

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

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 2408/DEL/2022
Assessment Year: 2012-13

M/s Mam Raj Chunni Lal, 5183, Lahori Gate, Delhi-110006. PAN- AAAFM9668A	<u>Vs</u>	Income-tax Officer, Ward-46 (1), New Delhi
APPELLANT		RESPONDENT
Assessee represented by	S/Shri Somil Agarwal Adv. & Sh. Shrey Jain, Adv.	
Department represented by	Shri Om Parkash, Sr. DR	
Date of hearing	25.05.2023	
Date of pronouncement	25.05./2023	

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi, dated 07.09.2022, pertaining to the assessment year 2012-13. The assessee has raised following grounds of appeal:

“1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not quashing the impugned reassessment order passed by Ld. AO inter alia on the ground that jurisdiction was not validly assumed and without complying with mandatory

conditions as envisaged under section 147 to 151 of Income Tax Act, 1961.

2. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not quashing the impugned reassessment order passed by Ld. AO inter alia on the ground that mandatory notices u/s 143(2), 142(1) and 148 of Income Tax Act, 1961 were not issued/served upon the appellant.*

3. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making estimated addition of Rs.6,98,840/- (5% of Rs.1,39,76,778/-) on account of purchases made from M/s Gayatri Maa Enterprises by treating it as alleged income of assessee u/s 68 and that too by recording incorrect facts and findings and in violation of principles of natural justice and without providing the adverse material available on record and without providing the opportunity of cross examination of the deponent.*

4. *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in making estimated addition of Rs.6,98,840/- u/s 68, is bad in law and against the facts and circumstances of the case and the same is not sustainable on various legal and factual grounds.*

5. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making estimated addition of Rs.6,98,840(5% of Rs.1,39,76,778/-) on account of alleged commission paid u/s 69C and that too by recording incorrect facts and findings and in violation of principles of natural justice and without providing the adverse material available on record.*

6. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of Ld. AO in charging the interest u/s 234A, 234B and 234D of Income Tax Act, 1961.*

7. *That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.”*

2. Facts giving rise to the present appeal are that the case of the assessee was reopened u/s 147 of the Income-tax Act, 1961 (the "Act"). In response to the notice issued u/s 148 of the Act the assessee filed its return of income on 23.11.2019. Thereafter the impugned assessment was framed. Thereby the AO made two additions of Rs. 6,98,840/- each u/s 68 & 69 of the Act respectively. Aggrieved against this the assessee preferred appeal before the learned CIT(Appeals), who also sustained the additions. Now the assessee is in appeal before this Tribunal.

3. Apropos to ground nos. 1 & 2, learned counsel for the assessee at the outset submitted that notice u/s 143(2), which is mandatory, was not served upon the assessee. He has relied upon the judgment of the Hon'ble Supreme Court rendered in the case of CIT Vs. Laxman Das Khandelwal (2019) 417 ITR 0325 (SC). He submitted that in the absence of such mandatory notice the assessment so framed deserves to be quashed.

4. On the other hand, learned DR supported the orders of the authorities below.

5. I have heard rival submissions and perused the material available on record. During the course of proceedings the Revenue was directed to produce

assessment record and also the AO was directed to file a factual report. As per the assessment record and the factual report filed by the AO, no proof regarding issuance and service of notice u/s 143(2) of the Act could be placed on record. The Hon'ble Supreme Court in the case of Laxman Das Khandelwal (supra) has decided the issue against the Revenue by observing had under:

"4. In said appeal arising from the decision of the Income Tax Appellate Tribunal ('the Tribunal', for short), the issue that arise 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 Moo- (2010) 3 SCC 259. 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.

5. At the outset, it must be stated that out of two questions of law that arose for consideration in Hotel Blue Moon's case 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 sub-sections (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 case. 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.”

6. Respectfully following the binding precedence, the assessment order is hereby quashed. Since I have quashed the assessment order on the legal ground, the other grounds raised by the assessee have become of academic interest only and need not to be adjudicated at this stage.

7. Appeal of the assessee is partly allowed.

Order pronounced in open court on 25.05.2023.

**Sd/-
(KUL BHARAT)
JUDICIAL MEMBER**

MP

Copy forwarded to:

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

**ASSISTANT REGISTRAR
ITAT, NEW DELHI**