

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "F", MUMBAI  
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER  
**ITA No. 7577/Mum/2019(A.Y. 2012-13)**

**Mr. Vishal Bhupendra Mehta**

3/4, New Shanivan, Oberoi Complex,  
Off. New Link Road,  
Andheri (W)  
Mumbai-400 053

**PAN:AAEPM4690G**

..... Appellant

Vs.

**ACIT, Circle-25 (1)**

202, 2<sup>nd</sup> Floor,  
Kautilya Bhavan,  
G Bloack, Bandra Kurla Complex,  
Mumbai-400 051

..... Respondent

Appellant by : None  
Respondent by : Smt. Vranda U. Matkari, Sr. AR  
  
Date of hearing : 20/03/2023  
Date of pronouncement : 15/05/2023

**ORDER**

**PER GAGAN GOYAL, A.M.:**

This appeal by assessee is directed against the order of Ld. Commissioner of Income Tax Appeals-53, Mumbai (for short 'Ld. CIT(A)) dated 30.10.2019 u/s. 250

of the Income Tax Act, 1961 (for short 'the Act') for A.Y. 2012-13. The assessee has raised the following grounds of appeal:

*"1. The order dated 30/10/2019 bearing No. CIT[A]-53/IT-249/ACIT-25[1]/2018-19 passed under section 250 of Income Tax Act, 1961 by the Hon'ble CIT(A)-53, Mumbai, is excessive, unreasonable, arbitrary, against the provisions of Income Tax Act, 1961 and therefore liable to be quashed.*

*2. On facts and circumstances of the case and in law, the Hon'ble CIT [A] has erred in holding that, the assessment is valid even though no notice under section 143[2] was issued.*

*3. On facts and circumstances of the case and in law, the Hon'ble CIT [A] has erred in holding that, gain of Rs. 2,43,00,000/- realized on the sale of flat constituted "short-term capital gain" instead of "Business Profit" as shown by the Appellant.*

*4. on facts and circumstances of the case and in law, the Hon'ble CIT [A] has erred in confirming the application of section 50C without making a reference to DVO*

*5. The appellant craves to alter, add, delete, substitute, or modify and other grounds of appeal."*

2. Brief facts of the case are that assessee filed his return of income on 29-09-2012 declaring total income at Rs 1,22,36,515/-. Case of the assessee was reopened u/s 147 and a notice u/s 148 was issued vide dated 31-03-2016 i.e., within 4 years from the end of the relevant assessment year. Reasons for reopening were supplied to the assessee as assessee has sold a flat for an amount of Rs 1.7 Cr on 07-12-2011 and the same was purchased for an amount of Rs 37,23,260/- on 05-08-2010 i.e., short term in nature.

3. AO observed that assessee has claimed the profit on sale of the flat as business profit rather than short term capital gain and has also claimed expenses against such income. AO treated the same as short term capital gain and applied section 50C also. Assessee being aggrieved with this order of AO,

preferred an appeal before the Ld. CIT(A) taking various grounds on technicality of the order and merits of the case. The Ld. CIT(A) also confirmed the action of AO and dismissed assessee's appeal.

4. Assessee being further aggrieved preferred this appeal before us. We have gone through the order of AO, order of Ld. CIT(A) and submissions of the assessee along with supporting documents and case law relied upon. Assessee raised total 5 grounds of appeal, out of these ground nos. 1 and 5 are general in nature hence no adjudication is required. Ground nos. 2, 3 and 4 are substantive ground needs our adjudication. Ground wise adjudication is done here under through this order.

5. Ground no. 2 pertains to validity of the order, as no notice u/s. 143(2) was issued, as claimed by the assessee. On this issue we have gone through the order of AO and Ld. CIT (A) and it is observed that there is no reference of issuance of Notice u/s. 143(2) found in the order of AO. In addition to this there are contradictions in the order of AO and Ld. CIT (A). AO in his order vide para 2, page 2 of the assessment order categorically confirmed about communication from the assessee vide dated: 11.07.2016, that the original return filed be accepted as return filed in response to the notice u/s. 148 and then asked for the reasons for re-opening and the same were supplied also in anticipation of the same, but Ld. CIT(A) in his order vide para 6.2, page 7 narrated the facts differently by stating that no return in response to section 148 was filed by the assessee, which factually incorrect. In addition to this it is mentioned in the assessment order that notice u/s. 148 was issued on 31.03.2016, whereas Ld. CIT (A) vide para 6.2, page 7 mentioned that notice

u/s. 143(2) was also issued on 31.03.2016 vide order sheet noting submitted by AO before Ld. CIT(A).

6. Now, here it is pertinent to discuss and mention that in absence of any return in compliance to section 148 of the Act, how AO can issue a notice u/s. 143(2) of the Act. As per Ld. CIT(A), assessee never raised this issue of non-issuance of notice u/s. 143(2) of the Act before AO is of no relevance. Why assessee should raise this issue, it is paramount duty cast upon AO to issue statutory notice as required by the Law. It is further observed that assessment has been completed u/s. 143(3) r.w.s. 147 of the Act, if no return has been filed by the assessee and proceedings not complied with the same should have been completed u/s. 144 r.w.s. 147 of the Act. The order of Ld. CIT(A) is far away from the factual reality of the matter. We have also taken note of the assessee's affidavit vide Page No. 54 of the Paper Book, there is no rebuttal of the same by the Department and even before the Tribunal Department, not filed any evidence of issuance of notice u/s. 143(2) of the Act.

7. In these circumstances and facts of the case, we found contention of the assessee as sustainable on this legal ground itself and assessment is null and void. While holding so we fetch strength from the decision of Hon'ble Supreme Court in the case of **CIT v. Laxman Das Khandelwal [2019] 108 taxmann.com 183 (SC.)**, wherein the Hon'ble court held as under:

*"A close 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. [Para 7].”*

*“According to section 292BB, 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 section 292BB is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee and **section does not save complete absence of notice and, thus, for section 292BB to apply, the notice must have emanated from the department and it is only the infirmities in the manner of service of notice that the section seeks to cure and it is not intended to cure complete absence of notice itself. [Para 9]”***

*“Since the facts on record are clear that no notice under section 143(2) was ever issued by the department, the findings rendered by the High Court and the Tribunal and the conclusion arrived at were correct. There is no reason to take a different view in the matter. [Para 10]”*

8. In view of the above facts emanated from the order of AO and Ld. CIT(A) read with the law of the land pronounced by the Hon’ble Supreme Court mentioned (supra), we reached to the conclusion that mandatory procedure of issuing the Notice u/s. 143(2) was not followed in this case. **Hence, Ground No.2 raised by the assessee is allowed.**

9. As Ground No. 2 pertaining to legality of the order itself is allowed in favour of assessee, we allow the appeal without going into the merits of the case. Hence, we are not adjudicating the Ground Nos. 3 and 4 raised by the assessee.

10. **In the result, appeal of the assessee is allowed.**

Order pronounced in the open court on 15<sup>th</sup> day of May, 2023.

Sd/-

(AMIT SHUKLA)  
JUDICIAL MEMBER

Sd/-

(GAGAN GOYAL)  
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 15/05/2023

*Sr.PS Dhananjay*

**Copy of the Order forwarded to:**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy. /Asstt. Registrar)  
ITAT, Mumbai