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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 62/2022

PR. COMMISSIONER OF INCOME TAX-1 Appellant
Through: Mr. Sanjay Kumar, Advocate.

versus

M/S CONSORTIUM NUSSLI COMFORT NET Respondent
Through: Dr Rakesh Gupta, Advocate with
Mr. Somil Agarwal, Advocate.

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Date of Decision: 24th March, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

MANMOHAN, J (Oral):

CM Appl. 14353/2022 (for exemption)

Allowed, subject to all just exceptions.

Accordingly, present application stands disposed of.

ITA 62/2022

1. Present appeal has been filed challenging the order dated 23rd March, 2021 passed by ITAT in C.O. No. 198/Del/2017 in ITA No. 456/Del/2015 for the assessment year 2011-12.

2. Learned counsel for the appellant states that the respondent-assessee had appeared and cooperated in the assessment proceedings and had not raised any objection about non-service of notice under Section 143(2) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') during the entire assessment proceedings and therefore, the assessee was precluded from taking any objection that the notice was not issued in time in accordance with Section 292BB of the Act.

3. Learned counsel for the appellant states that the Tribunal has erred in ignoring Section 124(3) of the Act which mandates that issue regarding jurisdiction of Assessing Officer cannot be challenged after one month from issuance of notice under Section 143(2) of the Act or after completion of assessment proceedings, whichever is earlier.

4. He also submits that Section 292BB has been interpreted by the Apex Court recently in **Commissioner of Income-Tax vs. Laxman Das Khandelwal, [2019] 417 ITR 325 (SC)** wherein it has been held as under:-

“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 the 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 the 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.”

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) 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.”

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 vs. Rajeev Sharma**, [2011] 336 ITR 678 (All.HC), **CIT vs. Ponorama Builders (P.) Ltd.**, [2014] 224 Taxman 203 (Gujarat)(MAG.) and **CIT vs. Salarpur Cold Storage (P.) Ltd.**, [2014] 50 taxman.com 105 (Allahabad)].

7. The Supreme Court in **Commissioner of Income-Tax vs. 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. Commissioner of Income-tax Vs. Shri Jai Shiv Shankar Traders (P.) Ltd.*** [2015] 64 taxmann.com 220 (Delhi) 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.

MANMOHAN, J

DINESH KUMAR SHARMA, J

MARCH 24, 2022

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