

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No.435 of 2011

For Approval and Signature:

HONOURABLE MR.JUSTICE V. M. SAHAI

Sd/-

HONOURABLE MR.JUSTICE N.V. ANJARIA

Sd/-

1.	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2.	To be referred to the Reporter or not ?	YES
3.	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4.	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	NO
5.	Whether it is to be circulated to the civil judge ?	NO

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COMMISSIONER OF INCOME TAX-III - Appellant

Versus

PANORAMA BUILDERS PVT LTD - Opponent

Appearance :

MS PAURAMI B SHETH for Appellant.

None for Opponent.

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CORAM : HONOURABLE MR.JUSTICE V. M. SAHAI

and

HONOURABLE MR.JUSTICE N.V. ANJARIA

Date : 30/08/2012

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE V. M. SAHAI)

1. We have heard Ms. Paurami B. Sheth, learned Central Government Standing Counsel appearing for the Revenue in this Tax Appeal on the following proposed substantial questions of law :-

"[A] Whether the Appellate Tribunal is right in law and on facts in holding that once the notice u/s. 143(2) was not issued within the prescribed time, the whole block assessment order would be null and void and bad in law ?

[B] Whether the Appellate Tribunal is right in law and on facts in deleting the addition of Rs.1,42,01,000/- made on account of unexplained cash credits ?

[C] Whether the Appellate Tribunal is right in law and on facts in holding that once the notice u/s.143(2) was not issued within the prescribed time, the whole block assessment order would be null and void and bad in law, despite the assessee not having raised any objection before the passing of the assessment order and despite the provisions of section 292BB of the Act ?"

Since the aforesaid the questions are inter-connected, therefore, we have considered all the three questions together.

2. The facts in brief are that one Khurana Group is involved in construction business. A search was made on Khurana Group on 25.7.2002 at the premises of Shri Sudhir M. Khurana and during the search conducted under Section 132 of the Income Tax Act, 1961 (for short 'the Act'), papers relating to Panorama Builders were found and seized. Therefore, the Deputy Commissioner of Income Tax, Central Circle 1 (2), Ahmedabad by his letter dated 30.7.2004 sent intimation that proceedings under Section 158BD be initiated against the assessee, namely, Panorama Builders Private Limited. Accordingly, the Assessing Officer issued a notice

under section 158BD read with section 158BC of the Act on 10.9.2004 which was served on the assessee. In response, the assessee filed its return of income in Form No.2-B on 6.10.2004 declaring undisclosed income at Rs.NIL. Thereafter, a notice under section 143(2) was issued on 6.7.2006 and subsequently on 14.7.2006, a notice under section 142(1) was issued along with a questionnaire to the assessee in response to which the Chartered Accountant attended the hearing and satisfied the questionnaire by filing material before the Assessing Officer.

3. The assessee is a Company incorporated on 17.7.2000 for development of land and construction activity. But it had not started any commercial activity. In the course of assessment proceedings, the Assessing Officer, had found that during the relevant period the assessee had received unsecured loans of Rs.1,42,01,000/- which was reflected in Schedule-B of the balance sheet as on 31.3.2001. The balance sheet also showed the capital work-in-progress of Rs.1,40,04,030/-. According to the Assessing Officer, the assessee had failed to establish the identity and creditworthiness of the depositors and the genuineness of the transactions as required under section 68 of the Act. The Assessing Officer by invoking section 68, computed the undisclosed income of the assessee by his order dated 29.9.2006 and made additions of Rs.1,42,01,000/- on which tax on undisclosed income @ 60% was imposed to the tune of Rs.85,20,600/-. Apart from it, penalty proceedings were also directed to be initiated against the assessee.

4. The assessee filed an appeal before the Commissioner of Income-tax (Appeals) [for short 'CIT (A)']. It was urged by the assessee that since the return for the block assessment period 1.4.1997 to 25.7.2002 was filed by the assessee on 6.10.2004, therefore, notice under section 143(2) ought to have been issued on or before 31.10.2005. But the notice under section 143(2) was

issued on 6.7.2006 and as such the notice was beyond a period of 12 months from the end of the month in which the return was furnished by the assessee, therefore, the assessment order passed by the Assessing Officer on the basis of a time barred notice was bad in law and deserved to be set aside. The CIT (A) relying on the decision of the Apex Court in *Assistant Commissioner of Income Tax and another v. Hotel Blue Moon* [2010] 321 ITR 362 (SC) and *Smt. Bandana Gogoi v. Commissioner of Income Tax and another*, [2007] 289 ITR 28 (Gauhati) held that the notice was required to be issued under section 143(2) of the Act was a mandatory notice and if it had not been served within a period of 12 months, then the assessment proceedings on the basis of such a notice would be time barred and it will render the proceedings initiated by the Assessing Officer null and void. The CIT (A) by his order dated 28.9.2007 allowed the appeal and deleted the additions made by the Assessing Officer.

5. In the appeal filed by the Revenue the Tribunal had recorded a finding of fact that it was not disputed by the Revenue that notice under section 143(2) was issued to the assessee beyond the period of 12 months from the end of the month in which return was filed. The proviso to section 143(2) lays down that no notice under section 143(2) shall be served upon the assessee after the expiry of 12 months from the end of the month in which return is furnished. The Tribunal held that once the notice under section 143(2) was not served upon the assessee within the prescribed time, the whole block assessment order would be null and void and bad in law. Thus, the Tribunal by order dated 2.7.2010 dismissed the appeal filed by the Revenue.

6. Learned counsel Ms. Paurami Sheth appearing for the Revenue has urged that the assessee has not challenged that the notice under section 143(2) of the Act had not been issued and served within a period of 12 months from the end of the month in

which return was furnished before the Assessing Officer, therefore, he could not raise this objection before the CIT(A). She has further urged that the assessee had participated in the proceedings before the Assessing Officer and, therefore, non-issuance of notice or non-service of notice under section 143(2) cannot be raised for the first time before the CIT(A). She has further urged that in view of section 292BB of the Act, since no objection was taken with regard to issuance or service of notice before the Assessing Officer, the assessee shall be deemed to have been duly served in accordance with the provisions of the Act and he is precluded from raising any objection that the notice was served on him in time. She has placed reliance on the decision of Madhya Pradesh High Court in **Premium Capital Market and Investment Ltd. (infra)**.

7. We deem it necessary to extract Section 292BB of the Act which reads as below:

“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) 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.”

8. The Finance Act, 2008, w.e.f. 1.4.2008 had inserted a new section 292BB in the Act. The reason for inserting section 292BB has been explained in Circular No.1/2009 dated 27.3.2009. According to the Circular, paragraph 42.7, the amendment has been made applicable w.e.f. 1.4.2008 which means that the provisions of new Section 292BB shall apply in all proceedings which are pending on 1.4.2008. On the strength of this Circular, learned counsel for the Revenue has vehemently urged that the provisions of section 292BB would also apply to the instant case as on 1.4.2008 the appeal of the Revenue was pending before the Tribunal, though the case relates to block assessment period 1.4.1997 to 25.7.2002.

9. It cannot be disputed that by inserting section 292BB which is a procedural provision, a legal fiction has been created which cures the defect in the service of notice, if the assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment. But a question arises as to whether section 292BB would be applicable retrospectively or prospectively. Normally, the insertion of a new section in the Act has to be held prospective in nature unless the legislative intent is clear that the new section was inserted to operate retrospectively. Had the legislature intended that section 292BB should apply retrospectively, then it would have specifically said so in the section itself. In absence of any indication in the section that it will apply retrospectively to pending proceedings, we are of the opinion that it would apply prospectively.

10. Even assuming arguendo that section 292BB applied retrospectively and on 1.4.2008 it applied to the appeal filed by the Revenue which was pending before the Income Tax Appellate Tribunal (for short 'the Tribunal') then what will be the effect of the

new section. On a close scrutiny of section 292BB, we find that it cures the defect in service of notice and lays down that it shall be deemed that any notice under the provisions of the Act which is required to be served on the assessee would be deemed to have been served provided the assessee had appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment. This section is only confined to service of notice under the Act. Section 292BB does not apply to issuance of notice under the provisions of the Act. It does not lay down that if a mandatory notice is required to be issued by the Assessing Officer and it has not been issued within the period of limitation fixed by the section or its proviso, then such notice shall be deemed to have been issued within time.

11. The learned counsel for the Revenue has relied on the decision of the Madhya Pradesh High Court in **CIT v. Premium Capital Market and Investment Limited, [2005] 275 ITR 260 (MP)**. In this case, the assessee has alleged that the notice under section 143(2) was not served on him. The Division Bench took the view that with regard to service of notice, the assessee has not taken any objection either before the Assessing Officer or before the CIT(A) and the assessee had submitted to the jurisdiction of the Assessing Officer, therefore, the notice could not be said to be invalid on the ground that it was not served upon the assessee within time stipulated by the section. It further held that no such ground was not taken in the appeal. The Court was of the opinion that even before the Tribunal, a point was not raised in the memo of appeal, but was sought to be raised by way of an amendment. The Division Bench came to the conclusion that whether the notice was properly served or not on the assessee was a mixed question of law and fact and the Tribunal should not have allowed the assessee to raise the plea of service of notice for the first time in second appeal as an additional ground when there was no factual material

available for recording a finding on the merits.

12. The decision in **Premium Capital Market and Investment Limited (supra)** is not applicable to the facts of case in hand. From the facts of the instant case it is clear that no notice was issued at all under section 143(2) of the Act within a period of 12 months from the end of the month in which return was furnished by the assessee. Therefore, there was no question of service of any notice on the assessee within the time frame fixed by the proviso to section 143(2) of the Act. No doubt, the assessee had not raised any objection before the Assessing Officer with regard to validity of notice under section 143(2), but in appeal before the CIT(A), he had raised this question which had been accepted by the CIT(A) and the Tribunal has also affirmed the finding. The assessee could have challenged the notice issued 6.7.2006 under section 143(2) before CIT(A) as it was related with the jurisdiction of the Assessing Officer. The question raised by the assessee went to the root of the power and jurisdiction of the Assessing Officer, who had no power to issue the notice under section 143(2) after the expiry of 12 months statutory period from the end of the month in which return was furnished by the assessee under section 139 of the Act.

13. In this tax appeal, we find that on 6.10.2004 the assessee had furnished his return under section 139. The notice under section 143(2) could be issued by the Assessing Officer, [as per the provisions as existed in the year 2004, 2005 and 2006] within 12 months from the end of the month in which return is furnished, that is to say on or before 31.10.2005. But the notice under proviso to section 143(2) was issued on 6.7.2006, after about 20 months. Under proviso to under section 143(2) the notice under section 143(2) was issued after the expiry of statutory period of 12 months from the end of the month in which return was filed, therefore, if the notice itself has not been issued within statutory

time limit of 12 months, there was no question of deemed service of the notice within the statutory period fixed by the proviso to section 143(2) of the Act. Therefore, to such a case, section 292BB will not come to aid of the Revenue, even if we take a view that section 292BB would apply retrospectively. Resort cannot be taken by the Revenue to section 292BB to give a go-bye to mandatory requirement of issuance of notice within the statutory fixed by the proviso to section 143(2) of the Act.

14. Therefore, we are of the considered opinion that section 292BB does not apply to issuance of notice, neither it cures the defect or enlarges statutory period where a mandatory notice under section 143(2) of the Act is required to be issued within limitation fixed under the Act. In absence of issuance of the notice under the proviso to section 143(2) of the Act within a period of 12 months from the end of the month in which return was furnished by the assessee, the proceedings initiated by the Assessing Officer with regard to block assessment period 1.4.1997 to 25.7.2002 on the basis of notice issued on 6.7.2006 under section 143(2), after about 20 months, was time barred and the entire proceedings in pursuance of such notice is null and void.

15. For the reasons given above, we do not find that any of the three questions raised by the Revenue in this appeal raises any substantial questions of law. This appeal is devoid of any merits and is accordingly dismissed.

Sd/-

[V. M. SAHAI, J.]

Sd/-

[N. V. ANJARIA, J.]

Savariya