

**IN THE INCOME TAX APPELLATE TRIBUNAL – KOLKATA
PATNA ‘e-COURT’, KOLKATA
[Virtual Court Hearing]**

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI RAKESH MISHRA, ACCOUNTANT MEMBER**

**I.T.A. No. 119/PAT/2011 & C.O. No. 1/PAT/2012
Assessment Year: 2005-06**

International School of Social Welfare & Human Resources 61, South New Patliputra Colony, Patna, Bihar [PAN:AAATI4039B]	Vs	Assistant Commissioner of Income Tax, Circle-1, Patna
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Abhi Sarkar, Adv.
Respondent by : Ld. DR. Lalita Kumari, Sr. DR

Date of Hearing : 03.07.2024
Date of Pronouncement : 30.09.2024

ORDER

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

The appeal filed by the revenue is against the order of the Ld. Commissioner of Income Tax (Appeals), Dhanbad, Camp Office - Patna (hereinafter referred to as “the Ld. CIT(A)”) passed u/s 250 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for AY 2005-06, dated 07.09.2011, which is passed against the assessment order u/s 144/147 of the Act, dated 29.12.2010 of the Deputy Commissioner of Income Tax, Circle-1, Patna. The assessee has also filed Cross Objections. Initially, the appeal was decided by the ITAT vide order in I.T.A. No. 119/PAT/2011 & C.O. No. 1/PAT/2012 dated 20th July, 2015 but the order was recalled vide M.A. No. 1/PAT/2015 dated 23rd August, 2015. The order of the

Tribunal in the M.A. No. 1/PAT/2015 along with the chronology of events and the findings is as under:

ORDER

Per Rajpal Yadav, Vice-President (KZ):-

The present Miscellaneous Application is directed by the assessee pointing out apparent errors in the order of the Tribunal dated 20th July, 2015 passed in ITA No. 119/PAT/2011 & C.O. No. 1/PAT/2012.

2. *There is a chequered history of the litigation in the present case, therefore, in order to appreciate the facts in a more scientific manner, we take note of them in a tabular form:-*

Sr. No.	Date	Events
1.	31.10.2005	<i>The assessee filed its return of income and its case was not selected for scrutiny assessment by issuance of a notice under section 143(2) of the Income Tax Act.</i>
2.	18.01.2007	<i>The ld. Assessing Officer had issued notice under section 148 of the Income Tax Act and initiated the proceeding under section 147.</i>
3.	19.12.2007	<i>The ld. Assessing Officer has passed the assessment order under section 144/147.</i>
4.	16.01.2009	<i>The ld. CIT(Appeals) has decided the appeal of the assessee against the assessment order dated 19.12.2007. The case of the assessee was that though ld. Assessing Officer has commenced the reassessment proceedings by issuance of a notice under section 148 but before passing the assessment order under section 144/147, the ld. Assessing Officer has not served a notice under section 143(2) of the Income Tax Act. Therefore, this assessment order is not sustainable. The ld. CIT(Appeals) has entertained this plea and quashed the assessment order.</i>
5.	16.04.2009	<i>The ld. Assessing Officer on the one hand filed an appeal against the order of the ld. CIT(Appeals) dated 16.01.2009 before the ITAT, which was registered as ITA No. 66/PAT/2009. On the other hand, he again issued notice under section 148 for the same reasons and reopened the assessment.</i>
6.	29.12.2010	<i>The ld. Assessing Officer has passed the second reassessment order under section 144 read with section 147.</i>

7.	30.03.2010	<i>The ITAT has dismissed the appeal of the Revenue filed against the first round of ld. CIT(Appeals)'s order dated 16.01.2009. ITAT has upheld the finding of the ld. CIT(Appeals) that since no notice under section 143(2) was issued by the ld. Assessing Officer, the assessment order passed under section 147 read with section 144 is not a valid assessment.</i>
8.	07.09.2011	<i>The ld. CIT(Appeals) quashed the second round of assessment order on the ground that there was no fresh information possessed by the ld. Assessing Officer. He has initiated the reassessment proceeding qua the same set of reasoning, which attained finality upto the level of ITAT. Accordingly, ld. CIT(Appeals) has quashed this order.</i> <i>Dissatisfied with the order of ld. CIT(Appeals), Revenue filed an appeal bearing ITA No. 119/PAT/2011 and on receipt of notice, the assessee has filed Cross Objection bearing No. 1/PAT/2012.</i>
9.	20.04.2015	<i>The Tribunal has concluded the hearing and reserved the judgment.</i>
10.	20.07.2015	<i>The Tribunal has decided the appeal along with two more appeals bearing ITA Nos. 72/PAT/2011 & 99/PAT/2012. In these two appeals, the issue was whether registration under section 12AA ought to be granted to the assessee or not. Tribunal has allowed these appeals and held that the assessee deserves to be registered under section 12AA of the Income Tax Act.</i> <i>The Tribunal, however, in ITA No. 119/PAT/2011 has reversed the finding of ld. CIT(Appeals) and upheld the reopening of assessment. The Tribunal did not record any finding on the plea raised by the assessee in the Cross Objection.</i>
11.	29.07.2015	<i>The Tribunal found apparent errors in its order dated 20.07.2015 and suo motu exercised its powers for rectification of those errors and passed allegedly a Corrigendum whereby certain mistakes, which are nine in numbers, have been corrected.</i>

3. On receipt of this order of the Tribunal, the assessee has filed this application and pleaded therein that the Tribunal has not noticed all the details and has issued a Corrigendum without issuing any notice to it. The assessee further pleaded that in the Cross Objection, it has specifically taken a plea that ld. CIT(Appeals) has rightly quashed the second round of assessment on the ground that on the same set of facts, reopening of assessment has attained the finality and this aspect has not been addressed by the Tribunal.

4. *In response to the notice of hearing in M.A., no one has come present on behalf of the assessee.*

5. *With the assistance of ld. D.R., we have gone through the record carefully. It is pertinent to observe that the power of rectification under section 254(2) of the Income Tax Act can be exercised only when the mistake, which is sought to be rectified is an obvious and patent mistake, which is apparent from the record, and not a mistake which requires to be established by arguments and a long drawn process of reasoning on points on which their may conceivably two opinions. There is no dispute that Tribunal has a very limited power for rectifying the mistake. The Hon'ble Supreme Court in the case of ACIT –vs.- Saurashtra Kutch Stock Exchange Limited reported in 305 ITR 227 has propounded broadly six tests for judging an order passed by ITAT, whether it suffers from an apparent mistake or not.*

6. *In the light of above, we have gone through the order of the Tribunal dated 20.07.2015. The Tribunal has failed to take cognizance of the factum that reopening of assessment in both the reasons is based upon the same set of facts. The lacuna and the error at the end of the ld. Assessing Officer was an inherent error of procedure which became fatal to the assessment order in the first round of reopening. The Tribunal failed to adjudicate the ground raised by the assessee in the Cross Objection submitting therein that on the same set of facts, the assessment cannot be reopened twice. Therefore, in our view, an apparent error has crept in the adjudication process, whereby the specific plea in the Cross Objection and the arguments of the assessee have not been noticed. Therefore, we recall the order of the Tribunal in ITA No. 119/PAT/2011 & C.O. No. 1/PAT/2012 and restore them to their original numbers for readjudication on merit.*

7. *In the result, the Miscellaneous Application is allowed for statistical purposes.*

Order pronounced in the open Court on 23.08.2023.

Hence, the appeal was revived and heard.

2. The grounds raised by the Revenue in its appeal and the grounds in the CO dated 16th January, 2012 of the assessee are reproduced as under:

I. I.T.A. No. 119/PAT/2011, AY: 2005-06

Grounds of appeal in the case of International School of Welfare & Human Resource, 61, South New Patliputra Colony, Patna Appeal No. 371/CIT(A)/CO(Pat)/A.Y. 2005-06

That the CIT(A) grossly erred both in fact & in law in quashing the initiation of proceedings u/s 147 of the Income-tax Act, 1961 by applying the second provision of section 147 of the Income-tax Act, 1961 as the matter before the Tribunal in respect of the assessment order dated 31.12.2007 for A.Y 2005-06 u/s 144/147

was only in respect of validity of initiation of proceedings u/s 147 and not the quantum additions made in the impugned Assessment order dated 29.12.2010 for A.Y 2005-06 u/s 143(3)/147 which were included in the grounds of appeal raised by the assessee in the appeal filed in respect of this assessment order.

II. C.O. No. 1/PAT/2012, AY: 2005-06

*International School of Social Welfare & Human Resource Society
A.Y. 2005-06*

Grounds of Cross objections before the ITAT

- 1. That the grounds of cross objections are without prejudice to each other.*
- 2. That the grounds of appeal as taken by the appellant are invalid and fit to be rejected.*
- 3. That any other grounds that may be taken at the time of hearing.*

3. The facts of the case as per the Statement of Facts filed by the Revenue are as under:

The assessee International School of Social Welfare & Human Resources is a society registered under the Societies Registration Act, 1860. Its objects are to promote education and poverty removal etc. The society is running a school in the name of "International School." The assessee society is not registered u/s 12A of the Income-tax Act, 1961 (for brevity, the Act hereinafter). Nor is the society approved u/s 10(23C)(vi) of the Act by 'Prescribed Authority'. During the F.Y. 2004-05, relevant to the assessment year 2005-06, the assessee filed its Return of Income on 31.10.2005 on a total income of NIL. Notice u/s 148 of the I.T. Act was issued on 16.4.2009. Assessment order u/s 144/147 of the I.T. Act 1961 was passed on 29.12.2010 determining the total income at Rs.49,03,850/- as against returned income of NIL. The CIT(A) has given relief resulting in tax effect of Rs.25,58,254/-

It is clear from the assessment order that CIT(A) has quashed the 147 proceedings without going into merits relying wrongly on 2nd proviso to 147 of IT Act, 1961. The CIT(A) has erred on facts and on law as mentioned in AO's report.

4. On the date of hearing on 03.07.2024, rival contentions were heard and the record and the facts were examined. In this case no assessment was made on the return filed by the assessee. In the first round of reopening, Ld. CIT(Appeals)-II, Patna vide order dated 16.01.2009 in Appeal No. 212/07-08

quashed the assessment order dated 19.12.2007 of the Ld. AO passed under section 144/147 of the Act by holding as under:

I have considered the facts of the case and also carefully considered the submissions of the appellant society and the comments of the AO in his reports already reproduced hereinabove. After verification of the relevant case records it is observed that the AO has admitted that no notice u/s 143(2) of the Act dated 18.4.2007 has been issued to the assessee and that the mention of such a notice in the assessment order appears to be an inadvertent error. It is therefore evident that after filing a return of income by the appellant society on 7.2.2007 pursuant to issue of notice by the AO u/s 148 dated 17.1.2007 no notice u/s 143(2), of the Act has been issued by the AO.

4.1 The Ld. CIT(A) has thereafter elaboratively discussed the questions answered by the Special Bench of the ITAT, Delhi Bench in the case of Raj Kumar Chawla & Others vs ITO 277 ITR 225. He subsequently concluded that:

The Hon'ble Supreme Court in the case of R. Dalmia & others Vs. CIT. 236 ITR 480 which has also been relied upon by the ITAT, Delhi Special Bench in the case reported at 277 ITR (AT) 225 has also held that "A notice having been issued w/s 148, the procedure set out in sections subsequent to section 139 has to be followed so far as may be. Assessments w/s 143(3) and assessments or reassessments u/s 147 are different, but in making assessments and reassessments w/s 147 the procedure laid down in sections subsequent to section 139 including that laid down by section 144B has to be followed" It is therefore a settled legal position and also affirmed by the Hon'ble Apex Court that if the AO fails to serve on the assessee the notice within the statutory period provided u/s 143(2) of the Act, the AO loses his jurisdiction to make assessment u/s 143(3)/144 read with section 147 of the Act. With regard to insertion of a new section 292BB in the Income-tax Act, 1961 inserted by the Finance Act 2008, it is observed that the said amendment is with effect from 1" April 2008 and the Notes of Clauses of the Finance Bill, 2008 also categorically states that this amendment will take effect from 1" April, 2008. Therefore the

*provisions of section 292BB will not be applicable in the instant case which relates to A.Y. 2005-06. In the facts and circumstances of the case and the legal pronouncements as discussed above, I hold that since in the instant case the AO failed to serve the notice u/s 143(2) of the Act, the AO lost his jurisdiction to make assessment u/s 143(3)/144 read with section 147 of the Act. Therefore the assessment made is ordered to be cancelled. **As the assessment order passed u/s 144/147 has been quashed, the other grounds of appeal raised by the appellant are not being considered on merits.***

In the result, the appeal is allowed.

{emphasis supplied}

4.2 The revenue could not succeed in the appeal filed against the order of the Ld. CIT(A) before the Tribunal and the Tribunal upheld the order of the Ld. CIT(A) vide order dated 31.03.2010 in I.T.A. No. 66/Pat/2009 & C.O. No. 04/PAT/2009 for the AY 2005-06 by holding as under:

14. Having considered the rivals submissions of the case as well as the case laws/sections as relied on by the both the parties, we are of the opinion that as far as a service of notice u/s. 143(2) of the Act is concerned, it is now settled law that the same is mandatory for making the assessment u/s.143(3)/147 or u/s.158BC of the Act. We are further of opinion that it is also a settled law that non-service of notice u/s.143(2) of the Act within the period prescribed by proviso of section 143(2) except the cases which were covered by the amendment made in section 148 by the Finance Act '06, as per which the cases where the returns had been furnished during the period commencing from 1st day of October 1991 and ending on 30th Sept 05 were saved, vitiates all the subsequent proceedings i.e. any assessment framed without meeting the mandatory requirements of service of notice u/s.143(2) of the Act within prescribed period is bad in law and void ab initio.

15. Coming to the present case, it is noticed that return of income for the A.Y 2005-06 was furnished on 7-2-07 and therefore, the amendment in TA section 148 is not applicable. It is further noticed that the revenue has not brought any material in our knowledge to establish the service of notice u/s.143(2) of the Act issued on 18-4-07 or thereafter, meaning thereby that the assessee's objection that the assessment under appeal was completed without meeting the

mandatory requirements for service of notice u/s.143(2) of the Act'61 within the prescribed period is found to be correct and, therefore, the Id.CIT(A) was justified in canceling assessment made u/s.144/147 of the Act. We do not find any infirmity in the order of the Id.CIT(A) and the same is confirmed.

16. *The revenue's appeal is dismissed.*

C.O. No.04/Pat/09 [I.T.A No.66/Pat/09][by the assessee]

17. *Since we have upheld the order of the CIT(A) and therefore, the C.O. being in support of the order of the Id.CIT(A) is deemed to have been allowed.*

18. *In the result, revenue's appeal is dismissed and C.O. of the assessee is allowed.*

19. *Order pronounced in the open court on 31.3.2010.*

5. Thus, neither the Ld. CIT(A) nor the ITAT had decided any other ground of appeal and the merits of the case were not discussed apart from discussion on the legal issue on the basis of which the 1st reassessment order was cancelled.

Subsequently, the Ld. AO reopened the assessment by recording reasons on 16.04.2009 i.e. after the Ld. CIT(A) had cancelled the assessment made on 19.12.2007 on account of non-service of the notice u/s 143(2) the Act. The reasons recorded on 18.01.2007 for the 1st reopening and those recorded on 16.04.2009 for the 2nd reopening are as under:

i. Reasons to believe dated 18.01.2007:

18.01.2007 The assessee International School of Social Welfare and Human Resources Society filed its return of Income on 31.10.2005 showing no income. From the perusal of the return of income, it is seen that the assessee filed unsigned return of Income. Which is treated es non est. Further from the perusal of the audited report, it is seen that the assessee has a gross receipt of Rs.1,48,29,533.00 and surplus of Rs.6,30,671.11. The assessee has claimed the exemption of u/s 10(23C)(vi) without having approval from approving authority. As per the provision of the section 10 (23C)(vi) approval u/s 10(23)(C)(vi) from the CCIT or DGIT as the case may be is a necessary condition for getting exemption under this section. Further from the perusal of the balance sheet it is seen that the assessee is engaged in other various

activities which can not be termed as educational activities, such as providing transport facilities and others. From the perusal of the balance sheet, it is also seen that the assessee has given advance to land lord of Rs.16,68,523.18 and Rs. 13,93,625.00 without charging any interest. The landlord is the Director of the society Smt. Farhat Hasan. This leads to the benefit to the person referred to in section 13(3) and these investments are not allowable investment as per provision of section 11(5) of the I. T. Act which is one of the necessary conditions for u/s 10(23)(vi) of the Income-tax Act, 1961.

Therefore, I have reason to believe that an income of Rs.6,30,671.11 + Rs. 16,58,523.18 Rs. 13,93,625.00) = Rs.36,92,819.20 has escaped assessment. Hence a notice u/s 148 is issued for initiating proceeding u/s 147 of the Income-tax Act, 1961.

ii. Reasons to believe dated 16.04.2009:

"The assessee, International School of Social Welfare and Human Resources Society, filed its return of income for A.Y. 2005-06 on 31.10.2005 showing NIL income. A notice u/s 148 of the IT Act. 1961 was sent to the assessee on 17.01.2007 vide dispatch no. 3315. In response to this notice, the assessee filed a fresh Return on 07.02.2007. In this Return, the assessee declared an income of Rs. 6,30,671/- as 'Profit & Gains of Business & Profession'. However, the assessee claimed the entire amount to be exempt from taxation u/s 10(23C) of the Act. From the perusal of the Return filed on 07.12.2007, following observations are made:

1. The assessee Society has not been granted approval u/s 10(23C)(vi) by the 'Prescribed Authority' whereas its gross receipt exceeds Rs. 1 crore during the AY. 2005-06. It is, therefore, not entitled to the claim of exemption u/s 10(23C) of the Act.

2. The assessee-Society has given interest free loans of Rs. 13,93,625/- and Rs. 16,68,523/- as 'Advance to Landlord'. At the same time, the Society has paid Rs. 18,00,000/- as rent (to the landlords). The landlords in question are also the members of the Society or their family members. Thus, the assessee-Society is directly passing the benefits to its members. The Society is, therefore, not existing solely for education and not for the purpose of profit. It is, therefore, violating the most-essential precondition for claim of exemption u/s 10(23C) of the Act.

3. Even otherwise, the Society is not existing 'solely for education'. Clause (D) of the aims and objects of the Society is 'to remove poverty as such as possible by a part of earnings of the Society'. Clearly, this object of the Society does not fall under the category of 'existing solely for educational purposes'. It, therefore, cannot claim the benefits of S. 10(23C)(vi).

4. The assessee-Society has debited Rs. 2,27,550 as 'Road Tax' (on vehicles). However, during the course of scrutiny proceedings of the Society for the AY. 2006-07, it was found that some of the vehicles were not owned' by the Society, but rather by Mrs. Farhat Hasan in her individual capacity as the proprietor of International School (Jr.). Thus a part of the above Road Tax amount was not for the purpose of the Society.

5. Similarly, salary to the driver and expenses on fuel and lubricants, repairs & maintenance etc. on these vehicles also cannot be attributed to the 'business' of the assessee - Society.

In the light of the above, I, therefore, have reason to believe that income of the Society for the A.Y. 2005-06 has escaped assessment within the meaning of section 147 of the Act".

5.1 After recording reasons as above, the Ld. AO passed an assessment order dated 29.12.2010. The assessee sought the reasons for the issue of notice under section 148 the Act and also filed objections which have been duly responded by the Ld. AO and the same also appear from pages 4 to 12 of the assessment order. The income was assessed in the status of AOP as the approval by the prescribed authority was not granted under section 10(23C)(vi) of the Act and in fact the application of the assessee for grant of exemption for the AY 2009-10 was rejected by the CCIT vide order dated 29.09.2009, the relevant portion of which has been reproduced in the assessment order from Page 6 onward. The total income was assessed under section 144/147 of the Act vide order dated 29.12.2010.

5.2 The Ld. CIT(A) quashed the proceeding under section 147 by holding in para 4 that against the order of first reassessment, relief was allowed by the Ld. CIT(A) and an appeal was filed by the Ld. AO before the ITAT on 02.04.2009. While this appeal was pending, another proceeding under

section 147 was initiated on 16.04.2009 after recording reasons which have been reproduced above. The appeal of the assessee was allowed by giving the findings mentioned as under:

5. A perusal of above two reasons recorded shows that the AO has initiated second proceedings u/s 147 during the pendency of first re-assessment proceedings primarily for the same reasons. There is hardly any material difference between the two sets of reason to believe as above. The AO could only have initiated another proceedings under section 147 to assess or reassess income other than the income involving matters not subject matter of any appeal. It would be relevant to refer to second proviso to section 147 of the Income-tax Act 1961 which reads as under:

"Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment."

6. By this second innings of section 147 and subsequent Assessment Order, the order of CIT(A)-II, Patna dated 16.01.2009 has been reduced to a nullity and the same time, appeal has been filed against this order. Therefore, it was bad in law for the AO to initiate proceedings u/s 147 for a second time primarily for the same reasons when appeal in respect of first proceedings was pending before the ITAT. Therefore, the proceedings u/s 147 initiated on 16.04.2009 are not sustainable and need to be quashed.

7. The appellant has raised same further issues vide grounds of appeal number 2 to 19. However, since the re-assessment proceedings itself do not survive as above, there is no need to go in to these grounds of appeal.

8. In the result, the appeal is allowed.

5.3 The Revenue filed another appeal and vide a common order dated 20.07.2015 in I.T.A. Nos. 72 & 99/Pat/2011 & 12 (which related to denial of registration under section 12AA) and I.T.A. No.119/Pat/2011 and C.O.No.01/Pat/2012, the Tribunal decided the appeals and set aside the appeal order of the Ld. CIT(A). Subsequently, an MA was filed by the assessee and vide the order dated 23rd August, 2023 in M.A. No. 01/Pat/2015

arising out of I.T.A. No.119/Pat/2011 and C.O.No.01/Pat/2012, the MA filed was allowed and the order was recalled and restored to original numbers for re-adjudication on merit. The appeal was refixed and reheard and on the basis of the records and the submissions made by both the sides, the appeal is being decided after rehearing the matter.

6. First we would take up the Revenue's appeal. The Ground of Appeal in I.T.A. No. 119/PAT/2011 is that the Ld. CIT(A) grossly erred both in fact & in law in quashing the initiation of proceedings u/s 147 of the Income-tax Act, 1961 by applying the second proviso of section 147 of the Income-tax Act, 1961 as the matter before the Tribunal in respect of the assessment order dated 31.12.2007 for A.Y. 2005-06 u/s 144/147 was only in respect of validity of initiation of proceedings u/s 147 and not the quantum additions made in the impugned assessment order dated 29.12.2010 for A.Y. 2005-06 u/s 143(3)/147 which were included in the grounds of appeal raised by the assessee in the appeal filed in respect of this assessment order. It is relevant to reproduce the provisions of section 147 of the Act in this regard as relevant for the impugned AY 2005-06 on the date of issue of the notice under section 148 of the Act:

[54](#)/Income escaping assessment.

[55](#)147. *If the [56](#)[Assessing] Officer [57](#)[has reason to believe[58](#)] that any income chargeable to tax has escaped assessment[58](#) for any assessment year, he may, subject to the provisions of [sections 148](#) to [153](#), assess or reassess[58](#) such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in [sections 148](#) to [153](#) referred to as the relevant assessment year) :*

Provided that where an assessment under sub-section (3) of [section 143](#) or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure⁵⁹ on the part of the assessee to make a return under [section 139](#) or in response to a notice issued under sub-section (1) of [section 142](#) or [section 148](#) or to disclose fully and truly all material facts⁵⁹ necessary for his assessment, for that assessment year:

^{59a}**Provided further** that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.]

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily⁵⁹ amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(c) where an assessment has been made, but—

(i) income chargeable to tax has been underassessed ; or

(ii) such income has been assessed at too low a rate ; or

(iii) such income has been made the subject of excessive relief under this Act ; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.]

6.1 The Second Proviso relied upon by the Ld. CIT(A) has been inserted by the Finance Act, 2008, w.e.f. 1.4.2008. As the second reopening was done on 02.04.2009, being a procedural provision, the same was available on the statute but it has to be examined whether, on the facts of the case of the assessee, the second proviso was applicable to the reassessment proceeding initiated on 16.04.2009 so as to bar the Ld. AO to reissue the notice.

6.2 While the appeal was filed before the ITAT on 02.04.2009 against the cancellation of the assessment order by the Ld. CIT(A) on account of non-service of the notice under section 143(2) and without discussing any of the additions made or deciding the merits of the case, it cannot be said that the income involved in any of the additions made was subject matter of the appeal since the Ld. CIT(A) had decided the appeal only on the legal ground of nonservice of the notice and the other additions were not even discussed nor any finding was made in the appeal order nor the same were even in dispute before the ITAT. **In fact, the order of the Ld. CIT(A) states in the concluding para that “In the facts and circumstances of the case and the legal pronouncements as discussed above, I hold that since in the instant case the AO failed to serve the notice u/s 143(2) of the Act, the AO lost his jurisdiction to make assessment u/s 143(3)/144 read with section 147 of the Act. Therefore, the assessment made is ordered to be cancelled. As the assessment order passed u/s 144/147 has been quashed, the other grounds of appeal raised by the appellant are not being considered on merits.”** Hence the income involving matters of reassessment on the second occasion were not the subject matter of appeal before the Ld. CIT(A) nor any finding was given by the Ld. CIT(A) and the procedural defect of nonservice of the notice under section 143(2) on the basis of which the first reassessment order was cancelled was sought to be corrected by following the correct procedure. Hence, on the date of initiation of the proceedings for reassessment for the second time i.e. on 16.04.2009, none of the additions made/income in the original assessment order was the subject matter of the appeal before the Ld. CIT(A) as no finding in this regard had been made and in the appeal filed before the Tribunal, the grounds of appeal relating to the merits of the addition were not raised. Since the proceeding relating to cancellation of the reassessment order on account

of non-service of the notice under section 143(2) of the Act was only being disputed before the ITAT, hence there was no embargo on the Ld. AO to record the reasons and issue another notice within the permissible limitation of time, which was available to the Ld. AO as the income had escaped assessemnt. Hence, the finding of the Ld. CIT(A) is incorrect to this effect that the second proviso to section 147 was applicable to the facts of the case. Further, the finding of the Ld. CIT(A) that “*A perusal of above two reasons recorded shows that the AO has initiated second proceedings u/s 147 during the pendency of first re-assessment proceedings primarily for the same reasons*” is also not borne out of the perusal of the reasons recorded, which, at clauses 4 and 5 are different and do not appear in the earlier reasons recorded as the same emanated from the finding in the assessment proceedings for the AY 2006-07.

6.3 On the contrary, the Ld. AO was having the jurisdiction to issue the notice as the earlier reassessment consequent to the reopening had been cancelled and no valid assessment had ever been made. Hence, the appeal of the Revenue succeeds and the order of the Ld. CIT(A) is set aside to him for the appeal to be decided afresh on merits of the case in respect of grounds of appeal nos. 2 to 19 before him. Hence, the ground of appeal raised by the Revenue is allowed and the appeal is allowed.

7. As regards the Cross Objection filed by the assessee, Ground Nos. 1 and 3 are general in nature and do not require any separate adjudication. Ground No. 2 is *That the grounds of appeal as taken by the appellant are invalid and fit to be rejected*. However, in view of the detailed finding made in respect of the appeal, the Ground No. 2 of the C.O. is dismissed and the Cross Objection

filed by the assessee against the appeal filed by the Ld. AO is also dismissed.

6. In the result, the appeal filed by the Revenue is allowed while the Cross Objection filed by the assessee is dismissed.

Order pronounced in the open court on 30th September, 2024.

Sd/-
(Sanjay Garg)
Judicial Member

Sd/-
(Rakesh Mishra)
Accountant Member

Dated: 30th September, 2024

AK, P.S.

Copy to:

1. The Appellant:
2. The Respondent.
3. CIT(A)
4. The CIT,
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata