IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.6557/Del/2014
Assessment Year: 2008-09

Dy. Commissioner of Income-tax Circle Gurgaon, International Taxation, New Delhi.	vs	Smt. Suman Masciarelli, J-9/6, DLF Pgase-II, Gurgaon. **PAN: ALQPM7254F**
Appellant		Respondent

Assessee by: S/Shri S. Krishnan &V.Raja Kumar, Advocate
Department by: Shri N.K. Bansal, Sr. DR

Date of Hearing: 28.02.2019
Date of Pronouncement: 27.03.2019

ORDER

PER NARASIMHA K. CHARY, JM

Aggrieved by the order dated 23.09.2014 in Appeal No. 43/269/13-14 passed by the Learned Commissioner of Income-tax(Appeals)-XXIX, New Delhi {"CIT(A)"} for Assessment Years 2008-09, revenue preferred this appeal.

2. Brief facts of the case are that the assessee filed their return of income on 31.3.2009 declaring income of Rs.164,80,310/- and the

assessment order was completed u/s 143(3) of the Income-tax Act, 1961("the Act") by order dated 11.5.2012 at the returned income. However, subsequently, it was found that the assessee sold 6000 shares of M/s Astadia IT Solution P. ltd. for a consideration of Rs.3,45,83,342/- on 12.3.2008 and declared long term capital gains amounting to Rs.1,64,64,469/-after deducting indexed cost of acquisition amounting to Rs.66,519/- and claiming exemption u/s 54F of the Act for Rs.1,80,52,364/-, which was paid by the assessee to the builder for the purpose of building residential house.

3. Learned AO, therefore, sought to reopen the proceedings u/s 147 with the issuance of notice dated 21.3.20102 u/s 148 of the Act. Learned AO recorded that though notice u/s 143(2) and also u/s 142(1) were issued on 24.9.12 and 5.2.2013 respectively, there was no response from the assessee and, therefore, the assessment was finalized basing on the material available on record. He accordingly concluded the proceedings by order dated 22.3.2013 u/s 144/147 of the Act by making an addition of Rs.1,09,13,711/-.

4. Assessee preferred an appeal before the learned CIT(A) challenging the reopening of the proceedings on the question of law and fact and also the propriety in making the additions. Learned CIT(A) by way of impugned order held that in view of the decisions of the Hon'ble Apex Court in the case of CIT vs Kelvinator of India Ltd., 320 ITR 561 (SC); CIT vs BhanjiLavji, Porbandar, 79 ITR 582 (SC); ITO vs Nawab Mir Barkat Ali Khan Bahadur, 97 ITR 2399 (SC) and also other decisions held that the initiation of re-assessment proceedings u/s 147 of

the Act by the ld. AO is void ab initio and hence, the impugned assessment order was quashed.

5. Revenue is, therefore, before us in this appeal challenging the quashing of the re-assessment particularly re-assessment on technical grounds. The assessee also filed an application under rule 27 of the Income-tax Appellate Tribunal Rules, 1963 and urged that the authorities below ignored the fact of non service of notice u/s 148 of the Act on the assessee and for want of service of notice u/s 148, the assessment proceedings are void ab initio.

6. It is the submission of the learned DR that at the time of original assessment, no query on the aspect of this long term capital gain was raised and in view of plethora of decisions on this aspect, when no query was raised and the learned AO did not specifically advert to an aspect, the re-assessment proceedings on such aspect are permissible under law.

7. Per contra, it is the submission of the learned AR that vide Ground No.3 in the appeal before the ld. CIT(A), the assessee had taken a specific plea that there was no compliance of Section 147 and 148 inasmuch as no communication was received by the assessee. It is submitted that though such a plea was taken by the assessee and the learned CIT(A) vide para 6.1 recorded the submissions of the assessee that the assessee is a non resident and her father here not keeping good health so frequently undergoing treatment in India and Singapore and in those circumstances, no notice u/s 148 or 143(2) was received by them and that is the reason why there was no occasion for the compliance with any requirement of the above by the assessee, ld. CIT(A) did not discuss this aspect in his order but he disposed of the issue only stating that there

was no new tangible material available with the AO and, therefore, he cannot assume jurisdiction u/s 147 of the Act. Learned AR, therefore, submits that the impugned order is silent on this aspect though the assessee had taken a specific plea.

8. By way of reply, it is argued by the learned DR that in view of Section 292BB of the Act, the defect of non service of notice is cured and the assessee is precluded from taking any objection that the notice was not served upon him.

9. We have gone through the record in the light of the submissions on either side. As a matter of fact, the impugned order vide para 2.0 shows that by ground no.3, the assessee agitated the non-service of notice u/s 147 of the Act on her. Further, the impugned order vide para 6.1 also shows that it was submitted by the assessee that no notice u/s 148 and 143(2) was received by them. However, the impugned order does not deal with this aspect whether any notice was served upon the assessee or not. Learned CIT(A) proceeded to dispose of the rest in the light of the contention that in the absence of any new tangible material available with AO, assumption of jurisdiction u/s 147 is bad in law.

10. Section 292BB of the Act is not at all helpful to the case of revenue because under such Section, it is only when the assessee appeared in the proceedings, cooperated in the inquiry relating to the assessment or the re-assessment, there shall be a presumption that the requisite notice was duly served upon him and the assessee shall be precluded from taking any plea to the contrary. In this matter, the assessment order clearly does not read that it was passed u/s 144/147 of the Act and the learned AO recorded a finding that the assessee never

appeared before him nor did she cooperate in the inquiry. In these circumstances, we are of the considered opinion that it was incumbent upon the learned CIT(A) to answer ground No.3 in the affirmation or in the negative after verification of the record. It is not convenient before us to undertake such an exercise as to the service of notice u/s 147 of the Act. It is, therefore, necessary that the impugned order has to be set aside and the issue relating to the verification of service of notice u/s 148 has to be remanded back to the file of the learned CIT(A) for verification and answering the same. We accordingly set aside the impugned order and remand the issue of service of notice u/s 148 to the file of the learned CIT(A) to verify such a fact from the record and to give a finding thereon.

11. In the result, appeal of the revenue is allowed for the purposes of statistics.

Order pronounced in the Open Court on 27th March, 2019.

Sd/- **sd/-**

(PRASHANT MAHARISHI) **(K.NARASIMHA CHARY)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Dated: 27th **March, 2019.**
VJ

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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