble Bench Delhi against the aforementioned order of the Ld. CIT(A) dated 31.03.2013*
6. *That the Hon'ble ITAT Bench "E" vide their order bearing ITA No 3997/Del/ dated 23.05.2017 set aside the case to the file of the Ld. CIT(A) with an observation that a legal issue can be taken at any stage and with a direction to adjudicate on the claim of the appellant of non service of notice u/s 143(2) on them. That the Hon'ble Bench did not prefer to give any finding in respect of the addition of Rs.19,90,944/- as mentioned in ground No-2(b) above.*
7. *That in consequence of the aforesaid order of the Hon'ble ITAT Bench, the Ld. CIT(A) adjudicated on the claim of non service of notice u/s 143(2).*
8. *That the Ld. CIT (A) vide his order bearing appeal no. 365/2011-12 dated 28.02.2018 dismissed the claim of the appellant of non service of notice u/s 143(2) and supported his finding by referring to section 292BB of the I.T.Act.*

9. *That the appellant is now in appeal before the Hon'ble Bench against the aforesaid order of the Ld. CIT(A) dated 28.02.2018 in respect of his finding on the issue of non service of notice u/s 143(2).*
10. *That while rejecting the claim of the assessee of non service of notice u/s 143(2) the submissions of the appellant were not appreciated in a correct perspective.*
11. *That the Ld. CIT (A) erred in law and on facts in not considering the claim of non service of notice u/s 143(2) particularly in the context of the following observations of the Ld. A.O. in his assessment order.*

"Notice u/s 143(2) of the Act dated 23.03.2010 was issued to the assessee"

2. This is second round of litigation. In the earlier round of litigation, this Tribunal was pleased to restore the issue to the file of Ld.CIT(A) regarding non-service of notice u/s 143(2) of the Income Tax Act, 1961 ("the Act"). However, Ld.CIT(A) dismissed the appeal by observing that the case of the assessee is squarely covered by section 292BB of the Act. Ld. Counsel for the assessee submitted that admittedly there was no service of notice u/s 143(2) of the Act. Therefore, the assessment deserves to be annulled.

3. On the other hand, Ld. Sr. DR opposed these submissions and reiterated the written submissions. For the sake of clarity, the relevant contents of the written submissions are reproduced as under:-

"In the above case, following material facts and relevant case laws may kindly be considered.

On Service of Notice:

*It was held by Hon'ble Supreme Court in **Atulbhai Hiralal Shah Vs DCIt [SC] [2016] 73 taxmann.com 325 [SC]** that where Assessing Officer had reopened assessment of assessee and sent notice to him through postal*

department at address contained in his PAN card, which was returned back with remark 'left', and assessee challenged reopening of assessment contending that remark 'left' was totally incorrect, since assessee had not joined postal department to question why remark 'left' was made, only on ground of non service of notice, reassessment proceedings could not be terminated SLP was dismissed Hon'ble Delhi High Court in CIT Vs Three Dee Exim P Ltd [2012] 20 taxmann.com 146 [Delhi] held that participation by assessee in assessment proceedings on receipt of copy of notice can be deemed to be service of notice within ambit of section 148(1).

Hon'ble Delhi High Court in S K Srivastava Vs CBDT [2022] 139 taxmann.com 65 (Delhi) held that where petitioner challenged notice under section 148 on ground that same was not served within prescribed time, however it was found that address at which reopening notice was petitioner on his tax portal and was also reflected as communication address in his PAN and furthermore digitally signed notice was also uploaded on e-filing portal of petitioner within limitation period, impugned notice could not be said to be issued beyond limitation.

Hon'ble Supreme Court decision dated 13.08.2019 in CIT Vs Laxman Das Khandelwal C.A. NO.2019 SLP[C] Diary No.7708 of 2019', "Para 9' clearly says that

"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 been 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"

The clear proposition is that if notice is validly issued and followed by participation on the part of the assessee during the proceedings, the notice would be treated as served.

5. *In view of the contention of the appellant is devoid of legal merits and deserves to be rejected. It is further requested that the arguments and case laws as discussed by the AO in the assessment order and by the Ld. CIT[A] in the impugned order may a kindly be treated as my argument during the present proceedings before your honour*

Ref: CIT(A) Para 4 of order dt.31.03.2013 on merits of addition Rs.19,90,944/-

CIT[A] Para 3.4 onwards of order dt.28.02.2018 on service of notice u/s 143(2).”

4. I have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. The Hon’ble Delhi High Court rendered in the case of *Pr.CIT vs Silver Line [2016] 383 ITR 455 (Delhi)* had an occasion to decide the issue related to consequence of non-service of notice u/s 143(2) of the Act. Hon’ble Delhi High Court after considering the various judgements on this point held that *“With the legal position being abundantly clear that a reassessment order cannot be passed without compliance with the mandatory requirement of notice being issued by the Assessing Officer to the assessee under section 143(2) of the Act, the Income Tax Appellate Tribunal was in the present case right in concluding that the reassessment orders in question were legally unsustainable.”*

5. Further, reliance was placed upon the judgement of Hon’ble Supreme Court rendered in the case of *ACIT vs Hotel Blue Moon [2010] 321 ITR 362 (SC)* wherein *“Omission on the part of the assessing authority 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.” Therefore, in the light of above-mentioned binding precedents, the assessment framed by the Assessing Officer (“AO”) is held to be bad in law, the same is hereby quashed. Thus, grounds raised by the assessee are allowed.

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

Order pronounced in the open Court on 07th March, 2023.

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

** Amit Kumar **

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI