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DEPUTY COMMISSIONER OF INCOME TAX vs. BOARD OF CRICKET CONTROL IN INDIA

IN THE ITAT BOMBAY BENCH 'B'

PRAMOD KUMAR VP & SAKTIJIT DEY, JM.

ITA No. 2914/Mum/2017

Aug 2, 2021

(2021) 61 CCH 0426 MumTrib

Legislation Referred to

Section 142(1), 143(3), 148

Case pertains to

Asst. Year 2008-09

Decision in favour of:

Assessee

Reassessment —Reopening of assessment— Assessee a cooperative society filed its return of income — Assessment was completed — Subsequently, however, it was noticed by Assessing Officer that assessee has claimed TV subventions, infrastructure subsidy and coaching subsidy, paid to member associations, as deductions but to be reduced from its income which was assessed as business income, but, in opinion of Assessing Officer, it was nothing more than distribution of profits to its member associations — Assessing Officer was thus of view that income has escaped assessment — CIT(A) annulled reassessment order — Held, for assessment year 2007-08 Court observed that CIT(A) rightly notes in his impugned order, issuance and service of notice under section 143(2) is a foundational requirement for assessment under section 143(3) r.w.s. 147, and, in absence of same and notwithstanding fact that assessee may have participated in related assessment proceedings, reassessment order cannot have legal sanctity — As rightly analyzed by CIT(A), Section 292 BB cannot come to rescue of Assessing Officer in such cases — CIT(A) 's reasoning and conclusions is approved — There is no reasons to take any other view of matter than view so taken in assessee's own case — Respectfully following same, and holding that observations made therein will equally apply mutatis mutandis in these cases as well — Revenue's appeal is dismissed.

Held

For the assessment year 2007-08 Court observed as follows:-

> *9. CIT(A) rightly notes in his impugned order, issuance and service of notice under section 143(2) is a foundational requirement for assessment under section 143(3) r.w.s. 147, and, in the absence of the same and notwithstanding the fact that the assessee may have participated in the related assessment proceedings, the reassessment order cannot have legal sanctity. As rightly analyzed by the learned CIT(A), Section 292 BB cannot come to the rescue of the Assessing Officer in such cases. We approve learned CIT(A) 's reasoning and conclusions.*
>
> *10. Well reasoned conclusions arrived at by the CIT(A) is approved.*

There is no reasons to take any other view of the matter than the view so taken in assessee's own case. Respectfully following the same, and holding that the observations made therein will equally apply mutatis mutandis in these cases as well. Revenue's appeal is dismissed.

(para 3)

<u>Conclusion</u>

Issuance and service of notice under section 143(2) is a foundational requirement for assessment under section 143(3) r.w.s. 147, and, in the absence of the same reassessment order cannot have legal sanctity.

<u>In favour of</u>

Assessee

<u>Cases Referred to</u>

National Thermal Power Co. Ltd. v. CIT [1998] 229ITR 383
Apex Court in R. Dalmia v. CIT [1999] 236 ITR 480/102 Taxman 702
CIT vs. HUF of H.H. Late J.M. Scindia reported in 174 taxman 1
CIT v. M. Chellappan [2006] 281ITR 444
Smt. Bandana Gogol v. CIT [2007] 289 ITR 28

<u>Counsel appeared:</u>

K Madhusudan and Rahul Raman for the Petitioner.: P J Pardiwala, Nitesh Joshi and Anil Sathe for the Respondent

PRAMOD KUMAR VP:

1. By way of this appeal, the appellant Assessing Officer has challenged correctness of the order dated 9 X January 2017, in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), for the assessment year 2008-09.

2. Grievances raised by the appellant, as set out in the memorandum of appeal, are as follows:

(1) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in annulling the order passed u/s. 143(3) r.w.s. 147 of the I. T. Act after noting that the notice u/s 143(2) is not found on record inspite of the fact that there is mention in the questionnaire dated 28.08.2012, issued and served upon the assessee, that notice u/s 143(2) is enclosed along with that questionnaire, therefore, there was also issuance and service of the notice u/s 143(2) along with the questionnaire?

(2) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in annulling the order passed u/s. 143(3) r.w.s. 147 of the I. T. Act after noting that the notice u/s 143(2) is not found on record inspite of the fact that there is mention in the questionnaire dated 28.08.2012, issued and served upon the assessee, that the notice u/s 143(2) is enclosed, which is duly noted in the order-sheet by AO on 28.08.2012?"

(3) "On the facts and in the circumstances of the case and in law, the Ld. C1T(A) has erred in annulling the order passed u/s. 143(3) r.w.s. 147 of the I. T. Act after noting that the notice u/s 143(2) is not found on record inspite of the fact that there is mention in the questionnaire dated 28.08.2012, issued and served upon the assessee, that the notices u/s 143(2) and 142(1) are enclosed along with that questionnaire and notice u/s 142(1) is also found on record and same is responded by the assessee during the proceedings vide letter dated 14.12.2012?"

(4) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in annulling the order passed u/s. 143(3) r.w.s. 147 of the I. T. Act for the want of issuance of notice u/s 143(2) of the I. T, Act without appreciating that the appellant does not object to the non-service of notice u/s. 143(2) before the completion of the reassessment proceedings?"

(5) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in annulling the order passed u/s. 143(3) r.w.s. 147 of the I. T. Act for the want of issuance of notice u/s143(2) of the I.T Act without appreciating that the provisions of section 292BB precludes the assessee for raising objection about the non-service of notice u/s. 143(2) after the completion of the reassessment proceedings?"

3. Learned representatives fairly agree that whatever we decide for the revenue's appeal for the assessment year 2007-08, which was heard alongwith this, will apply mutatis mutandis for this year as well-as all the material facts, including note sheet entries and dates of notices are similar. Vide our order of even date, we have dismissed the said appeal and observed as follows:-

3. As all the above grievances revolve around the validity of reassessment proceedings, in the absence of evidence of service of notice under section 143(2), we will take up all these grievances together.

4. Briefly stated, the relevant material facts are as follows. The assessee before us is a cooperative society registered under the Tamilnadu Societies Registration Act 1975, and has, as its objects, promotion of game of cricket and to foster the spirit of sportsmanship in India. On 31 st October 2007, the assessee filed its return of income. On 30 th December 2009, the assessment was completed under section 143(3) assessing its income at Rs 274,86,30,510. Subsequently, however, it was noticed by the Assessing Officer that the assessee has claimed TV subventions, infrastructure subsidy and coaching subsidy, aggregating to Rs 244,29,40,158, paid to the member associations, as deductions but to be reduced from its income which was assessed as business income, but, in the opinion of the Assessing Officer, it was nothing more than distribution of profits to its member associations. The Assessing Officer was thus of the

view that the income has escaped assessment. It was in this backdrop that the assessment was reopened under section 147 on 29 th March 2012 by issuance of notice under section 148. In response to this notice, on 27 th April 2012, the assessee stated that the return already filed may be treated as return in response to notice. The reassessment proceedings thus followed, and the reassessed income was quantified at Rs 456,89,99,370. To adjudicate on the issues in this appeal, it is sufficient to note the facts at the assessment stage to this extent only. Aggrieved by the assessment so framed under section 143(3) r.w.s. 147, assessee carried the matter in appeal before the CIT(A). The assessee raised a grievance, though by way of an additional ground of appeal, that "the learned Assessing Officer erred in commencing and subsequently completing the reassessment proceedings, without issuing a notice under section 143(2) and the said proceedings are therefore bad in law and deserve to be quashed". Adjudicating on this grievance of the assessee, learned CIT(A) upheld the said plea and observed, inter alia, as follows:

6.3.1 I have considered the submissions of the appellant and perused the materials available on record. The appellant has requested to hold the impugned reassessment order u/s 143(3) rws 147 of the Act as bad in law and hence quash the same. The appellant has submitted that the Ld. AO has erred in commencing and subsequently completing the reassessment without issuing the mandatory notice u/s 143(2) of the Act. In support of it's said claim the appellant has relied on various judicial pronouncements.

6.3.2 The DCIT, Central- 6(2), Mumbai, the Ld. AO, vide her above letter dated 28.12.2016 has submitted as under.

"On perusal of the case records for the reassessment proceedings u/s 148 for A.Y. 2007-08 it is found that after the issuance of the notice u/s 148, no notice u/s 143(2) for the commencement of the reassessment is available on record.

However, it is pertinent to mention here that the assesses in this case has fully participated in the reassessment proceedings and has provided submission as called for and has in no way objected to the reopening u/s 148 being bad in law on account of non receipt of notice u/s 143(2) vide its objection filed dated 17.10.2012.

Further as per the provisions u/s 292BB of the Income tax act 1961 reproduced below:

NOTICE DEEMED TO BE VALID IN CERTAIN CIRCUMSTANCES

"Where an assessee has appeared in any proceedings 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 proceedings or inquiry under this Act that the notice was-

(d) not served upon him; or

(e) not served upon him in time; or

(f) 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."

Therefore, in view of the provision of the above referred section the assessee's additional ground of appeal filed should not be entertained and is liable to be rejected.

6.3.3 From the above it is evident that the Ld. AO has admitted that in the present case after issuing of notice u/s 148 of the Act, no notice u/s 143(2) for the commencement of the reassessment is available on record, i.e the Ld. AO has failed to prove, that In the present case any notice u/s 143(2) of the Act was issued before completing the impugned reassessment u/s 143(3) rws 147 of the Act. The issue whether the reassessment proceedings can be completed u/s 143(3) rws 147 of the Act without issuing the notice u/s 143(2) of the Act has been settled judicially. Various courts/Tribunals have held that the reassessment completed u/s 143(3) rws 147 of the Act without issuing notice u/s 143(2) of the Act is bad in law and the said defect is not curable u/s.292BB of the Act. The Hon 'ble ITAT Chandigarh in the case of Sanjeev Aggarwal, vs. DCIT while adjudicating similar issue, vide its order dated 25.05.2016 in ITA Nos. 102, 103, 169, & 170 (CHD) of 2016 has held as under.

"We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. From the order of the learned CIT (Appeals), we observe that there is no quarrel to the fact that in the present case notice under section 143(2) of the Act was not issued to the assessee. The fact of issuing notice under section 143(2) of the Act is also not coming out from the order of the Assessing Officer. This fact has not been controverted by the learned D.R. even before us. In view of this, since the learned CIT (Appeals) dismissed the ground of the assessee on the basis of provisions of section 292BB of the Act, the only issue remaining before us is to decide whether in the absence of issue of notice under section 143(2] of the Act. The assessment framed under section 147 r.w.s. 143(3) of the Act is valid in the background of provisions of section 292BB of the Act. The provisions of section 292BB read as under:

"[Notice deemed to be valid in certain circumstances.

292BB. Where on 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.]"

8. From the bare perusal of the above section, we see that a deeming fiction has been created by this section. In case, an assessee cooperates during the assessment even if no notice has been served on him, it is deemed to be served upon him in time as per the provisions of the Act. The provisions of this section clearly laid down the circumstances under which the deeming fiction has to come into force. These conditions have been stated to be as (a), (b) and (c), which talks about the situation where the notice was not served upon the assessee or not served upon him in time or served upon him in an improper manner respectively.

Therefore, we see that section talks about only the situation where the assessee raises the issue of non-service of a and still cooperates with the Department. Otherwise also, we are of the opinion that issuance of statutory notice cannot be dispensed with by the cooperation of the assessee. Since this notice forms the basis for Assessing Officer to assume jurisdiction under respective sections. Reliance placed by the learned counsel for the assessee on the judgment of the Punjab & Haryana High Court In the case of Cebon India Ltd. (supra) is not out of place, whereby if has been very categorically held that absence of a statutory notice cannot be held to be curable under section 292BB of the Act.

9. As regards the arguments of the learned D.R. that section 147 r.w.s. 148 of the Act, are a complete code in itself and there is no need for the Assessing Officer to go into other sections to assess or re-assess income under the said section. We would like to observe the substantive part ofprovisions of section 148, which reads as under ;

"[Issue of notice where income has escaped assessment.

148 [(1)] Before making the assessment reassessment or recompilation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, [* *] as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:]"*

10. From the perusal of the above provisions, it is quite clear that the Assessing Officer has to issue and serve a notice under section 148 of the Act to the assessee before making assessment under section 147 of the Act. The notice under section 148 of the Act requires the assessee to furnish his return of income, within the time specified in the notice. This return has to be in the prescribed form and in the prescribed manner. If has been very categorically provided in the section that afterwards the provisions of this Act shall so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 of the Act. Therefore, the provisions of section itself negate the arguments taken by the learned D.R. that once issuing notice under section 148 of the Act, the Assessing Officer cannot go into the provisions of other sections. Once the assessee files return in pursuance of notice under section 148 of the Act which is deemed to be filed under section 139 of the Act and in case the Assessing Officer wants to proceed with the/ return filed by the assessee, he has to issue a notice under section 143(2) of the Act. Any assessment framed without issue of notice under section 143(2) of the Act suffers from Jurisdictional error. This position of law has also clarified by Delhi High Court in the case of Alpine Electronics Asia Pte Ltd. (supra). In view of the above, we hereby quash the order of the Assessing Officer, which was made without issue of notice under section 143(2) of the Act."

Further, the Hon'ble Delhi High Court has held similar law vide its order dated 14.10.2015, in IT Appeal No. 519 of 2015, in the case of Pr. CIT vs Shri Jai Shiv Shankar Traders P Ltd and held as under.

"18. As already noticed, the decision of this Court in Vision Inc. (supra) proceeded on a different set offacts. In that case, there was a clear finding of the Court that service of the notice had been effected on the Assessee under Section 143 (2) of the Act. As already further noticed, the legal position regarding Section 292BB has already been made explicit in the aforementioned decisions of the Allahabad High Court. That provision would apply insofar

as failure of "service" of notice was concerned and not with regard to failure to "issue" notice. In other words, the failure of the AC, 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.

19. 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 16 th 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 reassessment.

20. Consequently, there is no legal infirmity in the impugned order of the ITAT. No substantial question of law arises. The appeal is dismissed."

6.3.4 The legal position, as discussed above, that without issuing mandatory notice u/s 143(2) of the Act, the Assessing Officer cannot assume jurisdiction to compete reassessment u/s 143(3) rws 147 of the Act is no more re-integra as the Hon'ble Bombay High Court has settled the same. The Hon'ble Bombay High court in the case of ACIT vs. Geno Pharmaceuticals Ltd, reported in 32 taxmann.com 162 has held as under.

"4. So far as Tax Appeals No.77/2012 and 78/2012 are concerned, in both these appeals, the ITAT has held that the issuance of notice after reopening of the case was mandatory and this order is under challenge.- It is contended that the said order is contrary to the provisions of Sections 292BB which was introduced by the Finance Act 2008 w.e.f 01.04.2008, in which it is stated that in a case where an assessee has appeared in any proceedings or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of the said Act which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of the said Act. Perusal of the order of the ITAT reveals that this aspect was not canvassed before the ITAT.

5. 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] 229ITR 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 ITR 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.

6. Under these circumstances, no case-is made out-for interfering with the Tax Appeals No.77/20I2 and 78/20J2 since no substantial question of law is raised in both the appeals."

Further, the Hon'ble Bombay High Court in the case of CIT vs. HUF of H.H. Late J.M. Scindia reported in 174 taxman 1, while adjudication the issue under WT Act has held as

under.

"In our opinion, it will not be possible to construe the provisions as are sought to be contended on behalf of the revenue. All the provisions of Chapter IV will have to be read in tandem so as to bring about an uniformity and certainty to an order of assessment. The proviso to section 16(2) Is in the nature of an embargo on the Assessing Officer, if the period has expired not to issue notice after that period.. , In other words, the Assessing Officer is bound to accept the return as filed. Though the notice under section 16(2) may be procedural the proviso is not merely procedural but is in the nature of a limitation on the power of the Assessing Officer not to proceed further in a case where return has been filed under section 14 or under section 15. That will have to read as applicable to a case of reassessment under section 17.

14. Let us now examine sections 143 and 148 of the provisions of the income-tax Act, where similar language had been employed. Under section 143(2) (II), there is a limitation on the Assessing Officer not to issue notice if the period of twelve months had expired. Section 148 of the Income-tax Act had come up for consideration before several High Courts. A learned Bench of the Madras High Court in CIT v. M. Chellappan [2006] 281ITR 444 had occasion to consider the provision. The Assessing Officer proceeded fo reassess under section 147 of the Income-tax Act and completed the assessment without issuing notice under section 143[2] within the time stipulated. The order was confirmed in appeal. The Tribunal had set aside the order on the ground that notice under sect/on 143[2] was not served on the assesse within the stipulated period. The learned Bench of the Madras High Court held that as the notice under section 143(2) was not served within the stipulated period, the procedure under section 143 came to an end and the matter attained finality. Similarly is the judgment of the Gauhati High Court in Smt. Bandana Gogol v. CIT [2007] 289 ITR 28 which also dealt with an issue of reassessment under section 147. That was a case of block assessment. If was found that notice under section 143(2) was not issued. The learned Bench came to the conclusion that requirement of section 143(2) cannot be dispensed with as it is mandatory. Parliament subsequently by the Finance Act, 2006, with effect from 1-10-1991, introduced the second proviso to section 148 saving proceedings where return had been filed pursuant to proceedings under section 147 and no notice had been served under section 143(2) within the period prescribed by the proviso to sect/on 143(2).

15. The language used in section 143(2) is similar to the language used in section 16(2), Parliament in the case of the Income-tax. Act under section 148 noting the omission in the section which was likely to affect assessments done, pursuant to powers conferred under section 147, inserted the proviso to section 148 to protect the assessments already done. It is true that merely because Parliament has as a matter of abundant caution intervened and amended the provisions of section 148 cannot be read to mean that there is a lacunae. Two High Courts, Madras and Gauhati, have taken a view that notice under section 143(2) is mandatory even in a case of reopening of assessment under section 148 of the Income-tax Act. In our opinion, the view taken by the two High Courts reflects the language of section 147. Therefore, even m a case of reopening of assessment under section 147, the Assessing Officer is bound to comply with the requirement of section 143(2) of the Income-tax Act.

16. Even Independently, we have examined the scope and effect of sections 14 to 16 on the one hand and section 17 on the other, in our opinion, there is no escape from arriving at the conclusion that when the Assessing Officer invokes section 17, the provisions of sections 14 and 16 to the extent applicable, for the purpose of making an order of reassessment will have to be followed which will include the time-limit for notice under section 16(2). Once the language of section 17 itself requires that other provisions to the extent applicable would

apply considering the return as filed under section 14, it contemplates that both procedural and substantive provisions will apply. In our opinion, therefore, while invoking the powers under section 17, the Assessing Officer is bound by the mandate of the proviso to section 16(2) and on failure the order of reassessment will be without jurisdiction and consequently the order of reassessment will have to be set aside.

17. Having said so, we are clearly of the opinion that no error of law can be found with the view taken by the Tribunal. Consequently, the appeal is dismissed."

6.3.5 In view of the above discussion, it is evident that it is mandatory to issue notice u/s 143(2) of the Act before completing the re-assessment u/s 143(3) rws 147 of the Act in pursuance of notice issued u/s 148 of the Act and hence non issuance of such mandatory notice u/s 143(2) of the Act is fatal and the Ld. AO will not have any jurisdiction to complete the reassessment u/s 143(3) rws 147 of the Act. It is further held by various courts/Tribunals that the defect of not issuing notice u/s 143(2) of the Act cannot be cured u/s 292BB of the Act. Since the Ld. AO has submitted that "after the issuance of notice u/s 148, no notice u/s 143(2) for the commencement of the reassessment is available on record", so in view of the factual report of the Ld. AO and respectfully following the decisions of Hon'ble Courts/Tribunals, referred above, I am of the considered opinion that impugned assessment order u/s 143(3) rws 147 of the Act dated 02.01.2013 is without jurisdiction and bad in law and hence the same is herewith annulled. Since the impugned assessment has been annulled, the various grounds raised in appeal have become academic and hence not adjudicated. As the impugned reassessment order has been annulled, so the appeal filed by the appellant is ALLOWED.

5. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. We have noted that the learned Departmental Representative 's basic plea before us is that there is a distinction between the notices under section 143(2) not having been issued, and the evidence of service of such notices on record. He submits that in the present case the notices have been issued, as evident from the material on record, but admittedly there is no evidence about such a notice being served in this case. That is a lapse which can take place because of the records not being kept well but that lapse, according to the learned Departmental Representative, would not vitiate the reassessment proceedings. In support of this claim, learned Departmental Representative has submitted certain material, including a copy of the note sheet recording proceedings before the Assessing Officer, and copies of questionnaires issued to the assessee. There are issues also raised with respect to inappropriateness of the admission of additional ground by the learned CIT(A) as the grievance regarding non-service of notice under section 143(2) was not a pure question of law but also a question requiring investigation of facts. Howsoever attractive these arguments may seem at the first sight, these arguments lack legally sustainable merits. A plain look at the proceeding sheet before the Assessing Officer shows that, according to the said proceeding sheet, the notice under section 143(2) and 142(1) is issued immediately upon issuance of notice under section 147 (sic- 148) on 29 th March 2012, and the entry immediately following the entry of issuance notices is the entry dated 27 th April 2012 which records filing of letter by the assessee to the effect that the income tax return filed by the assessee may be treated as return in response to notice- a fact corroborated by the facts set out in the assessment order as well. Quite clearly, therefore, there was no return, filed in response to notice under section 148, before the Assessing Officer at the

point of time when notice under section 143(2) was issued. Such a notice thus can not be relevant for the reassessment proceedings in question. There is no other reference to issuance of the notice under section 143(2) on the proceedings sheet. There is a reference to issuance of a questionnaire, which is rectified as a 'letter' by striking off the word questionnaire, on 28 th August 2012. As for the learned Departmental Representative's contention that the notice under section 143(2), as stated in the questionnaire in question- a copy of which was placed before us, accompanied the said questionnaire, that is a claim contested by the assessee. There is no evidence to the service of the notice purportedly attached to the said questionnaire. In any event, it is not clear whether this notice was the one issued on 29 th March 2012 or it was some other notices. If this notice was the one issued on 29 th March 2012, it had no legal sanctity because there was not even an income tax return before the Assessing Officer on that date. If it was some other notice, there is no mention of the same on the proceedings sheet, a copy of which is served by the learned Departmental Representative itself, but then where is the question of reissuance of the same notice if the proceeding sheet evidences issuance of notice, though not served, on 29 th March 2012. Whichever way one looks at it, as evident from the proceedings recorded by the Assessing Officer, there was not even a valid issuance of notice. Issuance and service of a valid notice assuming jurisdiction under section 147 is not a matter of inference or assumption, it is to be established by the evidence on record. Clearly, that evidence is missing. Quite to the contrary, the contradictions in the proceedings sheet show that no such valid notice was even issued. Even in the assessment order, there is a mention of notice under section 142(1), but there is not even a mention of issuance of notice under section 143(2). In view of these factual findings, it is not really necessary to deal with the judicial precedents cited by the learned Departmental Representative which admittedly are on the basis of certain foundational facts which are missing in this case, i.e. evidence substantiating issuance of a lawful notice under section 143(2). We are, therefore, of the view that the issues raised by the learned Departmental Representative lack legally sustainable merits. We reject the plea of the revenue.

8. As regards the admission of additional ground of appeal before the learned CIT(A), we have noted that the issue raised was an important question of law and merely because a reference to some facts was required, admission of this ground by the CIT(A) could not have been declined. The proceedings before the CIT(A) are a mere continuation of the assessment proceedings and there is no bar is raising any issue, requiring further examination of facts, before the CIT(A). We, therefore find no substance in this plea of the learned Departmental Representative either. As regards participation in the reassessment proceedings by the assessee, nothing really turns on the same. When assumption of jurisdiction is illegal, as no valid notice under section 143(2) was issued and served on the assessee, mere participation by the assessee in the resultant proceedings cannot clothe it with legality.

9. We find that, as the learned CIT(A) rightly notes in his impugned order, issuance and service of notice under section 143(2) is a foundational requirement for assessment under section 143(3) r.w.s. 147, and, in the absence of the same and notwithstanding the fact that the assessee may have participated in the related assessment proceedings, the reassessment order cannot have legal sanctity. As rightly analyzed by the learned CIT(A), Section 292 BB cannot come to the rescue of the Assessing Officer in such cases. We approve learned CIT(A) 's reasoning and conclusions.

10. In view of the above discussions, as also bearing in mind entirety of the case, we approve the well reasoned conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

4. We see no reasons to take any other view of the matter than the view so taken by us in assessee's

own case. Respectfully following the same, and holding that the observations made therein will equally apply mutatis mutandis in these cases as well, we uphold the preliminary objection of the learned Departmental Representative and allow the appeals to that extent.

5. In the result, the appeal is dismissed. Pronounced in the open court today on the 2 nd day of August 2021.

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Customized Notes

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