

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'C' : NEW DELHI)**

**BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.5853/Del./2016
(Assessment Year : 2006-07)**

**ITA No.5854/Del./2016
(Assessment Year : 2007-08)**

**ITA No.5855/Del./2016
(Assessment Year : 2007-08)**

**ITA No.7343/Del./2018
(Assessment Year : 2006-07)**

**ITA No.7344/Del./2018
(Assessment Year : 2007-08)**

**ITA No.7345/Del./2018
(Assessment Year : 2008-09)**

Shri Harish Bhasin,
T – 1, Rajouri Garden,
New Delhi.

vs. ACIT, Central Circle 3,
New Delhi.

(PAN : AALPB2977Q)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri K.R. Manjani, Advocate
REVENUE BY : Shri Munesh Kumar, CIT DR

Date of Hearing : 19.02.2020

Date of Order : 24.02.2020

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common questions of facts and law have been raised in the aforesaid cross appeals filed by the assessee, the same are being disposed off by way of composite order to avoid repetition of discussion.

2. Appellant, Shri Harish Bhasin (hereinafter referred to as 'the assessee') by filing the present appeals, ITA Nos.5853, 5854 & 5855/Del/2016, sought to set aside the impugned orders all dated 27.10.2016 passed by the Commissioner of Income - tax (Appeals)-23, New Delhi qua the assessment years 2006-07, 2007-08 & 2008-09 on the identical grounds inter alia that :-

“1. The Learned Commissioner of Income Tax (Appeal) has erred on facts as well as in law in dismissing the Appeal inspite of the fact that Department has no proof for service of notice U/s. 148.

2. The presumption of service under Clause 27 of the General Clauses Act, would not be available where the party has denied the service, as per Hon'ble Supreme Court as well as Hon'ble Delhi High Court Judgments which have neither the Learned Assessing Officer nor the Learned Commissioner of Income Tax (Appeal) referred nor this argument dealt with in their Orders, inspite of having been given in Written Arguments to both of them.

3. Dismissal of Appeal because nothing is stated on merits, is irrelevant when the issue before the Learned Assessing Officer, as per Income Tax Appellate Tribunal Orders and as argued by the assessee was service of notice under Section 148, question of merit will come only when the learned Assessing Officer passes this hurdles and shows the proof for service.

It is, therefore, prayed that Orders of the Learned Commissioner of Income Tax (Appeal) may kindly be set aside and assessment quashed, the same being without service in time of preliminary and foundation notice u/s 148.”

3. Appellant, Shri Harish Bhasin (hereinafter referred to as 'the assessee') by filing the present appeals, ITA Nos.7343, 7344 & 7345/Del/2018, sought to set aside the impugned orders all dated 15.09.2018 passed by the Commissioner of Income - tax (Appeals)-15, New Delhi qua the assessment years 2006-07, 2007-08 & 2008-09 confirming the penalties levied u/s 271(1)(c) of the Income-tax Act, 1961 (for short 'the Act') on the identical grounds inter alia that:-

“Learned A.O. as well as CIT appeal has erred on facts as well as law in imposing and sustaining the penalty even though the assessment is void due to non service of notice u/s 148. On this account appeal against assessment is pending in Hon'ble Tribunal.

Learned A.O. as well as CIT appeal are silent and not indicating or showing any proof of service of notice u/s 148 consequently very basis of imposing penalty is wrong and is without any foundation.

It is prayed that penalty levied may kindly be cancelled.”

ITA Nos.5853, 5854 & 5855/Del/2016
AYs : 2006-07, 2007-08 & 2008-09

4. Briefly stated the identical facts necessary for adjudication in all the aforesaid appeals at hand are : Assessee did not file return of income for AYs 2006-07, 2007-08 & 2008-09. In AYs 2006-07 & 2007-08, proceedings u/s 147 were initiated vide notices dated 05.06.2009. Notices u/ss 148 & 142 (1) of the Act were also issued in all the aforesaid years and stated to have been served

upon the assessee. Assessee is a Director in a company, M/s. Alpha Bhoj Ltd. and also running a proprietorship concern in the name of M/s. Alpha Associates. On failure of the assessee to appear, Assessing Officer (AO) proceeded to frame the assessment u/s 254/144 of the Act by making addition of Rs.34,15,65,858/-, Rs.9,17,59,044/- & Rs.1,14,07,313/- in AYs 2006-07, 2007-08 & 2008-09 respectively on the ground that from the bank statement of the assessee qua the bank account maintained with ABN Amro Bank, it was noticed that the assessee had deposited a total amount of Rs.34,15,65,858/-, Rs.9,17,59,044/- & Rs.1,14,07,313/- in AYs 2006-07, 2007-08 & 2008-09 respectively which the assessee had failed to explain. In all the aforesaid years, from the perusal of the record pertaining to AY 2005-06, AO noticed that the assessee had shown a commission income of Rs.13,93,050/- and assuming that assessee would have been carrying out the same business during the years under assessments and proceeded to estimate commission income at Rs.25,00,000/-, Rs.35,00,000/- & Rs.45,00,000/- in AYs 2006-07, 2007-08 & 2008-09 respectively.

5. In AY 2006-07, AO also noticed from the record that assessee has given unsecured loan to M/s. Alpha Bhoj Ltd. and closing balance of M/s. Alpha Bhoj Ltd. was Rs.45,50,000/- as on 31.03.2006 and thereby made addition of the same being income

from undisclosed sources. In AY 2007-08, AO also made addition of Rs.2,42,50,000/- on noticing from the record that assessee has given unsecured loan to M/s. Alpha Bhoj Ltd. and made the addition of Rs.2,42,50,000/- which is the closing balance as on 31.03.2007 by treating the same as income from undisclosed sources and thereby completed the assessment.

6. Assessee carried the matter before the Id. CIT (A) by way of filing the separate appeals for AYs 2006-07, 2007-08 & 2008-09 who have confirmed the additions by dismissing the appeals. Feeling aggrieved by the orders passed by the Id. CIT (A), the assessee has come up before the Tribunal by way of filing the present cross appeals.

7. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

8. This is second round of litigation before the Tribunal as the earlier appeals bearing ITA Nos.1469 to 1471/Del/2012 filed by the assessee were disposed off vide composite order dated 29.05.2014 vide which all the aforesaid appeals were remitted back to AO for de novo consideration of assessee's objection that

notices issued u/s 148 in AYs 2006-07 & 2007-08 and notice issued u/s 142 (1) in AY 2008-09 were never served upon.

9. At the very outset, Id. AR for the assessee sought to decide the legal issue as to the service of the notice u/s 148 raised vide ground no.3, issue which was remitted back by the Tribunal earlier to decide afresh by the AO.

10. Undisputedly, assessee has not filed return of income for AYs 2006-07, 2007-08 & 2008-09. It is also not in dispute that to initiate the reopening u/s 147 of the Act, service of notice u/s 148 is a mandatory provision. It is also not in dispute that assessee stated to have not appeared before the AO during initial assessment on the ground that he had not received any notice qua the assessment proceedings.

11. In the backdrop of the aforesaid facts and circumstances of the case, the first question to be decided in this case is :-

“as to whether notices dated 05.06.2009 stated to have been issued by the AO for AYs 2006-07, 2007-08 & 2008-09 were served upon the assessee?”

12. In order to decide the aforesaid issue, assessment records were summoned and perused by the Bench with the assistance of the Id. AR for the assessee as well as Id. DR for the Revenue and copies of notices along with copy of dispatch register were retained on the file for ready perusal.

13. For ready perusal, para 1 of the assessment order for AYs 2006-07, 2007-08 & 2008-09, identically worded, containing facts as to issuance and service of notice u/s 148 is extracted as under :-

“Original assessment in this case was completed under section 144 by the Assistant Commissioner of Income Tax, Central Circle-13, New Delhi on 27.12.2010. The assessee did not file a return of income for the assessment year 2006-07 under section 139(1) of the Income Tax Act, 1961. The proceedings u/s 147 were initiated vide notice dated 05.06.2009. However, no return was filed in response to this notice u/s 148 also. Notice u/s 142(1) were also issued and served on the assessee on various dates. However no response was received from the assessee. A final opportunity was given to the assessee vide letter dated 22.09.2010 to appear on 29.09.2010. No one appeared on this date and no reply was filed with this office.”

14. Perusal of the aforesaid narration given by the AO as to issuance of service of notice dated 05.06.2009 u/s 148 shows that it does not contain facts if the notice (supra) were ever served upon the assessee, it just contains the fact that notices u/s 148 were issued on 05.06.2009. When we further examine assessment record viz. order sheet prepared by the AO and dispatch register, no doubt copy of notices dated 05.06.2009 for AYs 2006-07 & 2007-08 is reportedly issued on 05.06.2009 vide dispatch register but the record is altogether silent if the said notices were served upon the assessee or received back served/unserved nor copy of acknowledgement from the postal authority acknowledging the receipt of notice is there on the file. It is settled principle of law that when the assessee has specifically challenged service of notice

u/s 148 as well as u/s 142 (1) since the stage of assessment it is the duty of the Revenue to prove the service of notice.

15. Hon'ble Supreme Court in case of *V.N. Bharat vs. D.D.A. & Anr. 2008 (6) Supreme 343* held in the identical situation that, *“onus of proving of service of notice is on the Revenue because except for denial there was nothing else that appellant could have produced to prove a negative fact and presumption under section 114(4) of the Evidence Act is a rebuttable presumption and on denial of receipt of the registered letter from DDA, appellant discharged his onus and the onus reverted back to respondent to prove such service by either examining postal authorities or obtaining a certificate from them showing that the registered article had been deliver to and had been received by the appellant and it was on a mistake understanding of provisions of section 114(f) of the Evidence Act that the Commission came to the erroneous conclusion that allegation of unfair trade practice on the part of the respondent authority had not been proved and Respondent authority was unable to prove that service of the demand notice for the fifth and final installment had been effected on appellant. The allegation of unfair trade practice on the part of the respondent authority stood established, the impugned judgment of MRTP Commission hence set aside and the appeal allowed.”*

16. So, in view of the law laid down by Hon'ble Supreme Court, it is bounded duty of the Revenue to prove the service of notice under sections 148 and 142(1) to the assessee.

17. Ld. DR for the Revenue supported the order passed by the AO as well as ld. CIT (A) by contending that notices have been duly served in due process and relied upon the order sheet entry and dispatch register showing copy of notice and dispatch thereof through postal department. Ld. DR has also filed written submissions which have been made part of the judicial file and the operative part of which is extracted as under :-

“4. The Additional Chief Metropolitan Magistrate (Special Acts), Central, Tis Hazari Courts, New Delhi, in his judgment dated 26.07.2013 has convicted the appellant after holding that the notice were duly served upon the accused. (Copy enclosed at Annexure '2'). The Hon'ble Magistrate has recorded as under in his remarks.

"C) Accused has taken a defence that no notice was received by him. In support of his claim and contention, accused examined on Mr. Oil Bahadur Thapa as DWI who stated in his evidence that he has been working as a gate keeper at T-1, Rajouri Garden, the residence of accused, for the last 10-11 years and he has not received any notice/document from Income Tax Department during 2006-10. This plea of DWI is not sustainable at all on two counts. Firstly, DWI failed to establish or bring any document on record to show that in fact he was working as gate keeper at the residence of accused during the relevant period. Sometimes, it may happen that a post man might have dropped the letter at the given address. But not again and again. A prudent post man is not supposed to deliver the parcel/letters (particularly sent through registered/speed post) to any person other than addressee after obtaining signature of that person. In his cross examination, DWI clearly stated that delivery of letter is made by the postman to the addressee only after taking his signature.

As per section 27 of the General Clauses Act, 1897 the service shall be deemed to be effected if the same is properly addressed, prepaid and posted by registered post. Relevant para of the aforesaid section reads as under:-

"Meaning of Service by Post:- Where any (Central Act) or regulation made after the commencement of this act, authorizes or requires any document to be served by Post, whether the expression 'Serve' or either of the expression 'Give' or 'Send' or any other expression is used, then unless a different intention appears. The services shall be deemed to be effected by properly addressing, prepaying- and posting by Registered Post, a letter containing the document, and unless the contrary is proved, to have been effected 'at the time at which the letter would be delivered in the ordinary course of post.'",*

D) Complainant has placed on record copy of speed post booking list. It is clear from the notices Ex.PW1/4, Ex.PW1/5, Ex.PW1/6. Ex.PW1/7 and speed post booking list, that all notices were sent to accused mentioning correct address. It is not the case of the accused that notices were sent at incorrect address. It is pertinent to mention here that summons issued to accused at the same address received back duly executed. Accused also furnished bail bond mentioning same address. Thus, keeping in view the aforesaid discussions and facts and circumstance of the case, it is held that the notices were duly served upon the accused."

5. In a large number of cases Hon'ble Courts of Record have held that if the notice is not received back within the period of 30 days of its issuance, it is to be held that the notice has been duly served upon the assessee. The order of Hon'ble Jurisdictional High Court of Delhi in CIT vs Yamu Industries Limited (2008) 306 ITR 309 (Copy enclosed for ready reference at Annexure '3').

6. Rule 19A of Code of Civil Procedure is relevant in the present case. The proviso to Sub Rule 2 reads as under:

"Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having lost or mislaid, or for other

reason, has been received by the Court within thirty days from the date of the issue of the summons."

7. Regarding the discussion, during the hearing, about the requirement of the assessing officer making a declaration/recording on the order sheet, in a case where a notice sent by registered post has not been received back unserved, specifying that the notice is deemed to have been served, the following are submitted:

- a. There is no such requirement in Section 282 or any other section of Income Tax Act.*
- b. The Assessing Officer in the assessment order as well as the Ld. CIT(A) in the appellate order have unambiguously declared that the notice has been served.*
- c. If the service of notice was to get invalidated merely because of the assessing officer's omission to right on the order sheets, that the notice is deemed to have been served, most of the assessments completed by the Income Tax Department would become invalid.*

These submissions are prayed to be taken on record and included in the order of the Hon'ble Bench."

18. When we examine the order sheet entries for AYs 2006-07 & 2007-08 prepared in due course of official duty by the AO, except for the fact that notices were issued on 05.06.2009, there is not a whisper even if the said notices were served upon the assessee. Identically worded order sheet entries dated 05.06.2009 for AYs 2006-07 & 2007-08 are extracted for ready perusal as under :-

“	<i>Notice u/s 148 issued on 05.06.2009 for filing the return of income for the AY 2006-07</i>	
<i>29.9.09</i>	<i>Notice u/s 142(1) issued for 15.10.09</i>	<i>sd/- AO</i>
<i>15.10.09</i>	<i>None attended</i>	<i>sd/- AO</i>
<i>17.10.09</i>	<i>Notice u/s 142(1) issued for 25.12.09</i>	<i>sd/- AO</i>

25.12.09	<i>None attended</i>	<i>sd/- AO</i>
23.9.10	<i>Notice u/s 142(1) issued for 29.9.10</i>	<i>sd/- AO</i>
29.9.10	<i>None attended</i>	<i>sd/- AO</i>
27.12.10	<i>Order u/s 144 passed</i>	<i>sd/- AO”</i>
“ <i>Notice u/s 148 issued on 05.06.2009 for filing the return of income for the AY 2007-08</i>		
29.9.09	<i>Notice u/s 142(1) issued for 15.10.09</i>	<i>sd/- AO</i>
15.10.09	<i>None attended</i>	<i>sd/- AO</i>
17.10.09	<i>Notice u/s 142(1) issued for 25.12.09</i>	<i>sd/- AO</i>
25.12.09	<i>None attended</i>	<i>sd/- AO</i>
23.9.10	<i>Notice u/s 142(1) issued for 29.9.10</i>	<i>sd/- AO</i>
29.9.10	<i>None attended</i>	<i>sd/- AO</i>
27.12.10	<i>Order u/s 144 passed</i>	<i>sd/- AO”</i>

19. This fact is also clear from para 1 of the assessment order, extracted in the preceding para. Merely producing the carbon copy of notice and dispatch register entry does not prove service of notice on the assessee.

20. In case, AO is to proceed to frame assessment u/s 144 of the Act on the basis of “due service”, he is required to bring these facts on record in the order sheet that notices issued to the assessee u/s 148/142(1) on 05.06.2009 were served upon the assessee or not received back served/unreceived and a period of one month has since elapsed and as such, the same is deemed served. But no such facts are there either in the order sheet or in the assessment order.

21. Under Order V Rule 16 of the Code of Civil Procedure, 1908, persons served to sign the acknowledgement, which reads as under :-

“16. Person served to sign acknowledgment.- Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.”

22. To prove the service of summon, the AO during the assessment proceedings were required to bring on record that by such and such acknowledgment service of notice was effected on the assessee or he was required to examine the postal authorities to prove that notice (supra) was duly served upon the assessee. But entire record maintained and produced by the Revenue is silent if service was actually affected on the assessee nor any service report or acknowledgment from the postal department has been brought on record.

23. Needless to say that during the first round of litigation the case was remitted back by the Tribunal to the AO to decide afresh if the notice (supra) was served upon the assessee on the basis of evidence available with the Revenue, however AO has decided this issue again on the fact that notice was dispatched vide order sheet entry and dispatch register on 05.06.2009 and has again not

preferred to substantiate his finding with the evidence available, if any, rather reiterated findings returned in the original assessment.

24. So far as service of notice u/s 142 (1) upon the assessee for AY 2008-09 was concerned, again AO recorded in para 1 of the assessment order that, "*notice u/s 142 (1) issued and served upon the assessee on various dates*", however no such dates have been brought on record on which the service of notice was effected upon the assessee.

25. With the assistance of the Id. DR for the Revenue, we have perused the assessment record in the presence of Id. AR for the assessee which does not contain any order sheet regarding this fact, if any such notice u/s 142 (1) was issued to the assessee. There is one notice dated 24.09.2009, with overwriting and copy of dispatch register showing dispatch of order on 25.09.2009 in the assessment record but the same is not sufficient to treat the service of assessee effected for the reasons recorded and discussed in the preceding paras for returning findings qua AYs 2006-07 & 2007-08.

26. So far as question of overwriting is concerned which is quite visible but does not go root of the case as many a times wrong date is written and then to avoid preparing of fresh notice, date is corrected by overwriting. Again as discussed in the preceding paras, there is no acknowledgement or any other evidence on the

file as required under Order V Rule 16 of the CPC to treat the service of assessee affected qua AY 2008-09 also. Moreover, AO at no stage of assessment proceedings tried to ensure if notice stated to have been issued were served upon the assessee, though he was having sufficient time to conclude the assessment rather merely relied upon copy of dispatch register and treated the same effected.

27. Reliance placed by the Id. DR for the Revenue on the *judgment dated 26.07.2017 passed by the Additional Chief Metropolitan Magistrate (ACMM) (Special Acts), Central, Tis Hazari Courts, New Delhi*, to prove the service of notice upon assessee, which is Annexure-2 enclosed with written submissions filed by the Id. DR, is entirely misplaced because Id. ACMM in his wisdom decided the issue as to the service of notice upon the assessee entirely on the basis of the fact that, *“the assessee has failed to establish or bring any document on record to show that he was not served upon”* and on the fact that u/s 27 of the General Clauses Act, meaning of service by post includes deemed service.

28. First of all, as discussed in the preceding paras, Hon'ble Supreme Court in the case of *V.N. Bharat* (supra) held that the onus to prove that service of notice has been effected on the assessee is on the Revenue and the assessee is not to be called upon

to prove negative. Secondly, so far as question of “deemed service” of notice by post on the assessee is concerned, no such view has been taken by the AO at any stage of the case. Order sheet entries prepared in the due course of official duties by the AO are self-speaking which shows that he has proceeded to frame the assessment on the basis of symbolic notice without having any follow up if the same was served upon and has nowhere taken the view that it is a case of “deemed service”. Lastly, we are of the considered view that issue before the Bench is to be decided on the basis of facts and evidence on record and not on the basis of borrowed findings returned by Id. ACMM in judgment (supra).

29. Reliance placed by the Id. DR for the Revenue on the judgment passed by the Hon’ble Delhi High Court in the case of *CIT vs. Yamu Industries Ltd.* (supra) is also misplaced because it is nowhere the case of the AO at any stage of the assessment proceedings that he has proceeded to hold the service of notice on the assessee as “deemed service”. Because there is not an iota of evidence on file if notice served upon the assessee was not received back within a period of 30 days of its issuance as neither record of postal authorities nor statement of any serving official of the postal department has come on record to prove that notice was served upon the assessee. Entire assessment proceedings ex-facie go to

prove that AO at no stage tried and ensured if notice has been served upon the assessee. So, the judgment relied upon by the Id. DR for the Revenue is not applicable to the facts and circumstances of the case.

30. In view of what has been discussed above, we are of the view that service of notice u/s 148 dated 05.06.2009 for AYs 2006-07 & 2007-08 and service of notice dated 24.09.2009 u/s 142 (1) in AY 2008-09 is not proved to have been effected upon the assessee in accordance with provisions contained under section 282 (1) of the Act read with order under Rule XII and Order III Rule 6 of CPC, 1908 which is a jurisdictional pre-condition to finalize the reassessment and as such, Revenue has failed to prove the proper service of notice u/s 148 of the Act on the assessee, as there is not an iota of evidence on record to prove this fact. So, the question framed is answered in negative.

32. Now, the next question arises for determination in this case is :-

“as to what is the effect of non-service of notice (supra) u/s 148 of the Act for AY 2006-07 & 2007-08 and notice (supra) u/s 142(1) of the Act for AY 2008-09 on the assessment framed by the AO u/s 254/144 of the Act?”

33. It is settled principle of law that when service of notice u/s 148 or u/s 142(1), as the case may be, is not proved to have been

effected on the assessee, the entire proceedings u/s 147 are without jurisdiction, hence not sustainable.

34. Hon'ble Delhi High Court in the case of *CIT vs. Chetan Gupta 382 ITR 613 (Del.)* in the identical facts and circumstances held that the non-service of notice u/s 148 of the Act as a pre-condition for finalizing the assessment and order to quash the reassessment proceedings by returning following findings :-

“Under section 148 of the Income-tax Act, 1961, the issue of notice to the assessee and service of such notice upon the assessee are jurisdictional requirements that must be mandatorily complied with. They are not mere procedural requirements. For the Assessing Officer to exercise jurisdiction to reopen an assessment, notice under section 148(1) has to be mandatorily issued to the assessee. Further the Assessing Officer cannot complete the reassessment without service of the notice so issued upon the assessee in accordance with section 282(1) of the Act read with Order V rule 12 and Order III rule 6 of the Code of Civil Procedure, 1908. Although there is change in the scheme of sections 147, 148 and 149 of the Act from the corresponding section 34 of the 1922 Act, the legal requirement of service of notice upon the assessee in terms of section 148 read with section 282(1) and section 153(2) of the Act is a jurisdictional precondition to finalising the reassessment. The onus is on the Department to show that proper service of notice has been effected under section 148 of the Act on the assessee or an agent duly empowered by him to accept notices on his behalf. The mere fact that an assessee or some other person on his behalf not duly authorised participated in the reassessment proceedings after coming to know of it will not constitute a waiver of the requirement of effecting proper service of notice on the assessee under section 148 of the Act. Reassessment proceedings finalised by an Assessing Officer without effecting proper service of notice on the assessee under section 148(1) of the Act are invalid and liable to be quashed.

Held accordingly, that no attempt had been made by the Department to serve the assessee at the address provided by him. All the notices were addressed to him at another address C/o. Kiran Cinema. Therefore, this was not a case where an attempt was made by the Department to serve the assessee at his known address, and upon not finding him there the Department learnt

of the address where he would be found. Merely because other notices sent to the "assessee group" were received by the employees of Kiran Cinema it did not automatically lead to the inference that the assessee's place of business was also Kiran Cinema. In any event, there could not be an inference that V was duly empowered by the assessee to receive notices on his behalf. In the very first notice dated March 28, 2008 the endorsement made by V showed him describing himself as "accountant, Kiran Cinema" and nothing more. The assessee made a specific request to the Assistant Commissioner that a copy of notice under section 148 along with basis and reason of opening the case under section 148 be provided to them to enable him to comply with it. However, the Assistant Commissioner in his reply of the same date continued to show the addresses of the assessee as C/o Kiran Cinema and insisted that notice had been validly served on V, accountant of Kiran Cinema (who also received other notices of the concerned group concerns). Section 292BB is prospective. In any event the assessee in the present case, having raised an objection regarding the failure by the Department to effect service of notice upon him, the main part of section 292BB was not attracted. Since no proper service of notice had been effected under section 148(1) of the Act on the assessee, the reassessment proceedings were liable to be quashed."

35. Hon'ble Delhi High Court in case of *CIT vs. Rajesh Kumar Sharma 311 ITR 235 (Del.)* held that, "onus to prove that notice issued u/s 148 has been served upon the assessee is on the Revenue particularly when the assessee had categorically denied receiving the notice and therefore, it could not be said that notice was correctly addressed to the assessee."

36. Hon'ble Delhi High Court in case of *CIT vs. Lunar Diamonds Ltd. 281 ITR 1 (Del.)* held that when the assessee has denied to have received the service of notice u/s 143(1)/143 (2), the burden of prove service of notice is on the Revenue to prove that the notice was serviced by returning following findings :-

“Held, dismissing the appeal, that the assessee had filed an affidavit stating that it had not received the notice and the Tribunal rightly held that under these circumstances, the burden was upon the Department to prove that notice was served upon the assessee within the prescribed time. The Department had failed to prove its case in this regard. The Tribunal was right in setting aside the order of assessment. No substantial question of law arose from its order.”

37. In view of what has been discussed above and following the law laid down by Hon’ble Delhi High Court discussed in the preceding paras, we are of the considered view that when the Revenue has failed to prove the mandatory service of notice upon the assessee issued u/s 148 and u/s 142(1), as the case may be, assessment framed by the AO u/s 254/144 of the Act is not sustainable, hence ordered to be quashed. Consequently, appeals filed by the assessee bearing ITA Nos.5853, 5854 & 5855/Del/2016 for AYs : 2006-07, 2007-08 & 2008-09 respectively are ordered to be allowed.

ITA NOS.7343, 7344 & 7345/Del./2018
AYs : 2006-07, 2007-08 & 2008-09

38. On the basis of assessments framed u/s 254/144 of the Act making various additions in AYs 2006-07, 2007-08 & 2008-09, AO initiated the penalty proceedings u/s 271(1)(c) of the Act and reached the conclusion that assessee has concealed his income and furnished inaccurate particulars of income and thereby levied the

penalty of Rs.11,73,88,798/-, Rs.4,02,71,624/- & Rs.54,51,082/- @ 100% for AYs 2006-07, 2007-08 & 2008-09.

39. In view of our findings on the quantum appeals filed by the assessee in the preceding paras vide which very assessments framed u/s 254/144 of the Act has been held to be *void ab initio* and ordered to be quashed, the penalty levied by the AO and sustained by the Id. CIT (A) is not sustainable as has been held by Hon'ble Supreme Court in the case of ***KC Builders & Anr. vs. ACIT 265 ITR 562 (SC)***. Consequently, penalty levied by the AO and confirmed by the Id. CIT (A) for AYs 2006-07, 2007-08 & 2008-09 are ordered to be deleted.

40. Consequently, quantum appeals bearing ITA Nos.5853, 5854 & 5855/Del/2016 and penalty appeals bearing ITA Nos.7343, 7344 & 7345/Del./2018 for AYs 2006-07, 2007-08 & 2008-08 respectively filed by the assessee are allowed.

Order pronounced in open court on this 24th day of February, 2020.

**Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 24th day of February, 2020
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-23 / CIT (A)-15, New Delhi
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.