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

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Decision delivered on: 06.11.2023

+ **ITA 609/2023**

PR. COMMISSIONER OF INCOME TAX -CENTRAL -1

..... Appellant
Through: Mr Ruchir Bhatia, Sr. Standing
Counsel.

versus

GRAND EXPRESS DEVELOPERS PVT. LTD. Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

CM No.57190/2023 [Application filed on behalf of the appellant seeking condonation of delay of 430 days in re-filing the appeal]

1. This is an application moved on behalf of the appellant/revenue seeking condonation of delay in re-filing the appeal.

1.1 According to the appellant/assessee, there is a delay of four hundred and thirty (430) days in re-filing the appeal.

2. Although the period of delay is substantial, we propose to condone the same as we intend to take up the appeal for hearing on merits. Accordingly, the delay in re-filing is condoned, and disposed of in the aforesaid terms.

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3. This appeal concerns Assessment Year (AY) 2013-14.
4. *Via*, the instant appeal the appellant/revenue seeks to assail the order dated 12.11.2021 passed by the Income Tax Appellate Tribunal [in short, “Tribunal”].
5. Before the Tribunal, a challenge was raised by the appellant/revenue to the order dated 17.11.2016 passed by the Commissioner of Income Tax (Appeals) [in short, CIT(A)].
6. The CIT(A) had quashed the assessment order dated 30.03.2015 on the ground that notice under Section 143(2) of the Income-tax Act, 1961 [in short, “Act”] was not issued before it was framed.
7. The facts on record disclose that the respondent/assessee had filed its original Return of Income (ROI), for the AY in issue, on 31.03.2014, declaring a loss amounting to Rs. 2,682/-.
8. The record also discloses that, previously, a search and seizure operation, under Section 132 of the Act, was conducted, on 18.10.2012, *qua* the sister concern of the respondent/assessee i.e., a company going by the name Bhasin Infotech & Infrastructure Private Limited.
9. In the course of the search under Section 132, *vis-a-vis* the sister concern of the respondent/assessee, certain documents belonging to the respondent/assessee were found and seized. Thus, after recording satisfaction under Section 153C of the Act, the respondent’s/assessee’s case was taken up for scrutiny. On 23.12.2014, notice under Section 142(1) of the Act was served on the respondent/assessee. Thereafter, notices under Section 142(1), along with questionnaires were served on the respondent/assessee on 30.01.2015, 27.02.2015, 03.03.2015, and



16.03.2015.

10. The proceedings against the respondent/assessee were founded on the receipt of 'unsecured loans' amounting to Rs. 88,60,76,521/- by it.

11. The assessment order notes that during the proceedings, the respondent/assessee was asked, *via* notice under Section 142(1) of the Act, dated 16.07.2014, to furnish details of the 'unsecured loans' received by it. Concerning 'unsecured loans' received from sister concerns, the respondent/assessee seems to have furnished confirmations, copies of accounts, balance sheets, and bank statements. However, for non-sister concerns, only the addresses were furnished.

11.1 To verify the identity, creditworthiness, and genuineness of the transaction entered into between non-sister concerns, and the respondent/assessee, notices were issued to the non-sister concerns. A copy of the notices was also furnished to the respondent/assessee with a request to produce the parties and evidence that establishes the genuineness of the subject transactions.

12. In the end, the AO added only Rs. 7,38,80,000/- to the income on the ground that the respondent/assessee could not satisfactorily explain the source of credit *qua* the said amount. This was reflected in the assessment order dated 30.03.2015 passed under Section 143(3) of the Act.

13. Being aggrieved, the respondent/assessee preferred an appeal with the CIT(A), and one of the grounds taken was that no notice under Section 143(2) of the Act had been issued before the expiry of the prescribed period of limitation.

14. It is not in dispute that the end date for the expiry of limitation for issuing a notice under Section 143(2) notice was 30.09.2014.



15. The CIT(A), *via* order dated 17.11.2016, after calling for a remand report from the AO, as noted above, deleted the addition by returning a finding of fact that no notice under Section 143(2) of the Act was issued. The order of the CIT(A) was confirmed by the Tribunal.

16. Mr Ruchir Bhatia, senior standing counsel, who appears on behalf of the appellant/revenue, contends that the absence of notice under Section 143(2) of the Act, before framing of the assessment order dated 30.03.2015, by the AO, does not render the assessment order defective. In support of this plea, he relies on Section 292BB of the Act and submits that since the respondent/assessee had participated in the proceedings concerning its assessment, it is precluded from taking the objection that no notice under Section 143(2) was served upon it.

17. Having heard Mr Bhatia and perused the record, what emerges is that both the CIT(A) and the Tribunal have confirmed the fact that no notice under Section 143(2) was issued. Therefore, what remains to be decided is whether the absence of notice, under Section 143(2), before framing the assessment order dated 30.03.2015, would render the assessment order defective, having regard to the provisions of Section 292BB.

18. The argument advanced on behalf of the appellant/revenue that the absence of notice under Section 143(2) would not render the assessment order under Section 143(3) defective does not impress us as the import of Section 292BB is to remedy infirmities that arise in the service of notice under the Act. However, this is a case, where no notice under Section 143(2) was issued, as noted by the CIT(A) and affirmed by the Tribunal; which is different from saying that a notice was issued which was deficient. This issue is no longer *res integra*, as is demonstratable by the decision of the



Supreme Court in *Commissioner of Income-tax v. Laxman Das Khandelwal*, (2019) 108 taxmann.com 183 (SC). For convenience, the relevant reasoning made in this behalf is set forth hereafter:

“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 Hotel Blue Moon's case (supra). 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.”

[Emphasis is ours]

19. Given the aforesaid position, in our view, no interference is called for with the impugned order. According to us, no substantial question of law arises for our consideration.
20. The appeal is, accordingly, closed.
21. The Registry will dispatch a copy of this order to the respondent/assessee *via* all modes, including email.
22. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER
(JUDGE)

GIRISH KATHPALIA
(JUDGE)

NOVEMBER 6, 2023/R.Y.

Click here to check corrigendum, if any