

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

**BEFORE SHRI CHELLA NAGENDRA PRASAD, JUDICIAL MEMBER, AND
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER**

ITA No. 179/DEL/2024 [A.Y. 2007-08]

Ashwani Kumar and Co. P. Ltd C - 10, Ground Floor, Ring Road Rajhouri Garden, New Delhi	Vs.	The Income-tax Officer Ward - 3(3) New Delhi
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PAN - AACCA 044 IJ

(Applicant)

(Respondent)

Assessee By : Dr. Rakesh Gupta, Adv
Shri Shrey Jain, Adv

Department By : Shri Amit Katoch, Sr. DR

Date of Hearing : 25.06.2024

Date of Pronouncement : .07.2024

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the
NFAC, Delhi dated 21.11.2023 pertaining to A.Y. 2007-08.

2. The sum and substance of the grievance of the assessee is two-fold- firstly, that the Assessing Officer has made an addition of Rs. 90 lakhs on account of undisclosed investment in share application money without going into the depth and facts of the case. Secondly, the assessee is aggrieved that notice u/s 143(2) was not issued and that the ld. CIT(A) dismissed the appeal of the assessee without going into the depth of the case and replies filed by the assessee and the actual status of issuance of notice u/s 143(2) of the Act.

3. Briefly stated, the facts of the case are that the assessee filed his return of income declaring his total taxable income of Rs.47,85,298/- on 25.10.2007. The case was selected for scrutiny and original assessment in this case was completed u/s 143(3) of the Income-tax Act, 1961 [the Act, for short] at returned income of Rs.47,85,298 /-.

4. The case was reopened vide notice u/s 148 of the Act dated 28.03.2011 culminating in addition of Rs.90 lakhs u/s 68 of the I T Act to the total income of the assessee company on account of share application money. The addition being confirmed by the CIT(A), the matter reached the ITAT, New Delhi where the assessee company took the ground that due opportunity was not allowed during assessment

proceeding and said assessment order was null and void as notice u/s 143(2) of the Act was not issued during the assessment proceedings. The Tribunal remanded back the said assessment order to the file of Assessing Officer to examine both aspects raised by the assessee company.

5. In the second round, the Assessing Officer has again made same addition of Rs.90 lakhs on account of share application money to the total income of the assessee company.

6. Aggrieved the assessee went in appeal before the ld. CIT(A) and vehemently contended that no notice was issued u/s 143(2) of the Act and no due opportunity was given to the assessee company to justify its claim. After considering the facts and submissions, the ld. CIT(A) was not satisfied with the reply of the assessee and dismissed the appeal.

7. The aggrieved assessee is now before us in the second round. At the very outset of the opening of the arguments, the ld counsel of the assessee challenged the assumption of jurisdiction as legally invalid as no notice u/s 143(2) was issued and served on the assessee. The ld AR pointed out to the assessment order to show that the AO mentions the issuance of notice u/s 143(2) and 142(1) on 18.11.2011 but the

assessee did not receive any such notice. To bolster his argument, he further refers to the order sheet entries at page 205 of the Paper Book filed to show that though the order sheet mentions issuance of notice u/s 142(1) on 18.11.2011 but nowhere is there any reference to notice/s 143(2). The ld. counsel for the assessee furnished on record two separate judgments of the Hon'ble Jurisdictional High Court of Delhi in the case of PCIT M/s Consortium Nussli Comfort Net in ITA Nos. 62 and 63/2022 decided on 24th and 25th March 2022 and relying upon the same, prayed that the assessment order be declared null and void. The ld counsel of the assessee also placed reliance on the following case laws:

- a) CIT v Laxman Das Khandelwal (2019) 417 ITR 325(SC)
- b) PCIT v Jai Shiv Shankar Traders Pvt Ltd (2016) 383 ITR 448(del)
- c) PCIT v Silver Line & anr. (2016) 383 ITR 455(Del)
- d) CIT v Kelvinator of India (2010) 320 ITR 561(SC)

8. Per contra, the ld DR relied on the orders of the authorities below. On a query from the Bench as to the existence of the notice u/s 143(2) in the assessment records, he was fair to admit the notice u/s 143(2) was not available on record. The ld DR relied on the decision of Hon'ble Delhi High Court in the case of Madhya Bharat Energy

Corporation (2011) 337 ITR 389(Del) for the proposition that absence of notice u/s 143(2) is not fatal to the assessment order. The ld DR also submitted that the assessee participated in the proceedings, hence he cannot challenge the jurisdiction now and referred to the provisions of section 124(3) and 292BB of the I.T. Act.

9. In the rejoinder, the ld counsel of the assessee referred to the decision of Hon'ble Delhi High Court in the case of Jai Shiv Shankar Traders Pvt Ltd (supra) to point out that the decision in the case of Madhya Bharat Energy Corporation Ltd (supra) was subsequently reviewed by the Hon'ble Delhi High Court and it noted that "at the time of admission of appeal on 17th February 2011 after noticing that in the said case that no notice u/s 143(2) had ever been issued, the Court held that no question of law arose on that aspect. Therefore, the case of Madhya Bharat is not of any assistance to the Revenue as far as the issue in the present case is concerned. As far as provision of section 124(3) is concerned, it was submitted that it only provide for territorial jurisdictional which is not under challenge in the instant case. On the reliance of provisions of section 292BB, the ld AR submitted that the section saves those situation where notices are issued but had difficulties in getting served. The section does not save cases of non-issuance of notice.

10. We have heard the rival submissions and have perused the relevant material on record. On careful consideration of the facts and submissions and the judgments of the Hon'ble High Court of Delhi [supra], we find substance in the submission of the ld. Counsel of the assessee. We find that the assessee was issued notice u/s 148 dated 28.03.2011 in response to which the assessee submitted its reply vide letter dated 14.09.2011 enclosing with it its financial records and copy of Income Tax Return for AY 2007-2008. We note that the CIT(A) refusal to take cognizance of the said order sheet mentioning notice 142(1), cannot be justified as the said order sheet was taken cognizance of by the ITAT in the first round in its order at para 16. We are of the considered opinion that the CIT(A) should have examined the assessment record to verify the issuance of notice u/s 143(2) as there was specific direction of the ITAT in the first round to that effect. Instead the CIT(A) invoked the reason of "typographical error" to justify the non-mention of section 143(2) in the order sheet. The fact of non-availability of notice u/s 143(2) in the assessment record or any non-existence of any evidence of the notice being issued, was however confirmed by the Ld DR before us. The irrefutable conclusion that can be drawn from the facts described above is that though various questionnaires alongwith notice u/s 142(1) was issued, no

notice u/s 143(2) was issued or served upon the assessee after he furnished reply in compliance to notice u/s 148 of the Act. The above being the factual matrix, we are called upon to decide the foundational issue of fatality or otherwise of re-assessment which is made without issuance of notice u/s143(2).

11. The issue of effect of non-issue of notice u/s 143(2) on the re-assessment order is no longer res integra. In the case of PCIT v Jai Shiv Shankar Traders Pvt Ltd (2016) 383 ITR 448(Del) and PCIT v Silver Line & anr. (2016) 383 ITR 455(Del), the Hon'ble Delhi High Court have held that non- issue of notice u/s 143(2) is fatal to the re-assessment order. The Hon'ble High Court of Delhi in the case of M/s Consortium Nussli Comfort Net [supra] vide order dated 24th March, 2022, discussing the provisions of section 292BB and referring to the decision of the Hon'ble Supreme Court in the case of Laxman Das Khandelwal (supra), dismissed the appeal of the Revenue by holding as under:

“5.Since the present appeal primarily deals with interpretation of section 292BB of the Act, the same is reproduced hereinbelow :—

“292BB. Where an assessee has appeared in any proceeding or co-operated 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)		<i>not served upon him; or</i>
(b)		<i>not served upon him in time; or</i>
(c)		<i>served upon him in an improper manner :</i>

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment."

6. This Court is in agreement with the Tribunal that section 292BB does not give the power to condone the failure or delay in issuing the statutory notice required to be issued under section 143(2) of the Act. Section 292BB deals with failure of service of notice and not with regard to failure to issue notice. [See: CIT v. Rajeev Sharma [\[2010\] 192 Taxman 197/\[2011\] 336 ITR 678 \(All.\)](#), CIT v. Panorama Builders (P.) Ltd. [\[2014\] 45 taxmann.com 159/224 Taxman 203 \(Mag.\) \(Guj.\)](#) and CIT v. Salarpur Cold Storage (P.) Ltd. [\[2014\] 50 taxmann.com 105/\[2015\] 228 Taxman 48 \(All.\)](#).

7. The Supreme Court in Laxman Das Khandelwal (supra) has clearly stated that the scope of Section 292BB is to make service of notice having certain infirmities to be proper and valid. However, 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. In fact, a Division Bench of this Court in Pr. CIT v. Shri Jai Shiv Shankar Traders (P.) Ltd. [\[2015\] 64 taxmann.com 220/\[2016\] 383 ITR 448](#) has categorically held that the failure of the AO, in re-assessment proceedings, to issue notice under section 143(2) of the Act, prior to finalising the re-assessment order, cannot be condoned by referring to section 292BB of the Act. The relevant portion of the said judgment reads as under :

".....Section 292BB would apply insofar as failure of "service" of notice was concerned and not with regard to failure to "issue" notice. The resultant position is that as far as the present case is concerned the failure by the AO to issue a notice to the Assessee under [Section 143\(2\)](#) of the Act subsequent to 16th December 2010 when the Assessee made a statement before the AO to the effect that the original return filed should be treated as a return pursuant to a notice under [Section 148](#) of the Act, is fatal to the order of re-assessment."

8. Therefore, on the basis of admitted fact that notice under [Section 143\(2\)](#) of the Act was not issued within the period of six months prescribed for the purpose, jurisdiction assumed by the Assessing Officer under [Section 143\(3\)](#) of the Act was assumed erroneously.

9. Further, it is settled law that the issue of jurisdiction goes to the roots of the cause and such an issue can be raised at any belated stage of the proceeding including appeal. (See: [Kanwar Singh Saini vs High Court of Delhi](#), (2012) 4 SCC 307 and [M/s Mavany Brothers vs. CIT](#), 2015 SCC Online Bom 1686.

10. Consequently, this Court is of the view that no substantial question of law arises for consideration in the present appeal. Accordingly, the present appeal is dismissed."

12. The decision of Hon'ble Supreme Court in the case of Laxman Das Khandelwal (supra) as quoted above by the Hon'ble Delhi High Court, saves u/s 292BB, only such situations where notice is issued and not those cases where notice has not emanated at all. In view of the above discussion, we find that the resultant position in the instant case is

that the failure of the assessing officer to issue notice u/s 143(2) after the assessee filed reply to notice u/s 148, becomes fatal to the re-assessment order. Consequently, the jurisdiction assumed by the Assessing Officer u/s 143(3)/147 of the Act was erroneously assumed. The re-assessment order by the assessing officer and upheld by the Id. CIT(A), in absence of notice u/s 143(2) qualifies for being quashed as void ab initio. We direct accordingly, and as a result part of the ground 1 and 2 is allowed. Since the issue has been decided on technical ground, the opinion on the merits is not given.

13. In the result, the appeal of the assessee in ITA No. 179/DEL/2023 is allowed.

The order is pronounced in the open court on 05.07.2024.

Sd/-

Sd/-

[CHELLA NAGENDRA PRASAD]
JUDICIAL MEMBER

[NAVEEN CHANDRA]
ACCOUNTANT MEMBER

Dated: 05th JULY, 2024

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
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Date of dispatch of the Order	