आयकर अपीलीय अधीकरण, न्यायपीठ – "A" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA

(समक्ष)Before **श्री जे. सुधाकर रेड्डी**, लेखा सदस्य **एवं/and श्री ऐ. टी. वर्की,** न्यायीक सदस्य)

[Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

I.T.A. No. 462/Kol/2020
Assessment Year: 2010-11

Khushi Commotrade Pvt. Ltd. (PAN: AADCK7829B)	Vs.	Principal Commissioner of Income-tax – 2, Kolkata
Appellant		Respondent

Date of Hearing (Virtual)	05.05.2021
Date of Pronouncement	11.05.2021
For the Appellant	Shri Devesh Poddar, Advocate
For the Respondent	Shri John Vincent D. Longstich, CIT

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order of Ld. Pr. CIT-2, Kolkata passed u/s. 263 of the Income Tax Act, 1961 (hereinafter referred to as the "Act") dated 24.06.2020 for A Y 2010-11.

2. At the outset, the Ld. AR Shri Devesh Podder, Advocate drew our attention to the additional ground of appeal which is as under:

> *"For that the order passed u/s. 263 is bad in law to the extent that the same has been passed against an in valid/null order passed by assessing officer u/s. 147/143(3). Ld. CIT intends to recall and set aside and order passed by Ld. AO u/s. 147/143(3) which has been completed without issue of notice u/s. 143(2) in response to the return filed and as such, since the initial assessment order is itself null and void, order passed u/s. 263 on the same is without jurisdiction and fit to be quashed. This fact emerges from the order passed by Ld. CIT itself."*

3. According to the Ld. AR, the impugned order of the Ld. Pr. CIT is bad in law since the re-assessment order passed by the AO u/s 147/143 of the Act which he [PCIT] intended to interfere was itself without jurisdiction and, therefore, null in the

eyes of law and since the AO's order itself is null in the eyes of law, meaning non-est in the eyes of law, consequently the Ld. Pr. CIT could not have interfered by exercising his power u/s. 263 of the Act to again resurrect the non-est order. Since it is a pure legal issue we note that the same can be challenged before us at any stage as held by the Hon'ble Supreme Court in the case of NTPC Vs. CIT 229 ITR 383 (SC). In order to buttress his challenge raised on the aforesaid legal issue, the Ld. AR drew our attention to the finding of the Ld. Pr. CIT at page 3 of the impugned order wherein the Ld. Pr. CIT has recorded a finding as under:

> *"1….*
>
> *2. The order was passed u/s. 143(3)/147 on 18.09.2017, but no notice u/s. 143(2) was issued by the officer against the return filed in response to notice u/s. 148 on 19.04.2017, as required by the statute."*

4. According to the Ld. AR, the Ld. Pr. CIT in order to interfere with the reassessment order of AO by exercising his power u/s. 263 of the Act had found out that AO omitted to have issued notice u/s. 143(2) of the Act before framing the reassessment order, when the assessee has filed the return pursuant to notice u/s. 148 of the Act. Therefore, according to the Ld. AR, the assessment order framed by the AO dated 25.07.2017 u/s. 143(3)/147 of the Act without issuing mandatory notice u/s 143(2) of the Act was without jurisdiction and, therefore, null in the eyes of law and consequently, the Ld. Pr. CIT cannot revise the order which is not existing in the eyes of law (i.e. AO's order dated 25.07.2017). Therefore, he prayed that the impugned order may be quashed.

5. Per contra, the Ld. CIT, DR Shri John Vincent D. Longstich submitted that since the assessee has already taken part in the proceedings before the AO he cannot now turnaround and challenge the non-issuance of notice u/s. 143(2) of the Act because AO's action of framing re-assessment order is saved by section 292BB of the Act and, therefore, the Ld. CIT, DR does not want us to interfere with the impugned order passed by the Ld. Pr. CIT.

6. Having heard both the parties and after perusal of the records, we note that the Hon'ble Supreme Court in the case of CIT V *Hotel Blue Moon* (2010) 321 ITR 362

(S.C) has held that before the scrutiny assessment is made u/s. 143(3) of the Act the issuance of notice u/s. 143(2) of the Act is mandatory which is applicable also in the case of reopening of assessment once the assessee has filed return pursuant to notice u/s. 148 of the Act. In this case, in the impugned order itself the Ld. Pr. CIT has clearly given a finding of fact that the AO has not issued notice u/s. 143(2) of the Act after the event of the assessee having filed the return of income pursuant to the notice u/s. 148 of the Act on 19.04.2017 (supra). In such a scenario, we find merit in the contention of the assessee that the AO while passing the order u/s. 147/143(3) of the Act on 25.07.2017 has not **issued** notice u/s. 143(2) of the Act. And, therefore, the mandatory requirement of law to usurp the jurisdiction to frame the assessment u/s. 143(3)/147 of the Act pursuant to reopening is absent and, therefore, the legal effect is that the order of the AO dated 25.07.2017 is null in the eyes of law.

7. The Ld. CIT, DR has contended that since the assessee has participated in the reassessment proceeding which culminated in the order dated 25.07.2017, section 292BB comes to the rescue of the AO to pass the order. We do not agree to the aforesaid submission of the Ld. DR, since section 292BB is only safeguarding the deficiency if any of the service/non-service of notice and it does not cure the omission of issuance of mandatory notice by the AO . And since in this case, the AO has not issued the mandatory notice u/s 143(2) of the Act as found by the Ld. Pr. CIT, the question of section 292BB coming to the rescue of the AO to pass the reassessment order does not arise. For this we rely on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Laxman Das Khandelwal, Civil Appeal Nos. 6261-6262 of 2019 dated 13.08.2019 wherein the Hon'ble Supreme Court has taken care of the similar plea of the department and repelled the same by holding as under:

> *"3. The relevant facts leading to the filing of aforementioned Income Tax Appeal No.97 of 2018 before the High Court, as culled out from the judgment and order dated 27.04.2018 presently under appeal are as under:-*
>
> *"The assessee is an individual carrying a business of brokerage. Search and seizure operation was conducted under Section 132 of the Act of 1961 on 11.03.2010 at his residential premises. The assessee submitted return of income on 24.08.2011, declaring total income of Rs.9,35,130/-. The assessment was completed under Section 143(3) read with Section 153(D) of 1961 Act. Rupees 9,09,110/- was added on account of unexplained cash under Section 69 of 1961 Act. Rs.15,09,672/- was added*

on account of unexplained jewellery. Rupees 45,00,000/- was added on account of unexplained hundies and Rs.29,53,631/- was added on account of unexplained cash receipts. Aggrieved, the assessee filed an appeal before the Commissioner Income Tax (Appeal). The Commissioner of Income Tax (Appeal) deleted an amount of Rs.7,48,463/- holding that jewellery found in locker weighing 686.4 gms stood explained in view of circular No.1916 and further deleted the addition of Rs.29,23,98,117/- out of Rs.29,53,52,631/- holding that the correct approach would be to apply the peak formula to determine in such transaction which comes to Rs.29,54,514/- as on 05.03.2010.

Aggrieved, Revenue filed an appeal. The Assessee filed cross objection on the ground of jurisdiction of Assessment Officer regarding non issue of notice under Section 143(2) of the Act of 1961. The Tribunal vide impugned order upheld the cross objection and quashed the entire reassessment proceedings on the finding that the same stood vitiated as the assessment Officer lacked jurisdiction in absence of notice under Section 143(2) of the act of 1961. The Tribunal observed:

"17. In conclusion, we find that there was no notice issued u/s 143(2) prior to the completion of assessment under section 143 (3) of the Act by the AO; that the year under consideration was beyond the scope of the provisions of Section 143A of the Act, it being the search year and not covered in the six year to the year of search as per the assessment scheme/procedure defined u/s 153A; that the AO has passed regular assessment u/s 143(3) of the Act; although the Id. CIT has mentioned the section as 143 r.w.s. 153A and that the department had not controverted these facts at the stage of hearing. It is noted that issue of notice u/s 143(2) for completion of regular assessment in the case of the assessee was a statutory requirement as per the provisions of the Act and non issuance thereof is not a curable defect. Even in case of block assessment u/s 158BC, it has been so held by the apex Court in the case of 'ACIT v. Hotel Blue Moon' (2010) 321 ITR 362 (Supra)."

4. In said appeal arising from the decision of the Income Tax Appellate Tribunal ('the Tribunal', for short), the issue that arose 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 Moon2. 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 case2 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 case2. 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.

11. These Appeals are, therefore, dismissed. No costs."

8. Respectfully taking note of the ratio of the decision of the Hon'ble Supreme Court in Laxman Das Kandelwal (supra), we find no merit in the contention of the Ld. DR that section 292BB of the Act would cure the defect of non-issuance of notice u/s. 143(2) of the Act and since the AO in this case had not issued notice u/s. 143(2) of the Act before framing the re-assessment u/s. 143(3)/147 of the Act as discussed supra, the order passed by the AO dated 25.07.2017 u/s 143(3)/147 of the Act is without jurisdiction and, therefore, is non-est in the eyes of law and therefore, the Ld. Pr. CIT could not have interfered by exercising his power u/s. 263 of the Act in respect of non-est order and, therefore, his action to pass the impugned order is also null in the eyes of law and is quashed.

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

Order is pronounced in the open court on 11th May, 2021.

Sd/-	Sd/-
(J. S. Reddy)	(A. T. Varkey)
Accountant Member	Judicial Member

Date: 11th May, 2021

Jd (Sr. PS.)

Copy forwarded to –

1. Appellant – M/sKhushi Commotrade Pvt. Ltd., Room No. 758, 7th floor, 32, Ezra Street, Kolkata-700 001.
2. Respondent – Pr. Commissioner of Income Tax-2, Kolkata.
3. ITO, Ward-4(4), Kolkata.
4. DR, ITAT, Kolkata. (Sent through e-mail)

True copy

By order

Assistant Registrar
ITAT, Kolkata.