IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "B", LUCKNOW

[Through Virtual Hearing]

BEFORE SHRI. A. D. JAIN, VICE PRESIDENT
AND SHRI T. S. KAPOOR, ACCOUNTANT MEMBER

ITA No.629/LKW/2019
Assessment Year: 2009-10

ACIT Circle-1 Lucknow	v.	M/s Wave Enterprises A-104, Indira Nagar Lucknow
		TAN/PAN:AAAFW8536D
(Appellant)		(Respondent)

C.O. No.04/LKW/2020
(In ITA No.629/LKW/2019)
Assessment Year: 2009-10

M/s Wave Enterprises A-104, Indira Nagar Lucknow	v.	ACIT Circle-1 Lucknow
TAN/PAN:AAAFW8536D		
(Cross-Objector)		(Respondent)

Department by:	Smt. Sheela Chopra, CIT (DR)		
Assessee by:	Shri Shubham Rastogi, C.A.		
Date of hearing:	16	06	2021
Date of pronouncement:	17	06	2021

O R D E R

PER A.D. JAIN, V.P.:

This is Revenue's appeal against the order of the ld. CIT(A)-III, Lucknow dated 27/1/2017, for the assessment year 2009-10. The assessee has filed cross objection.

ITA No.629/LKW/2019:

2. This appeal has been filed by the Department against the order passed by the ld. CIT(A), whereby the ld. CIT(A) has quashed the assessment order dated 30/12/2016 passed under section 143 of the Income Tax Act, 1961 read with 147 of the Act, observing therein that it is a fact that no notice under section 143(2) of the Act was issued and served on the assessee; and that therefore, in the absence of issuance and service of such notice under section 143(2) of the Act, the re-assessment made by the Assessing Officer under section 143 read with 147 of the Act, vide order dated 30/12/2016, for assessment year 2009-10 became null and void.

3. The ld. D.R., challenging the order under appeal, has contended that the Ld. CIT(A) erred in quashing the assessment, as non-issuance of notice u/s 143(2) is only a procedural irregularity on the basis of which assessment cannot be annulled, as discussed in 'M/s Areva T & D India Ltd. Vs. ACIT (Chennai)' and 'Jai Prakash Singh', 1996 AIR 1303, 1996 SCC (3) 525; that the Ld. CIT(A) erred in quashing the assessment without considering the fact that the basic requirement of section 143(2) has been fulfilled in this case, as in the notice issued u/s 142(1) dated 22.12.2016, the assessee was clearly asked to provide details of all related documents in support of its income tax return; that the Ld. CIT(A) failed to appreciate that no specific format has been prescribed for notice u/s 143(2) in the l.T. Act and I.T. Rules and as per the I.T. Act, only the basic requirement of providing an opportunity to produce any evidence, on which the assessee relies in support of the return, is to be fulfilled; and that the Ld. CIT(A) failed to appreciate that as per section 292BB of the Act, no assessment shall be invalid merely by reason of any mistake, defect or omission in such assessment if such

assessment is, in substance and effect, in conformity with or according to the provisions of the Act, and therefore the irregularity is curable u/s 292B of the Act.

4. On the other hand, the ld. Counsel for the assessee has placed strong reliance on the impugned order. It has been contended that issuance of notice under section 143(2) of the Act is a mandatory statutory requirement, which was not fulfilled in the present case and that therefore, the ld. CIT(A) has correctly annulled the re-assessment order. It has been stated that the matter stands finally adjudicated by the Hon'ble Supreme Court in the cases of 'ACIT vs. Hotel Blue Moon' 321 ITR 362 and 'CIT vs. Laxman Das Khandelwal' 108 taxmann.com 183. It is, thus, being requested that there being no force in the appeal filed by the Department, the same be dismissed.

5. Heard. It remains undisputed that no notice under section 143(2) of the Act was issued by the Assessing Officer to the assessee. The question is whether in such a circumstance, the ld. CIT(A) is correct in annulling the re-assessment order dated 30/12/2016.

6. In this regard, the observations of the ld. CIT(A) are as follows:

> *"12. The preliminary issue to be decided is, as to whether the assessment is valid in the absence of issue and service of notice u/s. 143(2) of the Act. The Hon'ble Mumbai High Court in the case of ACIT v. Geno Pharmaceuticals Ltd., [32 taxmann.com 162] held as under: -*
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> > *Apart from that, it is an admitted position that no notice under Section 143(2) had been issued while making assessment under Section 143(3) read with Section 147. The Apex Court in the case of National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383 has held that the Tribunal has discretion to allow or not to allow a new ground to be*

raised. But in a case where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee. The ITAT, after relying on the Judgment of the Apex Court in R. Dalmia v CIT [1999] 236 1TR 480/ 102 Taxman 702, came to the conclusion that issuance of notice under Section 143(2) was mandatory. The ITAT has taken into consideration the relevant provisions and has also taken into consideration the judgment of the Apex Court and relying on the said judgments, the ITAT has held that notice under Section 143(2) is mandatory and in the absence of such service, the Assessing Officer cannot proceed to make an inquiry on the return filed in compliance with the notice issued under Section 148.

Under these circumstances, no case is made out for interfering with the Tax Appeals No.7712012 and 7812012 since no substantial question of law is raised in both the appeals."

The Kerala High Court in the case of Travancore Diagnostics (P.) Ltd., ACIT [74 taxmann.com 239] held as under:-

"It is virtually admitted by the Revenue that no notice under section 143(2) had been issued. It is settled position of law that omission on the part of the Assessing Officer under section 143(2) cannot be a procedural irregularity and that the same is, not curable and that therefore, the requirement of notice under section 143(2) cannot be dispensed with. This emphatic statement of law, in the absence of issuance of a notice under section 143(2) by the revenue, would, therefore, inure to the benefit of the assessee, even though as noticed above, the contention of assessee that it was not aware of the proceedings under section 143 for the assessment year 2009-10 cannot be accepted. However, when the statute makes it imperative that notice under section 143(2) is to be issued, the omission or failure would then hit at the root of the jurisdiction.

"The extended question then is whether even if the assessee is deemed to have participated in the proceedings under section 143, even without the Assessing Officer having issued the mandatory notice, would the revenue be entitled to the benefit provided under section 292BB of the Act. Section 292BB creates an estoppel against the assessee in claiming that no notice has been served on him, if he has participated in the proceedings. However, the said section does not in any manner grant any privilege to the Assessing Officer in dispensing with the issuance of a notice under section 143(2) of the Act. Since the jurisdiction under section 143 is founded on the issuance of a notice under section 143(2), the Assessing Officer could have assumed jurisdiction only after issuing a notice under section 143(2). Even the participation of the assessee would not provide the benefit under section 292BB to the revenue. The requirement that a notice be issued is mandatory and the Assessing Officer has no other option but to issue the notice before commencing the jurisdiction."

13. Now, it is in this background that it would be necessary to consider the provisions of Section 292BB of the Act. Section 292 BB provides as follows: -

"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 objeo1p 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."

14. Section 292BB of the Act was inserted by the Finance Act, 2008 with effect from 1 April 2008. Section 292BB of the Act provides a deeming fiction. The deeming fiction is to the effect that once the assessee has appeared in any proceeding 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 292 BB of the Act, 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 292 BB of the Act cannot obviate the requirement of complying with a jurisdictional condition. For the Assessing Officer to make an order of assessment under Section 143 (3) of the Act, it is necessary to issue a notice under Section 143 (2) of the Act and in the absence of a notice under Section 143(2) of the Act, the assumption of jurisdiction itself would be invalid.

15. This principle.is no longer in doubt having due regard to the law laid down by the Supreme Court in the decision in Assistant Commissioner of Income Tax & another Vs. MIS Hotel Blue Moon 321 ITR 362. The Supreme Court has clearly held that the omission on the part of the Assessing Officer to issue a notice under Section 143(2) of the Act is not a procedural irregularity and is not curable. The requirement of a notice under Section 143(2) of the Act cannot be dispensed with.

16. The Hon'ble Apex court in a recent judgement made in the case of CIT Vs. Laxman Das Khandelwal (sic.) (CA no. 6261-6262 of 2019) dated 13/08/2019 has clearly held that section 292BB needs to be applied only on those cases in

which notice has emanated from the department. It is only the infirmities in the manner of the service of the notice that the section 292BB seeks to cure. It is not intended to cure complete absence of the notice.

17.In view of the above, I find that, where the Assessing Officer fails to issue a notice as spelt out in the proviso to clause (ii) of Section 143 (2) of the Act, the assumption of, jurisdiction under Section 143 (3) of the Act would be invalid. This defect in regard to the assumption of jurisdiction cannot be cured by taking recourse to the deeming fiction under, Section 292 BB of the Act. The fiction in Section 292 BB of the Act 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 292 BB of the Act cannot come to the aid in a situation where the issuance of a notice itself was not made, in which event the question of whether it was served correctly or otherwise, would be of no relevance whatsoever. Failure to issue a notice would result in the Assessing Officer assuming jurisdiction contrary to law.

18.It is a fact that the notice u/s. 143(2) has not been issued and served on the appellant. Therefore, in the absence of issue and service of notice u/s. 143(2) of the Act the re-assessment made by the Assessing Officer u/s. 143 r.w.s. 147 of the Act dated 30.12.2016 for the Assessment Year 2009-10 became null and void. Accordingly the Assessment Order passed u/s. 143 r.ws. 147 of the Act, is quashed as bad in law."

7. In the case of 'CIT vs. Laxman Das Khandelwal' 108 Taxmann.com 183 (SC), it has, inter alia, been held by the Hon'ble Supreme Court that a complete absence of notice under section 143(2) of the Act does not get cured even by section 292BB of the Act; that for section 292BB of the Act to apply, a notice under section 143(2) must have emanated from the

Department and it is only infirmities in manner of service of notice that section 292BB of the Act seeks to cur-e and it is not intended to cure complete absence of notice itself. It was held that 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 'ACIT vs. Hotel Blue Moon' [2010] 321 ITR 362(SC), wherein it was held that notice under section 143(2) of the Act would be mandatory for the purpose of making assessment under section 143(3) of the Act.

8. The above position has duly been taken into consideration by the ld. CIT(A), as noted hereinabove. The Department has not been able to refute the decisions in 'ACIT vs. Hotel Blue Moon' (supra) and 'CIT vs. Laxman Das Khandelwal' (supra), both rendered by the Hon'ble Supreme Court.

9. In view of the above, finding no merit in the grievance sought to be raised by the Department, the same is hereby rejected. The order under appeal is on all fours and it is, therefore, confirmed.

10. The appeal of the Department is accordingly ordered to be dismissed.

C,O. No.04/LKW/2020:

11. The following grounds have been raised by the assessee in the cross objection:

> (1) The Ld. C.I.T. (A)-III, Lko. erred on facts and in law in not deciding that notice u/s 148 of I. T. Act has been issued by Ld. A. 0. on 21.12.2016 for A. Y. - 2009-10 which is barred by limitation, hence the subsequent assessment is also invalid.
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> (2) The Ld. C.I.T. (A) erred on facts and in law in not deciding the issue that notice dated 31.03.2016 issued u/s 148 of I.T. Act by ACIT, R-1, Lko., has been issued at wrong

address and also served by ITI through affixture at wrong address, hence the notice dated 31.03.2016 was bad in the eye of Law.

(3) That the address of the Assessee Firm as per Income Tax Record is Wave Enterprises, A-104, Indira Nagar, Lucknow, PAN - AAAFW8536D and notice dated 21.12.2016 u/s 148 and other notices were also issued at this address.

WITHOUT PREJUDICE TO ABOVE

(4) The Ld. C.I.T. (A) erred on facts and in law in not deciding the issue that for a valid affixture of notice an independent witness is required and the same has not been followed in the present case as the so called notice as stated in the body of order has been affixed by IT! at wrong address in the presence of notice server only. Thus, it is an invalid affixture as per law and subsequent proceedings based on it are also invalid.

WITHOUT PREJUDICE TO ABOVE

(5) That Ld. C.I.T. (A) erred on facts and in law in not deciding the issue that reasons recorded u/s 148 of I. T. Act are only 'reason to suspect' and not 'reason to believe' that income chargeable to tax has escaped the assessment.

(6) That the assessee firm had filed its return in compliance to notice u/s 148 of I.T. Act issued by DCIT, CC-I, Lko. and also submitted objections on reasons to believe but the Ld. A.O. without disposing of the objections proceeded to complete the assessment.

(7) The Ld. C.I.T.(A) erred on facts and in law in not deciding the issue regarding addition of Rs. 2,60,50,000/- u/s 68 of I. T. Act without appreciating that the assessee has discharged its onus by submitting the evidences w. r. t. identity of the Loaner, creditworthiness and genuineness of the transaction and the evidences submitted has not been doubted by the Ld.A.0.

(8)That the Ld. C. I. T (A) did not appreciated that the assessee is not required to prove the source of source of Loaner as Loaner company M/s Sanyam Vyapar Pvt.

Limited is an independent assessee assessed to tax vide PAN - AAKCS6802R and if any addition is required the same has to be made in the hand of loaner only. Further, Ld A.O did not issued summons to M/s Sanyam Vyapar Pvt. Ltd., inspite of our repeated requests.

(9) The Ld. C.I.T. (A) did not appreciate the fact on record that assessee firm or its partner have no substantial interest in Loaner Company 'M/s Sanyam Vyapar Pvt. Ltd.'. Further, Ld. A 0 had not confronted any adverse material as relied by Ld A.O with regard to addition of Rs.2,60,50,000/-.

(10) The Ld. CIT (A) erred on facts and in law in adding Rs.81,12,281/- as income by client code modification process without confronting said details of modification. Further, Ld. A. O had neither brought out any evidence on record nor substantiated in what manner client code modification Rs. 1,12,281/- became the escaped income.

(11) The Ld. C.I.T.(A) did not appreciate that no addition can be made w. r. t. Rs.81,12,281/- without confronting any evidence in this regard Further, inspite of the facts assessee produced all evidences w. r. t. income from F & Q Trading as required u/s 43(5) of I. T. Act, the same were also examined and admitted by Ld A.O without any adverse remark."

12. The ld. Counsel for the assessee has filed an application seeking withdrawal of the cross objection as not pressed. Accordingly, the same is ordered to be dismissed as not pressed.

13. In the result, the appeal of the Department as well as the Cross Objection of the assessee are dismissed.

Order pronounced in the open Court on 17/06/2021.

Sd/-	Sd/-
[T. S. KAPOOR]	VICE PRESIDENT
ACCOUNTANT MEMBER	[A. D. JAIN]

DATED:17/06/2021

JJ:

Copy forwarded to:

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