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

BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA No.3889/M/2012
Assessment Year: 2004-05

M/s. Menz Retail Pvt. Ltd., Ground Floor, Knowledge House, Off. Jogeshwari-Vikroli Link Rd., Shyam Nagar, Jogeshwari (East), Mumbai – 400 060 **PAN: AAACM1978J**	Vs.	DCIT, 8(2), R.N.216-A, Aayakar Bhavan, M.K. Road, Mumbai - 60
(Appellant)		(Respondent)

Present for:
Assessee by : Ms. Dinkle Haria, C.A.
Revenue by : Shri Suman Kumar, D.R.

Date of Hearing : 15.09.2017
Date of Pronouncement : 10.11.2017

O R D E R

Per D.T. GARASIA, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 02.03.2012 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2004-05.

2. The short facts of the case are as under:

In this case, the assessee has filed the return of income on 29.10.2004 declaring total income at Rs.3,44,94,442/-. The return

was processed under section 143(1) of the Act. Thereafter, the Assessing Officer (hereinafter referred to as the AO) observed that assessee has claimed deduction of Rs.67,89,715/- out of “Business Income” on account of purchase of tenancy rights. The AO observed that since the purchase of tenancy rights is an expenditure which is of capital in nature, deduction for the same cannot be allowed against “Business Income”. The AO observed that assessee has made wrong claim of expenditure of Rs.67,89,715/-. The AO also observed that income on purchase and sale of shares amounting to Rs.4,07,69,668/- for the tax under the head “Income from capital gain”. The AO held that shares in which investments are made are of group company M/s. Pantaloon Retail (India) Ltd. and all the shares have been acquired out of loan funds. The AO observed that assessment order was passed under section 143(3) on 30.12.08 and it was categorically held that assessee is not investor but trader. The assessment was completed. Thereafter, the AO has reopened the assessment under section 147 of the Act and completed the assessment under section 143(3) read with section 147 of the Act.

3. The assessee has taken the preliminary objection that while passing the re-assessment order the AO has not issued notice under section 143(2) and it was not served on the assessee. The Ld. A.R. submitted that in this case the assessee’s return was processed under section 143(1) and notice under section 143(2) was not issued to the assessee. The assessee submitted that now a well settled legal position states that AO cannot take recourse of reassessment

proceedings just because he missed the time limit for issuing scrutiny notice. The assessee submitted that re-assessment proceeding is bad in law and illegal. It is well settled legal position that non issuance of mandatory notice under section 143(2) is jurisdictional defect and is not curable even in case where the assessee has appeared. This ground was taken before the Ld. CIT(A) and the Ld. CIT(A) has dismissed.

4. The Ld. A.R. submitted that no notice under section 143(2) was issued. Notice issued by AO in which there is no mention about notice under section 142 of the Act. The Ld. A.R. submitted that the notice under section 143(2) in assessment proceeding is necessary. The Ld. A.R. further submitted that notice under section 143 is mandatory and in absence of such service AO cannot proceed to make an enquiry on the return filed in compliance with notice under section 148 of the Act. The omission on part of AO to issue notice under section 143(2) is a procedural irregularity and it can be dispensed with. In absence of notice under section 143(2), the reassessment under section 148 could not be held to be validly made. Merely because matter was discussed with the assessee and signature is affixed, it doesn't mean the rest of procedure of notice under section 143(2) stood complied with or that on placing objection assessee had waived notice for further processing of reassessment proceedings. Where procedure prescribed of issuance of notice under section 143(2) had not been followed at all, assumption of jurisdiction of issuance of notice of reopening itself would not be

sustainable. Even where assessee requested AO to treat original return as one in response to section 148 proceeding, notice under section 143(2) was mandatory; otherwise re-assessment would be bad in law. The Ld. A.R. further submitted that merely because assessee participated in proceedings pursuant to notice under section 148, it would not obviate mandatory requirement of AO to issue assessee a notice under section 143(2) before finalizing order of reassessment. The Ld. A.R. further submitted that there was failure of AO to issue the notice under section 143(2) prior to finalizing reassessment order, therefore, reassessment is bad in law. In case of proceedings initiated under section 143(3) read with section 147 requirement to issue a notice under section 143(2) is mandatory and section 292BB does not in any manner grant any privilege to AO in dispensing with issuance of such a notice.

5. On the other hand, the Ld. D.R. submitted that the Ld. CIT(A) has held that 148 has been rightly taken by AO as the assessee took wrong claim, therefore, it is a procedural defect and as per section 292BB this defect is not a defect. The Ld. D.R. submitted that participation by assessee in proceedings on receipt of copy of notice can be deemed to be service of notice within the ambit of section 148(1).

6. We have heard the rival contentions of both the parties. During the course of hearing, the AO was requested to call for the record and we have verified that in case of the assessee the assessment was

reopened under section 147 of the Act by AO by issuing notice under section 148 of the Act on 19.01.09. In response to the said notice the assessee vide letter dated 07.03.09 requested the AO to treat the return already filed as it is return in response to the said notice. However, thereafter, the mandatory notice under section 143(2) which was neither issued nor served on the assessee. There was omission on the part of AO to issue said notice. We have verified this fact from the record and it is found that no notice under section 143(2) was issued after reopening of the assessment order. We find that this is a mandatory requirement. As per the decision of Hon'ble Supreme Court in the case of ACIT vs. Hotel Blue Moon 321 ITR 362 (SC) wherein it is held that if the AO for any reason repudiates the return filed by the assessee in response to the notice under section 158BC(a) of the Act relating to block assessment, the AO must necessarily send notice under section 143(2). It was further held that by making the issue of notice mandatory under section 158BC dealing with block assessment, makes such notice very foundation. The requirement of notice under section 143(2) cannot be dispensed with.

7. We find that the AO has completed the assessment under section 147/143 of the Act. We find that similar issue had come up before the Hon'ble Delhi High Court in the case of CIT vs. Mani Kakar 178 Taxman 315 (Del) wherein it was held as under:

> "For relevant assessment year, Assessing Officer completed assessment u/s. 147 / *143(3)* of the Act. On appeal before Tribunal, assessee contended that since no notice u/s. 148 had been issued / served upon him, all

subsequent proceedings including framing of reassessment order were liable to be set aside. The Tribunal having examined issue on facts concluded that there was no service of notice on assessee under section 148 and, therefore, impugned assessment was liable to be quashed - On instant appeal, revenue sought to place reliance on provisions of section 292BB which have been introduced with effect from 1-4-2008. The revenue's reliance on provisions of section 292BB was misplaced as said provisions were not applicable to assessment year 2001-02. Since, in instant case, no such notice was served on assessee prior to re-opening of assessment proceedings, the Tribunal was justified in setting aside assessment order passed under section 147/143(3)"

8. Similarly, the Hon'ble Delhi High Court has also considered that on receipt of notice when the assessee participates in proceeding in that case whether section 292BB is applicable or not has been explained by observing as under:

"The revenue also submitted that the Tribunal has ignored the provisions of section 292BB which lays down that 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 and the assessee shall be precluded from taking any objection in any proceedings or inquiry under the Act that notice was not served upon him or was served in an improper manner. In this regard, it may be stated that this provision came to be inserted by the Finance Act, 2008 with effect from 1-9-2008 and is not applicable to the assessment year in question. However, this provision also substantiates the finding that in the given circumstances as in the instant case, service of notice before assessment could be inferred.

The participation by the assessee in the assessment proceedings on receipt of the copy of the notice can be deemed to be service of notice within the ambit of section 148(1). That is what is the legislative intent of 'service of notice' on assessee under this section that no assessment under section 147 can be finalized before the assessee has sufficient notice thereof. [Para 19]

Thus, it was held that the Tribunal was not correct on facts and law to annul the assessment framed by the Assessing Officer. [Para 20]"

9. In the instant case, we find that the assessment year is 2004-05, therefore section 292BB is not applicable because the Tribunal in the case of Ghanshyamdas Gems & Jewels vs. DCIT – 36 ITR(T) 381

(Hyd – Trib) wherein it was held that provisions of section 292BB deeming a notice to be valid was inserted by Finance At, 2008 with effect from 01.04.2008 prospectively and, hence, could not be invoked for earlier period. We also find that similar view has been taken by Special Bench in the case of Kuber Tobacco Products (P.) Ltd. vs. DCIT – 117 ITD 273 (Del) (SB) wherein it has been held as under:

> "Section 292BB, inserted by Finance Act, 2008, has no retrospective effect and is to be construed prospectively. Therefore, up to 31-3-2008 as per section 2921313, assessee is not precluded from taking any objection regarding invalidity of an assessment/reassessment on ground of improper/invalid issuance/service of notice. So far as applicability of section 292BB is concerned, it is not strictly restricted to issue of notice under section 143(2), but it is in respect of other notices relating to any provisions of Act which include notice to initiate re-assessment proceedings and other proceedings also.
>
> Summarising our findings we hold as follows:-
>
> (i) Section 292BB even if it is procedural it is creating a new disability as it precludes the assessee from taking a plea which could be taken as a right, cannot be construed retrospectively as the same is made applicable by the statute with effect from 01.04.2008.
>
> (ii) Section 292BB is applicable to the assessment year 2008-09 and subsequent assessment years.
>
> The matter will be placed before the regular Bench to decide the appeals in regular manner."

10. We also get the support from jurisdictional High Court in the case of ACIT vs. Geno Pharmaceuticals Ltd. – (2013) 214 Taxman 83 (Bom) wherein it is held as under:

> "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] 229 ITR 383has 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."

11. Respectfully following above decision of the Hon'ble Bombay High Court, we allow the appeal of the assessee.

12. As we have disposed the matter on technical ground it is not necessary to dispose rest of the grounds.

13. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 10.11.2017.

Sd/- **(G. Manjunatha)** **ACCOUNTANT MEMBER**	**Sd/-** **(D.T. Garasia)** **JUDICIAL MEMBER**

Mumbai, Dated:10.11.2017.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.