

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E' BENCH,  
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
MS ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 6303/DEL/2012 [A.Y. 2009-10]

The Dy C.I.T  
Circle 65(1)  
New Delhi

Vs. M/s Mark Buildtech Pvt Ltd  
Flat No. 714  
89, Hemkunt Chambers  
Nehru Place, New Delhi

PAN: AAECM 7261 Q

CO No. 229/DEL/2015  
[A/o ITA No. 6303/DEL/2012 [A.Y. 2009-10]]

M/s Mark Buildtech Pvt Ltd  
Flat No. 714  
89, Hemkunt Chambers  
Nehru Place, New Delhi

Vs.

The Dy. C.I.T  
Circle 65(1)  
New Delhi

PAN: AAECM 7261 Q

(Applicant)

(Respondent)

Assessee By : Shri K. Sampath, Adv  
Shri Rajkumar, Adv

Department By : Shri Subhra Jyoti Chakraborty, CIR-DR

Date of Hearing : 24.01.2024  
Date of Pronouncement : 06.02.2024

**ORDER**

**PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-**

The above captioned appeal by the Revenue and cross objections by the assessee are directed towards the very same order of the Id. CIT(A) - IX, New Delhi dated 21.09.2012 pertaining to Assessment Year 2009-10.

2. Since the underlying facts are common in the appeal and cross objections, they were heard together and are disposed of by this common order for the sake of convenience and brevity.

3. The grievances of the Revenue read as under:

"1. That the order of the Id. Addl. CIT passed *uls* 143(3) dated 30.12.2011 is bad and contrary to law and facts.

2. That on the facts as well as in law the Id. Addl. CIT has gravely erred in treating the long term capital gains of Rs.1,25,80,48,639/- on sale of shares as "Business Profits" whereas these shares were held for more than 12 months as investments in the hands of the Company which is against the law and is based merely on conjectures and surmises.

3. That the Id. Addl. CIT has gravely erred in making further addition of Rs.32,21,46,000I- as business profits of the assessee which was paid by the purchaser company to clear the existing liability against the assets of the company of which shares were transferred treating the same as additional consideration on sale on land. The addition made is based merely on presumption, conjectures and surmises.

4. That the Id. Assessing Officer has wrongly held and concluded that amount received for repayment of existing liabilities by Shivam Infratech Pvt. Ltd. of Rs.36,21,46,000I- from Stedman Developers Pvt. Ltd., the purchaser company of the shares of Shivam Infratech Pvt. Ltd. as additional sale consideration against sale of land.

5. That the Additions made by the Ld. Assessing Officer be deleted.

6. That the Ld. Addl. CIT has erred in initiating penalty proceedings u/s. 271 (1 )(c) and 271 B of I.T. Act.

7. That the Id. Addl. CIT has erred in charging interest u/s. 234A, 234B, 234C and 2340 of I. T. Act.

8. That the applicant craves for leave to amend or add any other ground of appeal."

4. The cross objections of the assessee read as under:

**“On the facts and circumstances of the case and in law the authorities below erred in persisting with the assessment proceedings by holding the same to be valid despite the factum of non-service of the requisite notices on the assessee as provided under law. The assessment being ab initio invalid ought to have been quashed.”**

5. Since the grounds taken in the cross objections go to the root of the matter, we decided to adjudicate it first. The claim of the assessee is that the Assessing Officer without assuming jurisdiction framed assessment u/s 143(3) of the Income-tax Act, 1961 [the Act, for short] which is not according to the provisions of law.

6. The bone of contention is whether notice u/s 143(2) of the Act was served upon the assessee as per relevant provisions of law?

7. The case of the Revenue can be gathered from the remand report submitted by the Assessing Officer which reads as under:

stating as under:

✓ *"The assessee has filed additional ground of appeal before your goodself alleging that statutory notices u/s. 143(2) and 142(1) were not served upon the assessee within one year from the date of filing of return, and as such the return already filed is deemed to be accepted on the return income. Assessee has placed reliance on an affidavit filed by Sh. Surinder Garg, CA who was authorized to appear for the assessment proceedings of A.Y. 2009-10. My comments on the above submissions and additional ground raised by the assessee are as below:*

Regarding the contentions raised by the assessee on facts:

1. I have gone through the contents of the said affidavit wherein it has been alleged by Sh. Surinder Singh that a letter contending non service of notice u/s. 143(2) was refused to be accepted by then Assessing Officer, ITO, Ward-6(2), on the ground that the case is likely to be transferred to the Circle. It has been further alleged that when the matter was brought to the knowledge of DCIT, Circle-6(1), he said that the objection of the assessee is not going to be entertained. It is further stated in the affidavit that the case was then transferred to Addl. Commissioner, Range-6, Delhi i.e. the undersigned.

In the above background the comments of the concerned officers i.e. then DCIT, Circle-6(1) Sh. Sanjeev Ghei and ITO, Ward-6(2), Sh. Chand Singh Sarsar,

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CIT(A).IX

A.Y. 2009-10

were invited on the allegations made by the assessee. Both the officers have submitted sworn affidavits denying the above allegations. Sh. Chand Singh Sarsar has categorically stated in his affidavit that the concerned authorized representative never approached him with the objection that notice u/s. 143(2) has not been served upon the assessee company and that he never refused any letter containing the said objection with regard to non receipt of notice u/s. 143(2) of the Act. Similarly, Sh. Sanjeev Ghei in his affidavit has also stated that he never refused to entertain any objection raised by Sh. Surinder Garg Chartered Accountant regarding timely service of notice u/s. 143(2) and 142(1) in the case of Mark Buildtech Pvt. Ltd. For A.Y. 2009-10. Original affidavits of both the officers are being enclosed herewith for your kind perusal.

2. Further it has been verified from records that this case was selected for scrutiny under CASS and a notice u/s. 143(2) dated 19.08.2010 was sent by speed post vide speed No. ED963867488 IN on 20.08.2010 **i.e. well before the date of limitation of 30.09.2010.** The said notice never came back unserved. The said notice was sent at the address provided in the return of income and the address has been confirmed as the correct address vide order sheet entry dated 20.12.2011 by the authorized representative of the assessee during the course of assessment proceedings and again vide order sheet entry dated 06.02.2012 by the authorized representative during the course of recovery proceedings. It is further noticed that all further notices, assessment order, penalty notices, stay order and other miscellaneous letters sent thereafter, have been duly received at this address. Hence the assessee in the absence of any evidence cannot say that notice u/s. 143(2) dated 19.08.2010 sent by speed post on the same address was not received by it.

3. In view of the above it is clear that the affidavit filed by Sh. Surinder Garg Chartered Accountant and Authorized Representative of the assessee during assessment proceeding for A.Y. 2009-10, cannot be relied upon. It is an after thought by the assessee to scuttle the assessment proceedings on flimsy grounds. In the case of the assessee, it has been clearly brought out in assessment order for A.Y. 2009-10, that assessee has deliberately shown 'business income' under the head 'capital gains' which has serious revenue implications and that is why the assessee, who has now been caught on the wrong footing, is now trying to find ways to get the

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*assessment proceedings annulled by filing such baseless and false affidavits without any supporting evidence. Hence it is requested that the said affidavit filed by Sh. Surinder Garg, may be rejected as it has no basis whatsoever.*

8. The contention of the assessee finds support from the following order of the CCIT, Delhi - 2, New Delhi which reads as under:

Sub : M/S. Mark Buildtech Pvt Limited, Flat No.714, Hemkunt,  
Chamber-89, Nehru Place, New Delhi.  
Petition seeking stay of demand-  
Income Tax Assessment Year 2009-10

Ref : Assessee's letter No.nil dated 08.02.2012 addressed to this office

Please refer to the above.

Brief background of the case is as under:

The assessee made an applications dated 8.2.2012 & 13.2.2012 (copies attached as Annexure-A & B), in which it was mainly claimed that the demand raised against it is illegal as the statutory notice u/s 143(2) and 142(1) was not served upon the assessee within one year from the date of filing of the return of income and appeal *inter alia* on this ground is pending before learned CIT (A)-IX, New Delhi. The assessee requested that the stay of demand be allowed till the disposal of appeal so that the issue is thrashed out in appeal. The assessee has been heard. CIT, Delhi-II in her report dated 14.2.2012 (copy attached as Annexure-C) has recommended that the stay of demand petition of the assessee be rejected in view of the report from Addl. CIT, Range-6, New Delhi in which it was stated that the notice u/s 143(2) was sent by speed post and never came back un-served. In further submissions dated 2.03.2012 (copy attached as Annexure-D) the assessee reiterated that no notice u/s 143(2) was served on it and AO had no jurisdiction to make the assessment. The assessee further contended that the absence of notice cannot be held to be curable u/s 292BB. In this office directions to both CIT, Delhi-II and the assessee dated 02.03.2012 (copy attached as Annexure-E) they were directed to obtain evidence of proof of service of notice u/s 143(2) dated 19.08.2010 from the Postal authorities and till next date of hearing the proceedings for recovery were kept in abeyance. The assessee in its letter dated 13.03.2012 (copy attached as Annexure-F) stated that the AO has not confirmed the service of notice and no proof of service has been given and that the assessee has approached the Postal authorities for proof of service,. By this office letter dated 14.03.2012 (copy attached as Annexure-G) both CIT Delhi-II and the assessee were again directed to obtain proof of service from the Postal authorities and till next date of hearing the recovery action was kept in abeyance. On 21.3.2012 the assessee filed written submissions

dated 19<sup>th</sup> March, 2012 (copy attached as Annexure-H) along with which it filed a letter No. 2 52-10/2012-BD&MD dated 20<sup>th</sup> March, 2012 from the postal authorities informing that the speed post article sent on 20.8.2010 sent by the AO was returned undelivered with remarks "addressee left". The assessee also placed reliance on the decisions of the Hon'ble Delhi High Court in *Soul vs DCIT* ( 220 CTR 211) and another decision of Hon'ble Delhi High Court in the case of *Volvolines Cummins Limited; CIT vs Cebon India Pvt Ltd.* (229 CTR 188) (P&H High Court) and on Instruction No. 1914. CIT, Delhi-II vide her letter dated 21.03.2012 (copy attached as Annexure-I) reported that information has been sought from postal authorities by AO of status of notice u/s 143(2). It is noted that the appeal of the assessee is still pending with the Ld. CIT(Appeal). From the evidence placed on record *prima-facie* it appears that the notice under section 143(2) dated 19.2.2010 was returned undelivered by the Postal authorities and therefore none attended for the assessee on the date of hearing i.e. 8<sup>th</sup> Sept. 2010. AO had time till 30<sup>th</sup> Sept. 2010 to get the notice served but apparently the next notice was sent in 2011. The facts of the case *prima facie* show that there is force in the contention of the assessee that no notice u/s 143(2) was served on it within the statutory period and as the issue according to the assessee itself has to be thrashed out by learned CIT(A)-IX, Delhi in appeal proceedings, the recovery proceedings will be kept in abeyance till the decision of learned CIT(A). AO will remove attachments on Bank account and vacate notices issued u/s 226(3) to all debtors companies till decision of learned CIT(A) as request in this regard has been made by assessee in its submissions.. The CBDT instruction No.1914 para C (i) allows for keeping demand in abeyance for valid reasons.

In light of submissions of the Assessee and consideration of the matter, you are directed to treat the Assessee as not being in default in respect of the outstanding demand subject to fulfillment of below mentioned conditions:-

- a) require an undertaking from the assessee that he will cooperate in the early disposal of appeals failing which the stay order will be cancelled;
- b) Reserve the right to review the order passed after expiry of a reasonable period or if the assessee has not cooperated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority or court alters the above situations;
- c) Reserve a right to adjust refunds arising, if any, against the demand.

Yours faithfully,

*sd/-*

( R. BHARDWAJ )

Chief Commissioner of Income Tax,  
Delhi-II, New Delhi.

9. It can be seen from the above that there is a marked contradiction between the observations of the Assessing Officer and that of the CCIT. We further find that request for supply of information under RTI Act was made to the Post Master, Post Office, Kalkaji, New Delhi in relation to the Speed Post No. ED963867848IN dated 20.08.2010 and reply of the Chief General Manager, reads as under:

*“In continuation of this office letter of even number dated 15.03.2012, further enquires have revealed that only computer record is now available at Kalkaji HO. As per the computer record the article was returned and delivers with remarks “Addressee Left”.*

10. Whereas the Additional CIT, Range - 6, New Delhi, in his order u/s 7 of the RTI Act, addressed to the assessee has mentioned the following :

Date of Order: 07.03.2011

**Order u/s. 7 of the RTI Act**

An application u/s. 6 of the RTI Act was filed in the office of Addl. CIT, Range-6, New Delhi on 09.02.2012, seeking information as below:-

*"You are requested to furnish proof of service of notice u/s 143(2)/142(1) for the A.Y. 2009-10 served on or before 30.09.2010 upon us."*

In this regard, you are hereby informed that notice u/s 143(2) was issued by ITO, Ward-6(2) on 19.08.2010 by speed post vide No. ED9638678481N (copy of speed post proof is enclosed). The notice was not received back unserved.

3. The appeal against the present order lies before the Commissioner of Income Tax-II, Room No. 309, 3<sup>rd</sup> Floor, Central Revenue Building, I.P. Estate, New Delhi 110001.

Yours faithfully,

**(Nandita Kanchan)**

Additional Commissioner of Income Tax,  
Range-6, New Delhi

Copy to:-

1. M/s. Mark Buildtech Pvt. Ltd., Flat No. 714, Hemkunt

11. Again, there is a marked contradiction between the reply of the Chief General Manager and the Additional CIT, Range-6.

12. We are of the considered view that the Revenue has grossly failed in furnishing any conclusive evidence in respect of service of notice u/s 143(2) of the Act. This quarrel has been decided in plethora of judgments to name a few:

1. Hon'ble Punjab High Court in the case of CEBON India Limited 347 ITR 583

*“Mere giving of dispatch number, cannot be taken as an evidence of issuance of notice and the contention of the Revenue that where the notice has been duly dispatched to the assessee, the irregularity or defect in issuing notice was curable under section 292BB of the Act was rejected by the hon'ble High Court. It was further held by the hon'ble High Court that in the absence of notice being served, the Assessing Officer has no jurisdiction to make assessment and the absence of service of notice could not be held to be curable under section 292BB of the Act.”*

2. Hon'ble Delhi Court Mascomptel India Ltd 345 ITR 58

“no attempt was made to serve the assessee on the correct address which was available with the department and in fact stated in the return of the income for the A.Y. 2006-07. Subsequent attempt to serve another notice long after the expiry of the limitation period prescribed by the proviso, could not help the Revenue.”

3. Hon'ble Delhi High Court Lunar Diamonds Ltd 281 ITR 1

“the assessed had filed an affidavit stating that it had not received the notice and the Tribunal rightly held that under these circumstances, the burden was upon the Appellant to prove that

notice was served upon the assessed within the prescribed time. The Appellant had filed to prove its case in this regard.”

4. Hon'ble Delhi High Court NULON India Ltd 323 ITR 681

“The Assessing officer is also not sure nor specific as to when the notice in question has been served upon the assessed. It is only a presumption that notice which have been sent by speed post on 30th October, 2002, must have been delivered to the assessed by 31st October, 2002. There is no presumption under the law that any notice sent by speed post must have been delivered to the assessed within 24 hours. Moreover, there is nothing on record to show as whose instance the notice was redirected and sent at the address of Noida.

So, from the material available on record, we come to the conclusion that no notice u/s 143(2) of the Act, which is mandatory requirement of law, have been served upon the assessed within prescribed period.”

13. The contention of the ld. DR that it is a curable defect u/s 292BB of the Act has not been accepted by the Hon'ble High Court of Allahabad in the case of Salarpur Cold Storage [P] Ltd 228 Taxman 48 wherein the Hon'ble High Court held as under:

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- Under clause (ii) of sub-section (2) of section 143, the Assessing Officer is required to serve, on the assessee, a notice requiring him to attend the office or to produce evidence on which the assessee may rely in support of the return, if the Assessing Officer 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. Under the proviso to clause (ii), it has been specified that no notice under clause (ii) 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. Service on the assessee of a notice within the period prescribed by the proviso presupposes the issuance of a notice for, it is only when a notice is issued, that it can be served. Thereafter, the provisions of sub-section (3) of section 143 stipulate that on the date specified in the notice issued under clause (ii) of sub-section (2) of section 143, the Assessing Officer shall, after hearing the evidence as the assessee may produce and considering such other evidence as he may require and upon taking into account all relevant material, by an order in writing make an assessment of the total income or loss of the assessee. The jurisdiction of the Assessing Officer to make an assessment under section 143(3)(ii) is premised on the issuance of a notice under clause (ii) of section 143(2). The proviso to clause (ii) of sub-section (2) of section 143 stipulates that a notice must be served on the assessee no later than the expiry of six months from the end of the financial year in which the return has been furnished. If a notice is not even issued within the period of six months from the end of the financial year in which the return is furnished, there would be no occasion to serve it upon the assessee within the stipulated period. [Para 7]
  - In the present case, the notice was, issued on 6-10-2009 much beyond the period of six months. In such a situation, there could be no occasion to serve the notice within six months since the very act of issuance was beyond six months. [Para 8]
  - Now, it is in this background that it would be necessary to consider the provisions of section 292BB.
  - Section 292BB was inserted by the Finance Act, 2008 with effect from 1-4-2008. Section 292BB provides a deeming fiction. The deeming fiction is to the effect that once the assessee has appeared in any proceedings or cooperated in any enquiry relating to an assessment or reassessment, it shall be deemed that any notice under the provisions of the Act, which is required to be served on the assessee, has been duly served upon him in time in accordance with the provisions of the Act. The assessee is precluded from taking any objection in any proceeding or enquiry that the notice was (i) not served upon him; or (ii) not served upon him in time; or (iii) served upon him in an improper manner. In other words, once the deeming fiction comes into operation, the assessee is precluded from raising a challenge about the service of a notice, service within time or service in an improper manner. The proviso to section 292BB however, carves out an exception to the effect that the section shall not apply where the assessee has raised an objection before the completion of the assessment or reassessment. Section 292BB cannot obviate the requirement of complying with a jurisdictional condition. For the Assessing Officer to make an order of assessment under section 143(3) it is necessary to issue a notice under section 143(2) and in the absence of a notice under section 143(2) the assumption of jurisdiction itself would be invalid. [Paras 9 and 10]
  - This principle is no longer in doubt having due regard to the law laid down by the Supreme Court in the decision in *Asstt. CIT v. Hotel Blue Moon* [2010] 321 ITR 362/188 Taxman 113. While construing the

provisions of Chapter XIV-B of the Act in relation to block assessments, the Supreme Court in that decision considered the effect of section 143(2) and has, therefore, clearly held that the omission on the part of the Assessing Officer to issue a notice under section 143(2) is not a procedural irregularity and is not curable. The requirement of a notice under section 143(2) cannot be dispensed with. [Paras 11 and 12]

- | In our view, where the Assessing Officer fails to issue a notice within the period of six months as spelt out in the proviso to clause (ii) of section 143(2), the assumption of jurisdiction under section 143(3) would be invalid. This defect in regard to the assumption of jurisdiction cannot be cured by taking recourse to the deeming fiction under section 292BB. The fiction in section 292BB overcomes a procedural defect in regard to the non service of a notice on the assessee, and obviates a challenge that the notice was either not served or that it was not served in time or that it was served in an improper manner, where the assessee has appeared in a proceeding or cooperated in an enquiry without raising an objection. Section 292BB cannot come to the aid of the revenue in a situation where the issuance of a notice itself was not within the prescribed period, in which event the question of whether it was served correctly or otherwise, would be of no relevance whatsoever. Failure to issue a notice within the prescribed period would result in the Assessing Officer assuming jurisdiction contrary to law. [Para 13]
- | For the aforesaid reasons, there is no error in the view which was taken by the Tribunal. The appeal is accordingly, dismissed. [Para 15]

14. As no demonstrative evidence has been brought on record, in respect of service of notice u/s 143(2) of the Act, respectfully following the decision of the Hon'ble High Court [supra], the assessment order is quashed.

15. Since we have quashed the assessment, we do not find it necessary to dwell into the merits of the case.

16. In the result, the appeal of the Revenue in ITA No. 6303/DEL/2012 is dismissed and the cross objections of the assessee in CO No. 229/DEL/2015 are allowed.

The order is pronounced in the open court on 06.02.2024 in the presence of both the rival representatives.

**Sd/-**

**[ASTHA CHANDRA]  
JUDICIAL MEMBER**

**Sd/-**

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 06<sup>th</sup> FEBRUARY, 2024.

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	