

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "SMC" BENCH: NEW DELHI**

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

**ITA No.9432/Del/2019
[Assessment Year : 2003-04]**

Major Suresh Yadav (Retd.), Farm No.36, Dera Mandi Road, Mandi Gaon, Near Chattarpur, New Delhi-110030. PAN-AAUPY5153C	vs	ITO, Ward-24(3), New Delhi.
APPELLANT		RESPONDENT
Appellant by	Shri Mukesh Kohli, CA	
Respondent by	Shri Om Parkash, Sr. DR	
Date of Hearing	28.06.2023	
Date of Pronouncement	31.07.2023	

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the assessee is directed against the order of Ld.CIT(A)-34, New Delhi passed u/s 147/143(3) of the Income Tax Act, 1961 ("the Act") dated 12.09.2019 for the assessment year 2003-04. The assessee has raised following grounds of appeal:-

1. *"That the order passed by the learned AO/ Commissioner of Income-tax (Appeals), is erroneous, contrary to the facts and circumstances of the case, based on surmises and conjectures, against law and principles of natural justice and thus erroneous and unsustainable.*
2. *Based on the facts and circumstances of the case and in law, the learned AO/Commissioner of Income-tax (Appeals) has erred in calculating income based on inaccurate assumptions.*
3. *Based on the facts and circumstances of the case and in law, the learned AO/Commissioner of Income-tax (Appeals) has erred innot taking into consideration the number of connection confirmations*

given by Media companies to the Income Tax department given to the Appellant.

4. *Based on the facts and circumstances of the case and in law, the learned AO/Commissioner of Income-tax (Appeals) has erred in taking a standard rate for all the customers while calculating Income which is not a practical scenario.*
5. *Without prejudice to the above, no proper notice was duly served on the Appellant. Hence, the Appellant was prevented by sufficient cause and opportunity provided was inadequate.*
6. *Without prejudice to the above, the learned AO erred on facts and in law in levying interest under section 234A, 234B and 234C of the Act.*

The above "Grounds of Appeal" are all independent and without prejudice to one another.

The Appellant also craves leaves to supplement, to cancel, amend, add and/or otherwise alter or modify any or all, grounds of the appeal stated hereinabove."

2. Apart from this, the assessee has raised following additional grounds of appeal:-

1. *"That the order passed by The A.O. and confirmed by the CIT(A) is illegal and without jurisdiction because the A.O. has not issued notice u/s 143(2) before completion of the re-assessment whereas the assessee appeared before the A.O. and informed him that the return originally filed should be treated as return filed pursuant to the notice under section 148.*
2. *That merely because assessee participated in proceedings pursuant to notice under section 148, it would not obviate mandatory requirement of Assessing Officer to issue assessee a notice u/s 143(2) before finalizing order of assessment.*

3. *That the CIT(A) as well as A.O has erred on facts and under the law because the A.O. has issued reassessment notice on borrowed satisfaction whereas it has to be on his own satisfaction.*
4. *That the order passed by A.O. and confirmed by the CIT(A) is illegal because that A.O. has not made independent inquiry but only relied upon the order passed by Entertainment Officer, New Delhi and order confirmed by Deputy Commissioner (Taxes).*
5. *That the appeal has been pending before Appellate Authority, Excise and Luxury & entertainment Tax, Government of NCT of Delhi, Since 25/08/2005. Therefore, the order passed by the A.O. and confirmed by CIT(A) is wrong.*
6. *That Hon'ble Tribunal has jurisdiction to examine a question of law which arises from the fact as found by authority below and having bearing on tax liability of the assessee even through such question was not raised before authority below nor in grounds in appeal but raised by way of additional issue in forwarding letter.”*

3. Facts giving rise to the present appeal are that the assessee filed his return of income on 10.11.2004, declaring total income of INR 1,03,890/-. The case of the assessee was re-opened and notice u/s 148 of the Act was issued to the assessee. In response to the notice issued, it is recorded by the Assessing Officer (“AO”) that the assessee sought reasons for re-opening of the assessment which was duly supplied to him. It was also requested by the assessee that the return filed by him, may be treated as return of income filed in response to notice issued u/s 148 of the Act vide letter dated 27.12.2010. It was also stated by the assessee that the assessee had closed its business in August, 2004 and was not keeping the records of the closed business as a long time had elapsed. However, the submissions made by the assessee were not found acceptable by the Assessing Authority. He therefore, made estimation of

profit @ 8% of the total receipts in respect of number of cable connection subscribers. As per the record of the AO, the assessee was having 28,000 cable connections subscribers and monthly subscription fee charged of INR 200/- per connection, the total receipt was taken up at INR 6,72,00,000/- and further 10% of such gross receipt was reduced on account of the fee which was estimated to have not been paid by the customers hence, he computed total receipt at INR 6,04,80,000/-. The gross receipts declared by the assessee in its return of income was further reduced and the receipt which was not disclosed by the assessee was taken at INR 5,45,34,500/- and average profit @ 8% was calculated at INR 43,62,760/- was earned in addition to the profit declared by the assessee. Thus, The AO assessed the income of the assessee at INR 44,66,650/-.

4. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A), who after considering the submissions, dismissed the appeal *ex-parte* to the assessee and without adverting to the material placed before Ld.CIT(A).

5. Aggrieved against the order of Ld.CIT(A), the assessee preferred appeal before this Tribunal.

6. Ld. Counsel for the assessee reiterated the submissions as made in written synopsis. For the sake of clarity, same is reproduced as under:-

“Hon'ble Sir,

Most respectfully we submit that we have raised various additional grounds of appeal on 24.02.2022 and the A.O. filed the factual report dated 05/09/22 through Sr DR before the Hon'ble Bench on 14/11/2022.

We also filed Written submission against this factual report of A.O. on 21/12/2022 before the Hon'ble Bench.

We have stated in our additional grounds of appeal that A.O. has not issued notice u/s 143(2) of the act before completion of reassessment proceedings and condonation for the same cannot be given. However, the A.O. filed his factual report against our additional grounds of appeal on 5.9.2022 which is as under:

4.1 For grounds 1,2 & 3: The Assessee has stated that the A.O. has not issued the notice u/s 143(2) of the Act, before the completion of the re-assessment proceedings and the condonation for the same cannot be given u/s 292BB of the Act. In this regard, it is submitted that the issuance of notice u/s 143(2) of the Act, and the proof for the service of the same could not be ascertainable at the moment because the assessment records are not traceable right now despite all possible efforts. However, from perusal of assessment order passed by the then A.O. on 31.12.2010, it is crystal clear that the assessee has not filed fresh return in response to notice issued u/s 148 of the Act, till the completion of assessment proceedings. Assessee has been almost non-responsive during the entire period of assessment proceedings. On 27.12.2010 (just 04 days before expiring of limitation to pass assessment order), he has stated that return filed as per the provisions of section 139(1) of the Act, may kindly be treated as return filed in response to notice u/s 148 of the Act.

We have filed our reply against this factual report on 21.12.2022 before the Hon'ble Bench. Copy of the same is attached.

In our case, notice u/s 148 was issued on 23.3.2010. In response to the notice the assessee has filed his return of income on 27.12.2010 but no notice u/s 143(2) was issued after the filing of return of income.

It is clear from the reply of the A.O. that proof for service of notice u/s 143 (2) is not there and the A.O. admitted that on 27.12.2010, the assessee has stated that return filed as per provision of section 139(1) of the act may kindly be treated as return filed in response to notice u/s 148 of the Act.

It is clearly evident that notice u/s 143(2) was never issued by the A.O. before completion of the Assessment and this fact has categorically been admitted by the A.O. in remand report submitted before the Hon'ble Bench.

In these grounds of appeal, assessee has challenged the action of A.O. in completing assessment without issuing notice u/s 143(2), which is sine qua non once assessee furnished return of income.

In our case, the case of assessee was reopened by issue of notice u/s 148 of the Act and there after the assessment was completed without issuance of notice u/s 143(2) though the assessee had filed the return of income in response to such notice u/s 148.

Further we submit that omission to issue notice u/s 143(2) is not a procedural irregularity and same is not curable.

You honours will appreciate that it has nowhere been provided in the Act that A.O. shall be absolved with the requirement of issuing notice u/s 143(2) in the event of late filing of return. In-fact proviso to section 148 provides that notice u/s 143(2) can be issued at any time before completion of assessment.

In our case, the assessee himself attended on 27.12.2010 and filed letter dated 27.12.2010 stated there in that the return already filed u/s 139(1), may be treated as return filed in response to notice u/s 148 but no notice u/s 143(2) was issued and re-assessment order passed which is invalid.

We relied upon the following court judgment: -

ACIT VS Hotel Blue Moon (2010) 321 ITR 362 (SC) (Paper book Dated 24.2.2022 page no 27-38)

We also relied upon Hon'ble Delhi court in the case of PCIT Vs Shri Jai Shiv Shankar Traders Pvt Ltd. reported in (2015) 64 taxmann.com 220 (Delhi) (Paper Book dated 24/2/2022 pages no 39-47) In this case, The Hon'ble Court has held that the issue of notice u/s 143(2) is not a procedural requirement and is mandatory and completion of assessment without issue of notice u/s 143 (2) is fatal to the assessment.

In this case, notice u/s 148 was issued on 30.3.2010 in response to which no return of income was filed. On 1.10.2010, the Ld A.O. issued notice u/s 143(2), which was duly served. Subsequently notice u/s 142(1) were also issued on certain occasions. AR of the assessee on 16.12.2010 presented and stated that return of income filed u/s 139 may be treated as furnished in response to notice u/s 148. Assessment was completed vide order dated 31.12.2010.

In that situation also, the Hon'ble Court held that A.O. ought to have issued notice after 16.12.2010, in absence of which assessment was held invalid.

In our case also the return was filed after the issue of notice u/s 142(1), this is squarely covered by the decision of Hon'ble Delhi high Court as stated above.

Further we wish to submit that we have raised this issue first time before the Income Tax Appellate Tribunal and it is settled legal position that the requirement of issuance of notice under section 143(2) of the Act is a jurisdictional one, it goes to the root of the matter as far as the validity of the reassessment proceedings under section 147/148 of the Act is concerned.

The Hon'ble Delhi High Court in the case of PCIT Vs Silver Line (2016) 65 taxmann.com 137 (Page No.- 51-63 of Paper Book Dated 24/02/2022) held that as regards the objection of the revenue to the Tribunal permitting the assessee to raise the point concerning non-issuance of notice under section 143(2) for the first time in the

appeal before the Tribunal, in view of the settled legal position that the requirement of issuance of such notice is a jurisdictional one, it does go to the root of the matter as far as the validity of the re-assessment proceedings under section 147/148 is concerned. It raises a question of law as far as the instant cases are concerned, since it is not in dispute that prior to finalization of the re-assessment orders, notice under section 143(2) was not issued by the Assessing Officer to the assessee. With there being no fresh evidence or disputed facts sought to be brought on record, and the issue being purely one of law, the Tribunal was not in error in permitting the assessee to raise such a point before it.

This finds support in the decision of the Supreme Court in National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383 (SC) and the decision of this court in Gedore Tools (P.) Ltd. v. CIT [1999] 238 ITR 268 (Delhi).

We further submit that where notice u/s 143(2) is not served upon the assessee within stipulated time period, the consequent order passed cannot be sustained.

As per Hon'ble Rajasthan High Court in the case of PCIT Vs Kamla Devi Sharma Vide ITA No.- 197/2018 and as per Hon'ble ITAT Bangalore Bench 'C' in the case of Shri G.N. Mohan Raju VS ITO ITA No.- 242 & 243 (Bang) 2013 where in it was held as under: -

7. "This brings us to the crux of the issue i.e., whether notice under section 143(2) is mandatory in a reopened procedure and whether notice issued prior to the reopening would satisfy the requirement specified U/s 143(2) of the Act. That issue of a notice U/s 143(2) of the Act, is mandatory even in a re-assessment proceeding-initiated u/s 148 of the Act has been clearly laid down by the Hon'ble Delhi High Court in the case of M/s Alpine Electronics Asia PTE Ltd., (Supra). Hon'ble Delhi High court had reached this conclusion after considering decision of the Hon'ble Apex Court in the

case of Hotel Blue Moon (supra). At para-24 of the judgment their Lordship has held that Section 143(2) was application to a proceedings u/s 147/148 also, since proviso to Section 148 of the Act, granted certain specific liberties to the revenue, with regard to extension of time for serving such notices. No doubt, Hon'ble Madras High Court in the case of Areva T and D India Ltd., (supra) had held that issue of notice u/s 143(2) was procedural in nature. However, Co-ordinate Bench in the case of M/s Amit Software Technologies Pvt. Ltd., (supra) after considering the decision of the Hon'ble Madras High Court as well as Delhi High Court had held that Section 143(2) of the Act, was a mandatory requirement and not a procedural one.

Once notice u/s 148 of the Act, issued to the assessee required it to file a return within 30 days from the date of service of such notice. There is no provision in the Act, which would allow an A.O. to treat the return which was already subject to a proceeding u/s 143(1) of the IT Act, as a return filed pursuant to a notice subsequently issued U/s 148 of the Act. However, once an assessee itself declare before the A.O. that his earlier return could be treated as filed pursuant to notice U/s 148 of the IT Act, three results can follow. Assessing officer can either say no, this will not be accepted, you have to file a fresh return or he can say that 30 days' time period being over I will not take cognizance of your request or he has to accept the request of the assessee and treat the earlier return as one filed pursuant to the notice u/s 148 of the IT Act. In the former two scenarios, A.O. has to follow the procedure set out for a best of judgment assessment and cannot make an assessment under section 143(3). On the other hand, if the A.O. chose to accept assessee's request, he can indeed make an assessment under section 143(3).

In our case before you, assessment completed under section 143(3) read with section 147. Or in other words A.O. accepted the request of the assessee. This in turn makes it obligatory to issue notice u/s 143(2) after the request by the assessee to treat his earlier return as filed in pursuance to notices u/s 148 of the IT Act was received. This request, in the given case, has been made only on 27.12.2010. Any issue of notice prior to that date cannot be treated as a notice on a return filed by the assessee pursuant to a notice u/s 148 of the Act. Or in other words, there was no valid issue of notice u/s 143(2) of the IT Act, and the assessment done without following the mandatory requirement u/s 143 (2) of the IT Act. This in our opinion, render the subsequent proceedings all invalid" In view of above judicial pronouncements, it is submitted that so far as assessee furnished return of income u/s 148, Ld. A.O. was duty bound to issue notice u/s 143(2) of the Act. And the non-issuance of notice u/s 143(2) was not a procedural error which could have been corrected in the wake of deeming provisions of sec 292BB of the Act. Thus, in the case of assessee, since no notice was issued u/s 143(2), it is prayed that assessment completed u/s 143(3)/ 147deserves to be Quashed."

Our next ground of appeal is that A.O. has not made any independent enquiry about no. of cable connections but relied upon only the order of the Entertainment officer, New Delhi and the A.O. has not applied his mind while recording the satisfaction for reopening the assessment proceedings u/s 147 of the Act.

Respected Sir, we wish to submit that the assessee had closed his business in January 2005 and the he had intimated this to Entertainment officer on 18/05/2005. The Assessing officer received information from ITO (Inv.) Unit-V (5) New Delhi vide letter dated 28/03/2008. How can an inspector make inquiry about the number

of cable connections after the closure of business and after so many years.

The Ld A.O. made addition without making any independent enquiry but only relied upon the order passed by Entertainment officer New Delhi and order confirmed by Deputy Commissioner (Taxes). The Ld A.O. has not applied his mind while recording satisfaction and reason to belief that the income has been escaped. The re-assessment notice has to be issued by A.O. by his own satisfaction and not on borrowed satisfaction. In our case A.O. has not issued re-assessment notice on his satisfaction. We rely upon the following court judgments.

PCIT VS Shodiman Investment (P.) Ltd. (2018) 93 taxmann.com 153 (Bombay). (Page No.- 70-71 of Paper Book Dated 24/02/2022)
Reynolds Shirting Ltd. Vs ACIT (2022) 135 taxmann.com 78 (Bombay). (Page No.-79-82 of Paper Book Dated 24/02/2022)

Please delete the addition made by A.O. and confirmed by CIT (A) and oblige.”

21st December, 2022

Hon'ble Sir,

This has reference to factual report for the assessment year 2003-04 dated 5/9/2022 which the counsel of the assessee received on 04/10/2022 during the hearing before the Hon'ble ITAT SMC Bench. Our reply is as under: -

We have stated in our grounds of appeal that A.O. has not issued the notice u/s 143(2) of the Act before completion of the re-assessment proceedings and condonation for the same cannot be given. Moreover, we have stated in our grounds of appeal that the order passed by the A.O. and confirmed by the CIT(A) is illegal and without jurisdiction because the A.O. has not issued notice u/s 143(2) before completion of reassessment proceedings whereas the assessee appeared before the A.O. and informed

him that the originally filed should be treated as return filed pursuant to the notice u/s148.

The A.O. stated in his factual report that on 27/12/2010 (just 4 days before expiring of limitation to pass reassessment order) the assessee has stated that the return filed as per the provisions of section 139(1) of the Act, may kindly be treated as return filed in response to Notice u/s 148 of the Act.

As per 2nd para of the assessment order at page no-17 of the paper book it was stated in the assessment order that

"In the case information has been received from the office of ITO(Inv.) Unit V (5), New Delhi vide letter F.No. ITO (Inv), Unit V(5)/TEP/07-08/714 dated 28.03.2008 along with the copy of order No 9722-9723 dated 17/12/2002 of Entertainment Tax Officer passed u/s15(1) of the Delhi Entertainment and Betting Tax Act, 1996. It was stated in the order that during the period April, 2001 to March 2002, the assessee Major Suresh Yadav (Retd.) had 28000 cable connection subscribers whereas, the assessee had paid entertainment tax only to the extent of 2000 cable connections. After detailed enquiries, the Entertainment Tax officer had concluded that the assessee had 28000 cable connection subscribers and accordingly he had charged entertainment tax on the above. Further, enquiries were also conducted by inspector that average monthly Rs.200/- were charged per month for each connection. On the basis of information received from the Investigation wing and enquiries made in the case, the matter was examined along with the return of Income, it revealed that the assessee had reported only meager receipts from the above subscriptions of cable connections. Based on the above, it was satisfied and reason to belief that the income assessable with respect to the receipts received on account of 28000 cable subscriptions were escaped from income chargeable to tax."

We wish to submit that the Assessee has closed his business on January 2005 and he has intimated to Entertainment Officer on 18/05/2005 about

this closure of business. The A.O. received information from ITO(Inv) Unit-V (5) New Delhi vide letter dated 28/03/2008. How can an inspector make enquiry about the number of cable connections after the closure of business?

When the Assessee subscribed 2000 connection then how can he sale 28000 connection. Copy of receipt from Star India Limited is enclosed at page no 54 of paper book.

When we requested the A.O. to inspect the assessment record on 22/02/2022 then we were informed by the A.O. on 20/05/2022 that record keeper is unable to trace the record despite his best efforts to locate the files.

As per Para 6.4 of CIT(A) order at page no 14 and 15 of the paper book.

"In the case of the appellant AO has received the information from the investigation wing that during the year under consideration appellant had 28000 cable connections subscribers, whereas the appellant had paid entertainment tax only to the extent of 2000 cable connections. The A.O. has initiated reassessment proceedings on the basis of the information and issued notice u/s 148 to the appellant. During the assessment proceedings, appellant has not made proper compliance before the A.O. and declared cable connection fee amounting to Rs.59,45,500/-. The Entertainment Tax Officer vide order no. 9722-9723 dated 17/12/2002 and levied penalty and taxes amounting to Rs. 2,55,02,400/- for the period April 2001 to March 2002. The appeal filed against the order of Entertainment Tax Officer was dismissed by the Dy. Commissioner (Taxes) vide his order dated 26/7/2005. The appellant failed to furnish the details asked for and failed to produce books of account for verification, the A.O. has rejected them u/s145(3) of the Act. After considering the facts in the case of the appellant, A.O. has computed the subscription amount @200/- per month per connection for 12 months in respect of 28000 connections at Rs.6,72,00,000/- and after allowing credit of not payment of subscription fee by customers

10% and receipts shown by the appellant in the return computed total receipts at Rs.5,45,34,500/- and average profit computed @8% on the above receipts at Rs.43,62,760/-. During the appellate proceedings, appellant has not brought any evidence on record to controvert the finding of the A.O. in spite of providing various opportunities. Thus A.O. is justified in making addition on account of profit earned by the appellant from undisclosed cable connections and addition made by the A.O. at Rs.43,62,760/- is hereby confirmed.

From the above submission it is very much clear no enquiry was done by the A.O. about the no of cable connection and notice u/s 148 was issued on the borrowed satisfaction.”

7. On the other hand, Ld. Sr. DR opposed these submissions and supported the orders of the authorities below.

8. I have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. In this case, the lower authorities have taken total receipt of INR 6,72,00,000/- and computed the profit thereon @ 8%. It is noticed that the assessee submitted before lower authority that he had closed the business and he was not carried out any such business. It is contended that the AO did not make any independent inquiry and merely relied upon the order confirmed by Ld. Dy. Commissioner (Taxes) of Government of Delhi. It is pointed out by the Ld. Counsel for the assessee that the assessee subscribed cable connection numbers of 2000 throughout the year and how could he have allotted 28000 cable connection which is not possible. I find that these contentions of the assessee were not considered and adverted by the lower authorities. The assessee has placed reliance on various case laws including the decision of

Hon'ble Bombay High Court in the case of ***Pr.CIT vs Shodiman Investment P.Ltd. [2018] 93 Taxmann.com 163 (Bombay)***. Further, reliance placed upon the judgement of Hon'ble Supreme Court in the case of ***ACIT vs Hotel Blue Moon [2010] 321 ITR 362 (SC)*** so far the question of legality, the reasons for re-opening the assessment is concerned the AO acted upon information received from the Investigation Wing wherein order by Entertainment Tax Officer was brought to the notice of the Assessing Authority. As per the aforesaid order, it was stated that the assessee had 28000 cable connection subscribers whereas he paid entertainment tax only to the extent of 2000 cable connection subscribers. Therefore, in my considered view, the reasons were sufficient for re-opening the assessment. Another ground regarding legality of assessment is that the assessee did not receive notice u/s 143(2) of the Act as no such notice was issued by the Assessing Authority. It is seen that the AO had issued various notices to the assessee when notice u/s 148 of the Act was not complied by the assessee. However, on 27.12.2010, the assessee had requested to treat the return of income filed u/s 139(1) of the Act as in response to section 148 of the Act. Having noted this, the AO proceeded to frame the assessment. However, there was nothing recorded in the assessment order whether any notice u/s 143(2) of the Act was issued to the assessee. The AO submitted a report regarding this ground. The relevant contents of report submitted to the Assessing Authority dated 05.09.2022 are reproduced as under:-

- 4.1. *"For grounds 1,2 & 3: The assessee has stated that the AO has not issued the notice u/s 143(2) of the Act, before the completion of the re-assessment proceedings and the condonation for the same cannot*

be given u/s 292BB of the Act. In this regard, it is submitted that the issuance of notice u/s 143(2) of the Act, and the proof for the service of the same could not be ascertainable at the moment because the assessment records are not traceable right now despite all possible efforts. However, from perusal of assessment order passed by the then AO on 31.12.2010, it is crystal clear that the assessee has not filed fresh return in response to notice issued u/s 148 of the Act, till the completion of assessment proceedings. Assessee has been almost non-responsive during the entire period of assessment proceedings. On 27.12.2010 (just 04 days before expiring of limitation to pass assessment order), he has stated that the return filed as per the provisions of section 139(1) of the Act, may kindly be treated as return filed in response to notice u/s 148 of the Act.”

9. Since the Revenue itself has admitted the fact that issuance of notice u/s 143(2) of the Act is not ascertainable therefore, in the absence of any proof of issuance of notice u/s 143(2) of the Act and the service of the same to the assessee, it can be inferred that no such notice was issued by the AO to the assessee.

10. The law is well settled that non-issuance of notice u/s 143(2) of the Act is not a curable defect. Hon'ble Delhi High Court in the case of **Pr.CIT vs Shri Jai Shiv Shankar travels (P.) Ltd. [2015] 64 Taxmann.com 220 (Delhi)** has elaborately discussed this issue wherein the Hon'ble High Court has unequivocal terms held that *“the failure of Assessing Officer in reassessment proceedings to issue notice u/s 143(2) prior to finalizing the reassessment order cannot be condoned by referring to section 292BB of the Act.”* Further, the Hon'ble High Court observed that *“the resultant position is that the failure by the AO to issue a notice to the assessee u/s 143(2) of the Act is fatal to the order*

of reassessment. Subsequent to 16.12.2010 when the assessee made a statement before the AO to the fact that original return filed, should be treated as return of income pursuant to a notice issued u/s 148 of the Act, is fatal to the order of reassessment.”

10.1. In the present case, the Assessing Authority itself noted that on 27.12.2010, the assessee himself attended the proceedings and filed a letter dated 27.12.2010 stating that the return already filed u/s 139(1) of the Act, may be treated as filed u/s 139(1) of the Act. The facts are identical in the present case.

11. Therefore, respectfully following the judgment of Hon'ble Delhi High Court rendered in the case of ***Pr.CIT vs Shri Jai Shiv Shankar travels (P.) Ltd.*** (supra), I hold that the impugned assessment order suffers from patent legality and deserves to be quashed. The additional ground raised by the assessee is thus, allowed.

12. Now, coming to the merit of the addition, it was the case of the assessee before lower authorities that the assessee had taken only 2000 cable connections from service provider. Therefore, he could not have subscribed higher numbers. The AO has not verified this fact and estimated the gross profit. From the records, it is clear that the AO did not verify the claim of the assessee and proceeded purely on estimate basis which was not justified. I therefore, hold that the addition made by the AO purely on estimation basis without verifying the correctness of the claim of the assessee, is not in accordance with law, the same deserves to be deleted. The AO is therefore,

directed to delete the impugned addition. Grounds raised by the assessee are thus, allowed.

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

Order pronounced in the open Court on 31st July, 2023.

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

** Amit Kumar **

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI