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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC-2', NEW DELHI

BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER

ITA Nos. 4171/Del/2015
AY: 2003-04

Ms. Meenakshi Aggarwal, C/o Kapil Goel, Adv. F-26/124, Sector-7, Rohini, Delhi – 110 085 (PAN: AAHPA6305P)	vs.	ITO, Ward 33(2), New Delhi

ITA Nos. 4172/Del/2015
AY: 2003-04

Ms. Savitri Aggarwal, C/o Kapil Goel, Adv. F-26/124, Sector-7, Rohini, Delhi – 110 085 (PAN: AAHPA2498R)	vs.	ITO, Ward 33(2), New Delhi

ITA Nos. 4173/Del/2015
AY: 2003-04

Mr. Yogesh Aggarwal, C/o Kapil Goel, Adv. F-26/124, Sector-7, Rohini, Delhi – 110 085 (PAN: AAGPA5008E)	vs.	ITO, Ward 33(2), New Delhi

ITA Nos. 4174/Del/2015
AY: 2003-04

Mr. Jhabermal Aggarwal, C/o Kapil Goel, Adv. F-26/124, Sector-7, Rohini, Delhi – 110 085 (PAN: AADPA8070F)	vs.	ITO, Ward 33(2), New Delhi

ITA Nos. 4175/Del/2015
AY: 2003-04

Baby Lakshya Gupta, C/o Kapil Goel, Adv. F-26/124, Sector-7, Rohini, Delhi – 110 085 (PAN: AATPA7142G)	vs.	ITO, Ward 33(2), New Delhi
(APPELLANTS)		**(RESPONDENTS)**

Appellant by : Sh. Kapil Goel, Adv.
Respondent by : Mrs. Rakhi Vimal, JCIT

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ORDER

These are the appeals filed by the different Assessees against the common Order dated 28.4.2015 passed by the Ld.CIT(A)-17, New Delhi all for the Assessment Year 2003-04. In these appeals the assessee has taken up the ground that no valid notice u/s. 143(2) of the I.T. Act was served upon the assessee after filing of return u/s. 148 of the I.T. Act. As this a common ground, we are disposing of these appeals by passing a common order for the sake of brevity, we first deal with ITA No. 4171/Del/2015 (AY 2003-04).

2. Ld. CIT(A) has discussed the issue in dispute at para no. 6, at page no. 29 in his order. In this paragraph the Ld. CIT(A) held that the Service of Notice u/s. 143(2) is only an administrative requirement and not a legal requirement. He concluded as follows:-

> "Thus, it is held that the AO has not erred in not issuing the notice u/s. 143(2) without having the ROI on the record after the assessee's letter dated 26.11.2010 requesting the AO to treat the original ROI as ROI filed in response to the notice u/s. 148."

3. The assesee filed a copy of the order sheet entries from the assessment records, duly certified by the AO. A perusal of the same demonstrates that no Notice u/s. 143(2) of the Act was issued, after the assessee filed a letter dated 26.11.2010, requesting the AO to treat the return of income originally filed as a ROI filed in response to the Notice u/s. 148 dated 30.3.2010.

4. On this factual matrix, I find that the issue is squarely covered in favour of the Assessee and against the Revenue. The ITAT, 'C' Bench, Bangalore in its order dated 10.10.2014 in the case of Shri GN Mohan Raju vs. ITO passed in ITA No. 242 & 243(Bang)2013 (AYrs 2006-07 & 2007-08), has been held as follows:-

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"7. This brings us to the crux of the issue i.e. whether notices under section 143(2) is mandatory in a reopened procedure and whether notices issued prior to the reopening would satisfy the requirement specified u/s 143(2) of the Act. That issue of a notice u/s 143(2) of the Act, is mandatory even in a re-assessment proceeding initiated u/s 148 of the Act has been clearly laid down by the Hon'ble Delhi High Court in the case of M/s Alpine Electronics Asia PTE Ltd., (supra). Hon'ble Delhi High Court had reached this conclusion after considering the decision of the Hon'ble Apex Court in the case of Hotel Blue Moon (supra). At para-24 of the judgment their Lordship has held that Section 143(2) was applicable to a proceedings u/s 147/148 also, since proviso to section 148 of the Act, granted certain specific liberties to the revenue, with regard to extension of time for serving such notices. No doubt, Hon'ble Madras High Court in the case of Areva T and D India Ltd.,(supra) had held that issue of notice u/s 143(2) was procedural in nature. However, Co-ordinate Bench in the case of M/s Amit Software Technologies Pvt. Ltd.,(supra) after considering the decision of the Hon'ble Madras High Court as well as Delhi High Court had held that Section 143(2)of the Act, was a mandatory requirement and not a procedural one. Of course, in the case before us, a notice u/s 143(2) of the Act has been issued to the assessee, but on the date when such notice was issued viz., 23-09-2010 assessee had not filed any return pursuant to the reopening notice undersection 148 of the Act. First instance when the assessee requested the AO to treat the returns originally filed by it as returns filed pursuant to the notices u/s 148 of the Act, was on 05-10-2010 which is clear from the narration in the order sheet which is reproduced here under;

" Sri M.Srinivas Rao Mannan, CA appeared in response to notices issued u/s 143(2) & 142(1) and requested that the return of income filed originally shall be treated as return of income filed in response to notice u/s 148. He has been asked to explain as to why a sum of Rs.1,00,00,000/- (Rs. One Crore) received from Wifi Networks Pvt.Ltd., should not be treated as revenue receipt and taxed accordingly. The case is posted for final hearing on 20-10-2010 at 3.30 pm. No further adjournment will be granted. If no compliance is forthcoming on that day, assessment will be completed bringing to tax Rs.1.00 (Rs. One Crore) as revenue receipt as per the provisions of sec.28(va) of the Act."

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8. A look at Section 143(2) is called for at this juncture. It is reproduced hereunder;

"143(2) Where a return has been furnished under section 139, or in response to a notice under sub-section(1) of section 142, the AO 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(1), if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under paid he tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his officer 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).

Once the original return filed by the assessee was subject to processing u/s 143(1) of the Act, the procedure of assessment pursuant to such a return, in our opinion came to an end, since AO did not issue any notice within the 6 months period mentioned in proviso to section 143(2)(ii). No doubt, if the income has been understated or the income has escaped assessment, an AO is having the power to issue notice u/s 148 of the IT Act. Notice u/s 148 of the Act, issued to the assessee required it to file a return within 30 days from the date of service of such notice. There is no provision in the Act, which would allow an AO to treat the return which was already subject to a processing u/s 143(1) of the IT Act, as a return filed pursuant to a notice subsequently issued u/s 148 of the Act. However, once an assessee itself declare before the AO that his earlier return could be treated as filed pursuant to notice u/s 148 of the IT Act, three results can follow. Assessing Officer can either say no, this will not be accepted, you have to file a fresh return or he can say that 30

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days time period being over I will not take cognizance of your request or he has to accept the request of the assessee and treat the earlier returns as one filed pursuant to the notice u/s 148 of the IT Act. In the former two scenarios, AO has to follow the procedure set out for a best of judgment assessment and cannot make an assessment under section 143(3). On the other hand, if the AO chose to accept assessee's request, he can indeed make an assessment under section 143(3). In the case before us, assessments were completed under section 143(3) read with section 147. Or in other words AO accepted the request of the assessee. This in turn makes it obligatory to issue notice u/s 143(2) after the request by the assessee to treat his earlier return as filed in pursuance to notices u/s 148 of the IT Act was received. This request, in the given case, has been made only on 05-10-2010. Any issue of notice prior to that date cannot be treated as a notice on a return filed by the assessee pursuant to a notice u/s 148 of the Act. Or in other words, there was no valid issue of notice u/s 143(2) of the IT Act, and the assessments were done without following the mandatory requirement u/s 143(2) of the IT Act. This in our opinion, render the subsequent proceedings all invalid. Learned CIT(A) had only adjudicated on a position where there was no service of notices u/s 143(2) of the IT Act. He had not dealt with the scenario, where notice was issued prior to the filing of return by the assessee. We therefore, quash the assessment done for the impugned assessment years. Since the appeals of the assessee are allowed on its ground 3, other grounds are not adjudicated."

- ITAT, 'E' Delhi Bench decision dated 08.4.2015 passed in the case of ITO vs. Naseman Farms Pvt. Ltd. & Ors. In ITA No. 1175/Del/2011 (AY 2002-03) wherein the Tribunal has followed the decision of the Apex Court in the case of ACIT vs. Hotel Blue Moon (2014) 321 ITR 362 (SC). The Tribunal has held as under:-

  "15. In the light of the above, we are of the view that the AO has not issued notice u/s. 143(2) of the Act which is mandatory. We are also of the view that in completing the assessment u/s. 148 of the Act, compliance of the procedure laid down u/s. 142 and 143(2) is

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mandatory. As per record, we find that there was no notice issued u/s. 143(2) of the Act which is very much essential for reassessment and it is a failure on the part of the AO for not complying with the procedure laid down in section 143(2) of the Act. If the notice is not issued to the assessee before completion of the assessment, then the reassessment is not sustainable in the eyes of law and deserves to be cancelled. In view of above facts and circumstances of the present case, the issue in dispute raised in additional ground relating to non issue of the mandatory notice u/s. 143(2) of the Act is decided in favour of the assessee and we hold that the impugned assessment order dated 31.12.2009 passed u/s. 147/143(3) of the Act by the AO as invalid. Our view is supported by the various judgments of the Hon'ble Supreme Court, and Hon'ble Jurisdictional High Court. The relevant portion of the head- notes of various judgments of the Hon'ble Courts are reproduced as under:-

"ACIT & Anr. vs. Hotel Blue Moon: [(2010) 321 ITR 362 (SC)]

HELD: "It is mandatory for the AO to issue notice u/s 143 (2). The issuance and service of notice u/s 143 (2) is mandatory and not procedural. If the notice is not served within the prescribed period, the assessment order is invalid Reassessment-----Notice-----Assessee intimating original return be treated as fresh return---Reassessment proceedings completed despite assessee filing affidavit denying serviced of notice under section 143(2)----Assessing Officer not representing before Commissioner (Appeals) that notice had been issued---- Reassessment order invalid due to want of notice under section 143(2)--- Income-tax Act, 1961, ss. 143, 147, 148(1), prov.----ITO v. R.K. GUPTA [308 ITR 49 (Delhi)Tribu.,"

CIT vs. Vishu & Co. Ltd. In ITA No. 470 of 2008 (2010) 230 CTR (Del) 62

Assessment – validity – Non Service of notice under section 143(2) within time – Notice served on the last date after office hours by affixture as no authorized person was present at assessee's premises – is not a valid

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service of notice – Assessment framed in pursuance of such notice is not valid – It is immaterial that the assessee appeared in the proceedings."

CIT Vs. Cebon India Ltd. (2012) 347 ITR 583 (P&H)

5. We find that concurrent finding has been recorded by the CIT(A) as well the tribunal on the question of date of service of notice. Notice was not served within the stipulated time. Mere giving of dispatch number will not render the said finding to be perverse. In absence of notice being served, the AO had no jurisdiction to make assessment. Absence of notice cannot be held to be curable under s 292BB of the Act.

CIT Vs.Mr. Salman Khan, ITA No.508 of 2010

1. In the present case, reassessment order passed under section 143(3) r/w 147 of the Income Tax Act, 1961 is held to be bad in law in view of the fact that the assessing officer has not issued notice under section 143(2) after issuing notice under section 148 of the Income Tax Act, 1961. This Court in the case of The Commissioner of Income Tax Vis. Mr. Salman Khan [Income Tax Appeal No.2362 of 2009)decided on 1st December, 2009 has considered similar question and has held that in the absence of notice under section 143(2) (prior to the insertion of section 292BB), the reassessment order cannot be sustained. In the present case, the reassessment year involved relates to the period prior to the insertion of Section 292BB. In this view of the matter, the appeal is dismissed with no order as to costs.

DCIT Vs. M/s Silver Line, ITA No.1809,1504,1505 & 1506/Del/2013

vii. The Hon'ble ITAT of Agra Bench, in the case of ITO v. Aligarh Auto Centre reported in 152 TTJ (Agra) 767, on an identical issue that of the present issue, has recorded its findings as under:

"5. We have considered the rival submissions and the material on record. It is not in dispute that the assessee filed original return of income and at the reassessment proceedings, the assessee contended before the AO that the original return filed earlier may be treated to have been filed in response to the notice u/s. 147, which is also supported by order sheet entry dated 09.08.2006 (PB-20). It is also not in dispute that AO never issued any

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notice u/s. 143(2) of the IT Act. The Revenue merely contended that the CIT (A) should have appreciated the provisions of section 292BB of the IT Act. Section 292 BB of the IT Act provides as under:

"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."

The above provision has been inserted by the Finance Act, 2008 w.ef. 01.04.2008. ITAT, Delhi Special Bench in the case of Kuber Tobacco Product Pvt. Ltd. vs. DCIT, 117ITD 273 held that section 292BB has been inserted by Finance Act, 2008, has no retrospective effect and is to be construed prospectively. The assessment order under appeal is 2001-02. Therefore, the provision of section 292BB of the IT Act would not apply in the case of the assessee. Further, no notice u/s. 143(2) has been issued or served upon the assessee. Therefore, the decision of Hon'ble Punjab & Haryana High Court in the case of Cebon India Ltd. (supra) squarely applies against the revenue. It was held in this case that absence of notice is not curable defect u/s. 292BB of the IT Act. Considering the above discussion and the case laws cited above, the sole objection of the Revenue is not maintainable. Therefore, the Id. CIT (A) was justified in setting aside the entire assessment order. We, therefore, do not find any infirmity in the order of the Id. CIT (A) for interference. "

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(v) The Hon'ble Mumbai Bench of the ITAT has, in the case of Sanjeev R Arora v. ACIT [IT (SS)A No.103/Muml2004 dated 25.7.2012], recorded its findings as under.

"Even, the irregularity in proper service of notice which can be treated as curable under section 292B of the Income-tax Act is only in the cases where the notice under section 143(2) was issued properly and within the period of limitation and the assessee did not raise any objection regarding the service of the notice during the assessment proceedings and also participated in the assessment proceedings then at a later stage the assessee is precluded from raising such objection. Therefore, the provisions of section 292B are not applicable in the case where the assessing officer has not at all issued notice under section 143 (2) within the period as prescribed."

7.9.Taking into account the facts and circumstances of the issue as deliberated upon in the fore-going paragraphs and also in views of the judicial pronouncements (supra), we are of the view that the re-assessment's made for the assessment years under consideration have become invalid for not having served the mandatory notice u/s 43(2) of the Act on the assessee. It is ordered accordingly.

7.10We have since decided that the re-assessment proceedings concluded u/s 147 r/w 143(3) of the Act were invalid for the AYs under dispute, the issues raised by the revenue in its appeals and also the Cross objections of the assessee firm based on the invalid assessment orders have not been addressed to."

16. In the backdrop of the aforesaid discussions and precedents relied upon, we find that the AO has not issued the notice u/s 143(2) of the Act in this case before completing the scrutiny assessment, therefore the impugned assessment order before us is invalid, void abnitio and so the impugned order is not sustainable in the eyes of law and hence, we cancel the same by allowing the additional ground raised in the cross objection filed by the Assessee on this issue.

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17. In the result, the Cross Objection filed by the Assessee is allowed. Since the assessment order is held to be void abnitio, the other grounds raised by the assessee in the Cross Objection have become academic in nature, hence, the same are not being adjudicated upon."

5. Respectfully following the decision of the Coordinate Bench, I hold that the non-issue of notice u/s. 143(2) after filing of the return of the Assessee, by way of letter, makes the assessment order passed u/s. 143(3) r.w.s. 147 bad in law. Hence, I quash the same and allow this ground of appeal in favour of the assessee. Since I have already quashed the assessment proceedings on this jurisdictional ground, I do not deem it necessary to adjudicate the other grounds raised by the assessee on the non-service of the Notice u/s. 148 etc. as it would be an academic exercise.

6. The facts in all the appeals listed above, admittedly, are the same. Hence, I hold that the assessment order passed in all the cases are bad in law and without jurisdiction and no notice u/s. 143(2) of the Act was served on the assessee after the filing of the ROI by way of letter by the assessee.

7. In the result, all the appeals filed by the Assessees are allowed.

Order pronounced in the Open Court on 16th October,2015.

Sd/-
(J.SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Dated: the 16th October, 2015

SR BHATNAGAR

Copy of the Order forwarded to:
1. Appellant;
2. Respondent;
3. CIT;
4. CIT(A);
5. DR;
6. Guard File

By Order

Asstt. Registrar