IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B" : HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.	A.Y.	Appellant	Respondent
56/Hyd/19	2010-11	Rajkumar Jindal, HYDERABAD [PAN: ACMPJ5612M]	Income Tax Officer, Ward-7(2), HYDERABAD
57/Hyd/19	2010-11	Smt. Payal Jindal, HYDERABAD [PAN: AEAPJ5314E]	

For Assessee : Shri Siddharth Toshniwala, AR
For Revenue : Smt. V. Aparna, DR

Date of Hearing : 03-06-2019
Date of Pronouncement : 03-07-2019

O R D E R

PER Smt. P. MADHAVI DEVI, J.M. :

Both are appeals filed by the respective assessees for the AY.2010-11, against the order of the Commissioner of Income Tax (Appeals)-3, Hyderabad, dated 16-11-2018.

2. Brief facts of the case are that both the assessees are husband and wife. They sold Northern portion of a house property bearing Municipal No.5-1-153/3, admeasuring 93.33 Sq. Yds., situated at Jambagh, Hyderabad for a consideration of Rs.15 Lakhs on 04-07-2009, vide document No.1559/2009. They also sold the Southern portion of the house property, bearing Municipal No.5-1-153/3, admeasuring 93.33 Sq. Yds., for a consideration of Rs.15 Lakhs, vide document

No.1560/2009, dt.04-07-2009. Thus, the total sale consideration as per two sale deeds was Rs.30 Lakhs, whereas the SRD value of the property was Rs.52,92,480/-. Since the assessees did not offer the capital gains to tax for the AY.2010-11, the assessment was re-opened by issuance of a notice u/s.148 of the Act, dt.31-03-2017 to the address mentioned in the sale deeds executed by the assessees. The envelop containing notice u/s 148 was returned by the postal authorities with an endorsement "*Addressee left, return to sendor".* Thereafter, the Assessing Officer got the notice u/s.148 of the Act, served by affixture on the same address on 03-05-2017. All the subsequent letters to the said address were returned to the office un-served by the postal authorities. Subsequently, a show cause letter dt.18-08-2017 was prepared and proposed to be served on the assessee and then changed the address of the assessees' was noticed. Thus, a show cause notice was served in the new address on 30-08-2017. In response to which, the assessee filed a letter stating that the notice u/s.148 was not served on him within the period of time i.e., on or before 31-03-2017 and hence the notice was time barred and invalid. The objections of assessee were rejected on the ground that the notice u/s.148 of the Act was served by affixture in the assessee's address as given in the registered sale deed, as the correct address was not known to the department on the date of issuance of notice u/s.148 of the Act i.e., on 31-03-2017. Thereafter, the Assessing Officer proceeded to invoke the provisions of Section 50C for both the documents and brought the difference of Rs.22,92,480/- to tax

as Short Term Capital Gain in both the hands i.e., Rs.11,46,240/- in the hands of each of the assessee.

2.1. Aggrieved, assessees preferred appeals before the CIT(A), both against validity of notice u/s.148 of the Act on the ground that the same were not served on the assessees and also on merits. The CIT(A), however, dismissed both the appeals, and the assessee's are in appeal before us by raising the following grounds of appeal. For the sake of convenience andready reference, the grounds raised in ITA No.56/Hyd/2019 are reproduced hereunder:

"*Pertaining to validity of Reassessment Order: tax effect: 3,47,572/-*

1) That the Learned CIT(Appeals) erred in holding that the Order passed u/s 143(3) rws 144 rws 147 without serving Notice issued u/s 148 is a valid Order.

2) That the learned CIT(Appeals) erred in holding that Reassessment Order passed without service of Notice issued u/s 148 is saved by provisions of Section 292B.

3) That the provisions of Section 292B applies only to mistake, defect or omission in Notice but they cannot override the statutory obligation of service of notice issued u/s 148 and non service of Notice issued u/s148 is incurable defect and Reassessment Order passed without serving Notice u/s 148 is void.

4) That the Assessing Officer's assertion that he was not having correct address of Appellant is wrong as he was already corresponding with Appellant at the correct address and his action of sending the Notice issued u/s 148 to the incorrect address and after the Notice was returned un-served, getting the Notice affixed at the same address is illegal.

5) That the judgment of Hon'ble Supreme Court in Sky Hospitality LLP Vs ACIT relied upon by learned CIT(Appeals) was rendered on different facts and hence does not apply to the facts of Appellant's case.

6) That the learned CIT(Appeals) erred in holding that no Capital Gain was offered in Return of Income ignoring the fact that the property was sold for the same price for which it was purchased and as result no gain or loss arose.

7) That the learned CIT(Appeals) erred in confirming the action of Assessing Officer of taking value fixed by Registration Authority for Stamp Duty as full value of consideration received by Appellant on sale of property.

8) Any other Ground of Appeal that may be taken up subsequent to the filing of Appeal".

3. Ld. Counsel for the assessee, while reiterating the submissions made before the authorities below, submitted that the assessees' filed their returns of income for the AY.2010-11 on 15-09-2010, giving the address they were residing in at that point of time in the returns of income. He submitted that subsequently, assessees' have changed their address and had also filed their returns of income for the AY.2012-13 onwards with the new address and there was also correspondence from the department at the new address vide letters dt.01-09-2014 and 06-03-2017. Thus, it is submitted that the Assessing Officer had the knowledge of change of address and also had known the correct address, but, for the reasons best known to him, the notices were sent to the old address after the period of limitation and therefore, they were clearly not served on the assessees. He drew our attention to the provisions of Rule 127 of I.T. Rules, wherein the addresses at which, the notices can be served on an assessee are given. He submitted that even after the assessees have brought to the notice of the Assessing Officer about the change of address, there was no action taken by the department by serving of fresh notice at the new address and the department cannot

plead ignorance about the new address and hence the notice u/s.148 of the Act was not validly served on the assessees. In support of this contention, he placed reliance upon the following :

(i) Judgment of the Hon'ble Supreme Court of India in the case of (i) Y. Narayana Chetty and another Vs. ITO [35 ITR 388] (SC), wherein it was held that - *the service of the prescribed notice on the assessee is a condition precedent to the validity of any re-assessment made under section 34 of the 1922 Act and if no notice is issued or if the notice issued is shown to be invalid, then the proceedings taken by the Income Tax Officer would be illegal and void.*

(ii) The judgment of the Hon'ble High Court in the case of CIT Kerala Vs. Thayaballi Mulla Jeevaji Kapasi (Deceased) [66 ITR 147] (SC), wherein it was held that – *the service of the notice prescribed by Section 34 of the Indian Income-tax Act, 1922, for the purpose of commencing proceedings for reassessment is not a mere procedural requirement: it is a condition precedent to the initiation of proceedings for assessment under section 34 of the Act.*

(iii) The decision of Hon'ble Gujarat High Court in the case of CIT Vs. Mintu Kalita [253 ITR 334] (Gau), wherein it was held that – *after considering that the notice u/s. 148 was not served on the assessee, it*

was held that it is a condition precedent to initiation of proceedings for the assessment u/s.147 and hence where there is no evidence of service of notice, that re-assessment is not valid.

(iv) The decision of Hon'ble Delhi High Court in the case of Veena Devi Karnani Vs. ITO [410 ITR 23] (Del), wherein in similar facts it was held that "*where the re-assessment notices were served on the other address inspite of intimation of changed address, the re-assessment proceedings are not valid and the reliance upon Section 292B of the Act is not sustainable.*

(v) The decision of the Hon'ble Calcutta High Court in the case of Rameshwar Sirkar Vs. ITO [88 ITR 374] (Cal), wherein it was held that – *the service of notice under section 148 is mandatory and is a condition precedent for the initiation of reassessment proceedings. The mere fact that the serving officer did not find the assessee to be served with the notice at his address is not sufficient to establish that he could not be found and the service of notice by affixture without reasonable attempt to find assessee is not proper.*

(vi) Also in the case of CIT Vs. Hotline International P. Ltd., [296 ITR 333] (Del), it was held that "*Without making any efforts to serve the notice to assessee, service of notice by affixture is not correct".*

(vii) In the case of CIT Vs. Avi-Oil India P. Ltd., [323 ITR 242] (P&H), it was held that – *where there is no personal service of notice and notice is served by affixture without any proof of serving the same to assessee, such notice is invalid and consequently, the assessment is also invalid.*

In support of his contentions that - *non-service of notice is a jurisdictional defect and cannot be cured by Section 292B of the Act,* the Ld. Counsel for the assessee placed reliance upon the following decisions:

i. CIT Vs. Smt. Phoolmati Devi [144 ITR 954] (All);
ii. PN Sasikumar and others Vs. CIT [170 ITR 80] (Ker);
iii. CIT Vs. Shital Prasad Karag Prasad [280 ITR 541] (All);
iv. CIT Vs. Norton Motors [275 ITR 595] (P&H)

4. Ld. DR, on the other hand, supported the orders of the authorities below to submit that the department has taken steps to serve the notice on the assessee and since the notice was un-served, it was served by affixture at the address given by the assessees in their returns of income and therefore the notices are validly served.

5. Having regard to the rival contentions and material on record, we find that the transaction of sale of property has taken place in the Financial Year 2009-10 and though the assessees have filed their returns of income, they did not offer the capital gains to tax. The Assessing Officer, therefore, could have re-opened the assessment by issuance of notice u/s.148

of the Act within a period of six years from the end of the relevant assessment year i.e., on or before 31-03-2017. The Assessing Officer has thought it fit to issue notice only on the last day dt.31-03-2017 and has sent the notice by Speed Post to the address mentioned in the sale deed. The said address is the same as mentioned in the return of income for the AY.2009-10. Rule 127 of the I.T Rules provides that the notices can be served on any of the places given there under. If the notice is sent to the address given in the return of income, but could not be served on the assessee, then, it is incumbent upon the Assessing Officer to verify the correct address of the assessee and send the notice accordingly in the mode and order prescribed under rule 127. In the case before us, we find that the Assessing Officer has resorted to service of notice by affixture at the old address after notice u/s.148 of the Act was returned unserved on the assessee. As rightly pointed out by the learned Counsel for the assessee, the department has been communicating with the assessee at the new address only on 16-03-2017 for the AYs.2015-16 and 2017-18 with regard to assessments of assessees incomes, and therefore, it cannot be said that the Department had no knowledge about the new address. As held by the Hon'ble Supreme Court and other courts, in the cases cited (Supra) and relied upon by the assessee, the issuance of notice u/s.148 of the Act is a question of jurisdiction and not a procedural aspect. By issuing a valid notice within the prescribed time limit, only the Assessing Officer gets the jurisdiction to re-open the assessment. In the cases before us, the notices u/s.148 of the Act, though were issued on the last

day of the relevant assessment year, were never served on the assessees. Even after the assessees have brought to the notice of Assessing Officer that the notices have not been served on them, no steps have been taken by the Department to rectify the said defect. Therefore, respectfully following the decision of the Hon'ble Supreme Court and other courts cited supra, relied upon by the Ld. Counsel for the assessee, we hold that the notice u/s.148 of the Act is invalid and consequently, the assessments are also invalid. The reliance of the CIT (A) on the provisions of section 292B is also not sustainable, because the defect is not a procedural defect but is a jurisdictional one. In the result, the appeals of both the assessees are allowed.

6. Since the assessments themselves have been set aside, the grounds of assessees on merits need no adjudication, as it would result only in an academic exercise at this stage.

Order pronounced in the open court on 3rd July, 2019

Sd/-	Sd/-
(S. RIFAUR RAHMAN)	**(P. MADHAVI DEVI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated 3rd July, 2019

TNMM /pvv

Copy to :

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2. Smt. Payal Jindal, C/o. Siddharth Toshnival, Advocate, 3-5-144/5, Eden Garden, Hyderabad.

3. The Income Tax Officer, Ward-7(2), Hyderabad.

4. CIT(Appeals)-3, Hyderabad.

5. Pr.CIT-3, Hyderabad.

6. D.R. ITAT, Hyderabad.

7. Guard File