IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 1374 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE DR.JUSTICE A. P. THAKER

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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THE PRINCIPAL COMMISSIONER OF INCOME TAX-1

Versus

MARCK BIOSCIENCES LTD.

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Appearance:
MR M.R. BHATT, SENIOR ADVOCATE WITH MRS MAUNA M BHATT(174) for the PETITIONER(s) No. 1
MR SN DIVATIA(1378) for the RESPONDENT(s) No. 1

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CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE DR.JUSTICE A. P. THAKER

Date : 04/02/2019

ORAL JUDGMENT
(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By this appeal under section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), the appellant has called in question the order dated 14.02.2018 made by the Income Tax Appellate Tribunal, Ahmedabad 'A' Bench in I.T.A. No.1506/AHD/2014 (hereinafter referred to as the "Tribunal") by proposing the following questions, stated to be substantial questions of law:

> "[A] Whether the Appellate Tribunal has grossly erred in quashing the re-assessment proceedings by ignoring the explicit provisions of section 292BB introduced w.e.f. 01.04.2008?
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> [B] Whether the Appellate Tribunal has failed to appreciate that the A.O. had validly done the re-assessment proceedings and the assessee had attended the re-assessment proceedings before the A.O. and the ground of non-issuance of section 143(2) notice had been taken up for the first time before the CIT(A) in contradiction of section 292BB?"

2. The assessment year is 2005-06 and the relevant accounting period is the previous year 2004-05.

3. In this case, the assessment order came to be passed under section 143(3) of the Act on 31.12.2007. Subsequently, the case was re-opened for the reason that the assessee was required to pay tax under the provisions of section 115JB of

the Act. According to the Assessing Officer, the calculation made by the assessee for the year under consideration was not in accordance with the Explanation to section 115JB of the Act, which resulted in short levy of tax. Accordingly, an order came to be passed under section 143(3) read with section 147 of the Act on 12.11.2010 and book profit was computed as per the provisions of section 115JB of the Act, which came to Rs.1,55,80,355/-.

4. The assessee carried the matter in appeal before the Commissioner (Appeals), before whom it was pointed out that the case was reopened by issuing notice under section 148 of the Act on 20.03.2009, 26.03.2009, 08.03.2010, 05.07.2010 and again on 04.10.2010. Notice under section 143(2) of the Act was served upon the assessee on 12.03.2010, whereas, the reasons for re-opening the assessment came to be recorded on 20.07.2010.

5. It was the case of the assessee before the Commissioner (Appeals) that the notice under section 143(2) of the Act was issued on 12.03.2010, before the assessee had filed a letter dated 19.07.2010 requesting the Assessing Officer to accept the earlier return filed by it as the return in response to the notice under section 148 of the Act, and, therefore, the

notice under section 143(2) of the Act was invalid. The Commissioner (Appeals) called for a report from the Assessing Officer, to which, the assessee filed a rejoinder. Considering the facts as emerging from the record, the Commissioner (Appeals) was of the view that the notice under section 143(2) of the Act, having been issued prior to the filing of the return of income, was invalid. He, accordingly, held that the assessment having been completed without issuance of a valid notice under section 143(2) of the Act is invalid, and consequently, quashed the assessment order.

6. The Revenue carried the matter in appeal before the Tribunal, which, agreed with the view adopted by the Commissioner (Appeals) and dismissed the appeal.

7. Mrs. Mauna Bhatt, learned Senior Standing Counsel, submitted that the assessee had duly participated in the proceedings and in view of the provisions of section 292BB of the Act, it is deemed that the assessee was duly served with the notice under section 143(2) of the Act and, therefore, the Tribunal was not justified in confirming the order passed by the Commissioner (Appeals) holding that the assessment order was invalid on the ground that the notice under

section 143(2) of the Act was issued prior to the filing of the return of income.

7.1 Reliance was placed upon the decision of the Punjab and Haryana High Court in case of ***Commissioner of Income-tax, Hisar v. Ram Narain Bansal,*** *(2011) 202 Taxman 213* wherein the court has held that when the assessee had participated in the assessment proceedings before its finalisation and no objection regarding issuance and service of notice under section 143(2) of the Act had been raised before the Assessing Officer, the reassessment order cannot be held to be invalid on the ground of non-issuance of notice under section 143(2) of the Act. The court placed reliance upon the provisions of section 292BB of the Act for the presumption that the assessee had been validly served.

7.2 Reliance was also placed upon the decision of Madras High Court in case of ***Venkatesan Raghuram Prasad v. Income-tax Officer, Non-Corporate Ward-2(3), Chennai,*** *(2018) 94 taxmann.com 249 (Madras),* wherein, the Assessing Officer had reopened the assessment of the assessee and the assessee had participated in the reassessment proceedings without raising any objection before the Assessing Officer to the effect that there

was no valid issuance or service of reassessment notice upon the assessee. On the said facts, the court held that such objection cannot be raised before the first appellate authority. It was submitted that since the assessee herein has not raised any objection before the Assessing Officer with regard to non-service of notice under section 143(2) of the Act, it was not permissible for the assessee to raise such objection before the Commissioner (Appeals) and that the impugned order passed by the Tribunal does give rise to a substantial question of law as proposed or as may be deemed fit by this court.

8. Opposing the appeal, Mr. S.N. Divetia, learned advocate for the respondent-assessee, submitted that section 292BB of the Act covers three types of situations. Firstly, where the assessee takes a contention that the notice was not served upon him; secondly, that such notice was not served upon him in time; or thirdly, that the notice was served upon him in an improper manner. It does not cover a situation where no notice has been issued at all. Reference was made to the decision of this court in case of ***Shirishbhai Hargovandas Sanjanwala v. Commissioner of Income Tax, Circle-4(2), Ahmedabad***, *2017(396) ITR 167*, for the proposition

that section 292BB of the Act guards against any objection to service of notice, particularly when, an assessee has, despite any defective service of notice, participated in the proceedings. The court noticed that the said case was a case of defect in issuance of notice and not service of notice and accordingly, set aside the impugned notice.

8.1 It was submitted that the present case stands on a stronger footing inasmuch as this is not a case where there is any defect in the issuance of notice but a case where no notice has been issued at all.

8.2 Reliance was placed upon the decision of the Calcutta High Court in the case of ***Principal Commissioner of Income-tax v. Oberoi Hotels (P.) Ltd.,*** *(2018) 96 taxmann.com 104 (Calcutta)* wherein, the court observed that even if section 292BB of the Act does not carry a non-obstante clause, since it is a provision of general application, it would be applicable in all situations; but only insofar as it proclaims to operate. Section 292BB of the Act, read in the context of several provisions of the Act which mandatorily require notices to be issued in diverse situations, cannot be said to have

dispensed with the issuance of such notices altogether. Section 292BB must be understood to cure any defect in the service of notice and not authorize the dispensation of a notice when the appropriate interpretation of a provision makes the notice provided for thereunder to be mandatory or indispensable.

8.3 Reliance was also placed upon the decision of the Supreme Court in case of ***CIT v. Hotel Blue Moon***, *(2010) 3 SCC 259* wherein, the court held that omission on the part of the Assessing Officer to issue notice under section 143(2) of the Act cannot be said to be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under section 143(2) cannot be dispensed with.

8.4 Reliance was also placed upon the decision of the Delhi High Court in case of ***Director of Income-tax v. Society for Worldwide Inter Bank Financial, Telecommunications***, *(2010) 323 ITR 249 (Delhi)*, wherein, the court held that the provisions of section 143(2) of the Act would make it clear that notice can be served after the Assessing Officer has examined the return filed by the assessee, whereas, in the facts of the said case, when the assessee came to file the

return, the notice under section 143(2) of the Act was served upon the authorized representative by hand. The court observed that thus, even if the statement of Assessing Officer is taken at its face value, it would amount to gross violation of the scheme of section 143(2) of the Act.

8.5 Reliance was also placed upon a decision of this court in case of ***Dy. CIT v. Mahi Valley Hotels & Resorts***, *2006(287) ITR 360*, wherein, the court placed reliance upon Circular No.549 dated 31.10.1989 issued by the Central Board of Direct Taxes, which to the extent the same is relevant for the present purpose reads thus:

> *"5.13 A proviso to sub-section (2) provides that a notice under the sub-section can be served on the assessee only during the financial year in which the return is furnished or within six months from the end of the month in which the return is furnished, whichever is later. This means that the Department must serve the said notice on the assessee within this period, if a case is picked up for scrutiny. It follows that if an assessee, after furnishing the return of income does not receive a notice under section 143(2) from the Department within the aforesaid period, he can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return.*

8.6 It was submitted that this is not a case where the service of notice is defective but, a case where no notice under section 143(2) of the Act has been issued to the assessee after the filing of the return of income. The Commissioner (Appeals) as well as the Tribunal were, therefore, wholly justified in holding that in absence of notice under section 143(2) of the Act, the assessment order is rendered invalid. It was urged that the appeal, being devoid of merits, deserves to be dismissed at the threshold as it does not give rise to any question of law.

9. In the light of the submissions advanced by the learned advocates for the respective parties the court is of the view that the matter requires consideration. Hence, ***Admit***. The following substantial question of law arises for consideration;

> Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in treating the assessment as invalid on the ground that no notice under section 143(2) of the Income Tax Act, 1961 had been issued after the assessee filed the return of income?

10. The facts are not in dispute. The Assessing

Officer initially issued notice under section 148 of the Act on 20.03.2009, seeking to reopen the assessment of the respondent assessee for assessment year 2005-06. Subsequently, notices under section 148 of the Act came to be issued to the assessee on 26.03.2009, 08.03.2010, 05.07.2010 and lastly on 04.10.2010.

11. It may be noted that the Assessing Officer recorded the reasons for reopening the assessment only on 20.07.2010, therefore, it is only the notice dated 04.10.2010, which can be said to have been issued in accordance with the provisions of section 148 of the Act, viz., after recording of the reasons. It appears that in response to the notice under section 148 of the Act, the respondent-assessee, by a letter dated 19.07.2010, had asked the Assessing Officer to consider the earlier return of income filed by it as the return filed in response to the notice. After the assessee addressed the above letter dated 19.07.2010 to the Assessing Officer, no notice under section 143(2) of the Act was issued. The notice under section 143(2) of the Act had been issued to the assessee on 12.03.2010 only, that is, prior to the communication dated 19.07.2010 of the assessee, informing the Assessing Officer to treat the earlier return filed by it as the return filed in response to

the notice under section 148 of the Act. Nonetheless, the assessment proceedings proceeded further pursuant to the notice under section 148 of the Act and came to be concluded by an assessment order dated 07.01.2011 made under section 143(3) read with section 147 of the Act.

12. The facts as emerging from the record show that it is an admitted position that no notice under section 143(2) of the Act had been issued after the assessee informed the Assessing Officer to treat the earlier return of income as the return filed in response to the notice under section 148 of the Act. In other words, no notice under section 143(2) of the Act was issued after the filing of the return of income. The question that, therefore, arises for consideration is whether the assessment order framed under section 143(3) read with section 147 of the Act would be rendered invalid in the absence of a notice under section 143(2) of the Act?

13. For the purpose of better understanding of the controversy in issue, it may be germane to refer to the provisions of sub-section (2) of section 143 of the Act, which as it stood at the relevant time when the notice under section 148 of the Act was issued reads thus:

*"**143. Assessment** (1) xxxxxx*

(2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer shall,—

(i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:

Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003;

(ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessee has not under-stated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return:

Provided that no notice under clause (ii) shall be served on the assessee after the expiry of six months from the

end of the financial year in which the return is furnished."

14. On a plain reading of the above provision, it is manifest that it contemplates that when an assessee files a return under section 143 of the Act, and the Assessing Officer finds that any claim as described therein is inadmissible, he is required to serve a notice to the assessee specifying particulars of such claim and a date on which he should produce or caused to be produced, any evidence or particulars specified therein on which the assessee may rely in support of such claim.

15. Section 292BB of the Act reads thus;

"292BB. Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or re-assessment, 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."

16. From the language employed in section 292BB of the Act, it emerges that a notice would be deemed to be valid in the three circumstances provided therein, namely, where the assessee has participated in the proceedings it would not be permissible for him to raise objection that (i) the notice was not served upon him; or (ii) was not served upon him in time; or (iii) was served upon him in an improper manner.

17. Thus, all the circumstances contemplated under section 292BB of the Act are in a case where a notice has been issued, but has either not been served upon the assessee or not served in time or has been served in an improper manner. The said provision clearly does not contemplate a case where no notice has been issued at all.

18. The Supreme Court in case of ***CIT v. Hotel Blue Moon*** (supra) held thus:

"21. We may now revert back to Section 158-BC(b) which is the material provision which requires our consideration. Section 158-BC(b) provides for enquiry and assessment. The said provision reads that:

> *"158-BC. (b) the assessing officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158-BB and the provisions of section 142, sub-sections (2) and (3) of section 143, section 144 and section 145 shall, so far as may be, apply;"*

An analysis of this sub-section indicates that, after the return is filed, this clause enables the assessing officer to complete the assessment by following the procedure like issue of notice under sections 143(2)/142 and complete the assessment under section 143(3). This section does not provide for accepting the return as provided under section 143(1)(a). The assessing officer has to complete the assessment under section 143(3) only. In case of default in not filing the return or not complying with the notice under sections 143(2)/142, the assessing officer is authorized to complete the assessment ex parte under section 144.

22. Clause (b) of section 158-BC by referring to sections 143(2) and (3) would appear to imply that the provisions of section 143(1) are excluded. But section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under section 143(2). However, if an assessment is to be completed under section 143(3) read with section 158-BC, notice under section 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under section 143(2) cannot be a procedural irregularity and the same is

not curable and, therefore, the requirement of notice under section 143(2) cannot be dispensed with."

19. Thus, the Court held that if an assessment has to be completed under section 143(3) read with section 158BC of the Act, then notice under section 143(2) of the Act should be issued within a period of one year from the date of filing of block return. The Court held that omission on the part of the Assessing Officer to issue notice under section 143(2) of the Act cannot be said to be a procedural irregularity and the same is not curable, and therefore, the requirement of notice under section 143(2) of the Act cannot be dispensed with.

20. In the facts of the present case also, if the contention of the appellant were to be accepted, it would amount to dispensing with the notice under section 143(2) of the Act in view of the fact that it is an admitted position that no such notice had been issued after the return of income was filed by the assessee. After the filing of the return of income, unless a notice under section 143(2) of the Act is issued to the assessee, he would have no means of knowing as to whether or not the Assessing Officer has accepted the return of income as filed by him. As held by

the Supreme Court in the above decision, omission to issue a notice under section 143(2) of the Act is not a procedural irregularity and is not curable. It is, therefore, mandatory to issue notice under section 143(2) of the Act.

21. At this juncture, reference may also be made to the contents of the Central Board of Direct Taxes Circular No.549 dated 31.10.1989, which finds reference in the decision of this Court in case of ***Dy. CIT v. Mahi Valley Hotels & Resorts*** (supra), which has been reproduced in paragraph 8.5 hereinabove. A perusal of the above circular indicates that if an assessee, after furnishing the return of income, does not receive a notice under section 143(2) of the Act from the Department within the prescribed period, then he can take it that the return filed by him has become final and no scrutiny proceedings could be started in respect of that return. This is the kind of significance that has been attached to a notice under section 143(2) of the Act by the Central Board of Direct Taxes itself.

22. Section 292BB of the Act provides for a deeming provision that any notice under any provision of the Act, which is required to be served upon the assessee, has been duly served upon him in time, in accordance with the

provisions of the Act. In the opinion of this Court, this section would be applicable where a notice has, in fact, been issued and a contention is raised that such notice has not been served upon the assessee or has not been served in time or has not been served properly, namely, where there is a defect in the service of notice. This provision does not apply to a case where no notice has been issued at all. In the facts of the present case, at the cost of repetition, it may be stated that no notice under section 143(2) of the Act has been issued after the assessee had filed its return of income and hence, section 292BB of the Act would not be attracted.

23. In the light of the above discussion, this Court does not agree with the view adopted by the Punjab and Haryana High Court in case of ***Commissioner of Income-tax v. Ram Narain Bansal*** (supra). Insofar as the decision of the Madras High Court in case of ***Venkatesan Raghuram Prasad v. Income-tax officer, Non-Corporate Ward-2(3), Chennai*** (supra) is concerned, that was a case where notice was in fact, issued, but it was contended that such notice was not served properly. Therefore, the said case was a case of defective service of notice, which would be squarely covered by the provisions of section

292BB of the Act. The said decision, therefore, has no applicable to the facts of the present case.

24. In the light of the fact that non-issuance of a notice under section 143(2) of the Act is not a procedural irregularity, the same cannot be cured under section 292BB of the Act and hence, the assessment order passed without issuance of notice under section 143(2) of the Act, would be rendered invalid. The Tribunal as well as the Commissioner (Appeals), therefore, did not commit any error in holding that the notice issued prior to the filing of the return of income was invalid and that, in absence of a valid notice under section 143(2) of the Act, the assessment order was rendered invalid.

25. The appeal, therefore, fails and is, accordingly, dismissed. The question is, accordingly, answered in the affirmative, that is, in favour of the assessee and against the revenue.

(HARSHA DEVANI, J)

(A. P. THAKER, J)

PRAVIN KARUNAN