आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI B.M. BIYANI, ACCOUNTANT MEMBER
AND
SHRI UDAYAN DAS GUPTA, JUDICIAL MEMBER

ITA No. 272/Ind/2024
Assessment Year:2010-11

Income Tax Officer-1(2) Indore	**बनाम/** Vs.	Divine Infracreation and Trading Private Ltd, 205, Sujata Chamber, 2nd floor, Off Katha Bazar, Maszid (W), 1/3 Abhichand Gandhi Marg, Mumbai - 400009
(Assessee/Appellant)		(Revenue/Respondent)
PAN: AACCD0425F		
Assessee by	Shri Vijay Mehta, AR	
Revenue by	Shri Ram Kumar, CIT-DR	
Date of Hearing	28.01.2025	
Date of Pronouncement	28 .02.2025	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by order of first appeal dated 22.02.2024 passed by learned Commissioner of Income-Tax (Appeals)-NFAC, Delhi ["CIT(A)"] which in turn arises out of order of re-assessment dated 09.01.2020 passed by learned ITO-3(1), Indore ["AO"] u/s 144 r.w.s. 147 r.w.s. 153(6) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2010-11, the revenue has filed this appeal.

2. The background facts leading to present appeal are such that the assessee-company filed original return of AY 2010-11 declaring a total income of Rs. 22,54,000/- which was assessed. Thereafter, the assessment of subsequent AY 2011-12 was finalized by way of scrutiny assessment u/s 143(3) after making certain additions, one among them was an addition of Rs. 48,47,22,100/- u/s 68 on account of unexplained share capital (including share premium). Aggrieved by addition, the assessee carried matter in first-appeal before CIT(A). The CIT(A), vide his order dated 09.04.2019, deleted the addition on merit. At the same time, the CIT(A) also observed that the assessee received share capital of Rs. 48,47,22,100/- in two years, namely Rs. 42,01,80,700/- in Previous Year 2009-10 relevant to AY 2010-11 and Rs. 6,45,41,400/- in Previous Year 2010-11 relevant to AY 2011-12. Accordingly, relying upon the provision of section 68(1), the CIT(A) also held that the receipt to the extent of Rs. 42,01,80,700/- found credited in books of assessee of AY 2010-11 cannot be taxed in AY 2011-12, the same needs to be added to the total income of assessee for AY 2010-11. Based on such conclusion, the CIT(A) directed the AO to re-open assessee's case of AY 2010-11. Pursuant to CIT(A)'s direction, the AO re-opened assessee's case of AY 2010-11 under consideration in present appeal through notice dated 08.08.2019 u/s 148 r.w.s. 153(6) which ultimately culminated in passing of impugned order of re-assessment dated 09.01.2020 u/s 144 r.w.s. 147 r.w.s. 153(6) after making an addition of Rs.

42,01,80,700/-. Aggrieved by this order of re-assessment of AY 2010-11, the assessee carried matter in first-appeal before CIT(A).

3. In the meantime, the revenue and assessee both filed cross-appeals ***ITA No. 730 & 656/Ind/2019 to ITAT Indore Bench for AY 2011-12***. The ITAT disposed of those cross-appeals vide order dated 21.12.2022. Vide Para Nos. 13-26 of its order, the ITAT upheld CIT(A)'s order deleting additions on merit. Further, vide Para Nos. 26-28 of its order, the ITAT also accepted assessee's legal claim that the CIT(A) was not having any power to give direction to AO for re-opening assessee's case of other year i.e. AY 2010-11.

4. Subsequently, when the assessee's first appeal of AY 2010-11 came up before CIT(A), the CIT(A) took note of aforesaid order dated 21.12.2022 of ITAT and allowed assessee's appeal by passing following order:

> *"3.1.3 It is, thus, observed that the foundation, based on which the case was reopened for AY 2010-11 has been dislodged by the categorical findings and decision of the Hon'ble Tribunal in the aforesaid order, I.T.A. Nos.730 & 656/Ind/2019 dated 21.12.2022. It is elementary to observe "Sublato fundamento cadit opus" meaning that once the foundation is removed, the superstructure collapses. Thus, in the circumstances and respectfully following the decision of the jurisdictional Tribunal, it is held that the re-opening of the appellant's case for AY 2010-11, based on the directions of the CIT(A), cannot be sustained and it is, thus, rendered invalid and the order is rendered void ab initio. Therefore, this ground is allowed.*
>
> *3.2 Consequently, all other grounds raised by the appellant require no further adjudication on merits of the case. However, it is relevant here to state that even on the issue of merit the Hon'ble ITAT, in the order mentioned above, has come to the conclusion that the appellant has satisfied all requirements to prove the identity of the investors, their creditworthiness and the genuineness of the transactions in questions- which were originally assessed in AY 2011-12 and then later a large part was taken to AY 2010-11, i.e. the matter under consideration.*
>
> *4. In the result, the appeal is allowed".*

5. Now, the revenue is aggrieved by CIT(A)'s order and has come in present appeal before us on following grounds:

> *"1. Whether on the facts and circumstances of the case the NFAC, Delhi was justified in deleting the addition of Rs. 42,01,80,700/- made u/s 68 of the I.T. Act, 1961 in view of findings in assessment order.*
>
> *2. Whether on the facts and circumstances of the case the NFAC, Delhi erred in deleting the addition of Rs. 42,01,80,700/- made u/s 68 of the I.T. Act, 1961, when it was evident that the entire share application money including share premium money was received by the assessee company in A.Y. 2010-11 not in A.Y. 2011-12."*

6. We have heard the learned Representatives of both sides and perused the impugned order of CIT(A) re-produced above. After a careful consideration, we do not find any error or infirmity in the order of CIT(A) which has been passed following the view taken by ITAT, Indore in ***ITA No. 730 & 656/Ind/2019 for AY 2011-12*** in assessee's own case. In that view of matter, we do not have any reason to interfere with the order of CIT(A), the same is hereby upheld. The appeal of revenue is thus dismissed being devoid of any merit.

Assessee's Application under Rule 27 of Income-tax (Appellate Tribunal) Rules, 1963:

7. The assessee/respondent has filed following application under Rule 27 of Income-tax (Appellate Tribunal) Rules, 1963:

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BEFORE THE HON'BLE INCOME-TAX APPELLATE TRIBUNAL
DIVISION BENCH, INDORE

16 JAN 2025

In the case of
ITO-3(1), Indore
v.
Divine Infracreation and Trading Pvt. Ltd.
A.Y. 2010-11
ITA No. 272/Ind/2024
Fixed for hearing: 27.01.2025

PRAYER FOR ADMISSION OF RESPONDENT'S GROUND UNDER RULE 27 OF THE APPELLATE TRIBUNAL RULES, 1963.

1. On behalf of our above-mentioned client and as per their instructions, we state and submit as under.
2. In the case of our above-mentioned client, assessment order was passed u/s. 144 r.w.s. 147/153(6) of the Act on 09.01.2020. Before completing the assessment, the A.O. has issued a notice u/s. 148 of the Act on 08.08.2019 which was received by the assessee on 19.08.2019. In response to the same, the assessee electronically filed a return of income on 05.10.2019 declaring total income of Rs. 22,54,000/-. A copy of the acknowledgment is **enclosed** herewith. The A.O. thereafter completed the assessment without issuing a notice u/s. 143(2) of the Act. In the said assessment order, the A.O. has determined the total income at Rs. 42,24,34,700/-.
3. It is submitted that the Assessing Officer ought to have issued a mandatory notice u/s. 143(2) of the Act before completing the assessment. The said issue was raised before the CIT(A) who has duly recorded a detailed submissions of the assessee on page nos. 11 - 13 of his order. However, the same has not been adjudicated by the CIT(A) in light of the fact that the CIT(A) has quashed the reassessment proceedings.
4. Considering the fact that the Department has filed the present appeal before Your Honours, the assessee would like to raise the above issue under Rule 27 of the IT(AT) Rules. The Respondent's ground under Rule 27 is **enclosed**

DIVINE INFRACREATION AND TRADING

herewith. It is submitted that the above ground goes to the root of the matter and, hence, may kindly be adjudicated by Your Honours in the interests of justice and equity.

5. For the ease of reference, the above referred Rule 27 is reproduced herein below:

> ***"Respondent may support order on grounds decided against him.***
>
> *27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him."*

6. The assessee relies upon following decisions in respect of maintainability of the enclosed ground under Rule 27 of the ITAT Rules, 1963.

   (a) Peter Vaz v. CIT [436 ITR 616 / 322 CTR 121 (Bom)]
   (b) CIT v. India Cements Ltd. [424 ITR 410 / 312 CTR 168 (Mad)]
   (c) Dahod Sahakari Kharid Vechan Sangh Ltd. v. CIT [282 ITR 321 / 200 CTR 265 (Guj)].

For Divine Infracreation and Trading Pvt. Ltd.

Director

Encl: 1. Acknowledgment of return of income filed on 05.10.2019.
2. Respondent's ground of appeal.

cc - Departmental Representative,
Division Bench,
Indore

8. By means of this application, the assessee/respondent has raised following ground for adjudication:

> *"1. The learned CIT(A) ought to have held that the assessment order passed by the Assessing Officer is illegal and bad in law as the A.O. has failed to issue a notice u/s. 143(2) of the Act pursuant to the return of income filed by the assessee on 05.10.2019 in response to the notice u/s. 148 of the Act dated 08.08.2019 issued by the A.O."*

9. Ld. AR for assessee submitted that in response to the notice dated 08.08.2019 u/s 148 issued by AO for re-opening assessee's case, the assessee filed return of income on 05.10.2019. Thereafter, the AO passed assessment-order dated 09.01.2020 u/s 144 r.w.s. 147 r.w.s. 153(6) without issuing notice statutory notice u/s 143(2). Thus, the assessment-order passed by AO without issuing notice u/s 143(2) falls short of jurisdiction and therefore the same is illegal and must be quashed.

10. So far as the assessee's right to file this application under Rule 27 of Income-tax (Appellate Tribunal) Rules, 1963 is concerned, Ld. AR firstly narrated the provision of Rule 27 reading as under:

> ***"27. The respondent, though may not have appealed, may support the order appealed against on any of the grounds decided against him."***

11. Thereafter, Ld. AR carried us to Page No. 12-13 of impugned order of first-appeal to demonstrate that the assessee raised this very claim before CIT(A) vide Para 35-40 of Written-Submission filed to CIT(A) but the CIT(A) did not give any adjudication qua the claim of assessee. Replying upon ***CIT Vs. India Cements Ltd. (2020) 118 taxmann.com 99 (Madras)***, Ld. AR contended that the non-adjudication of assessee's claim by CIT(A) entitles the assessee to raise this claim before ITAT in terms of Rule 27 as is loudly held by Hon'ble Madras High Court in following words:

> *"9. Before the Tribunal, the assessee contended that the CIT(A) had not gone into the correctness of the reopening under section 147 of the Act, because the CIT(A) allowed the appeal on merits. By referring to Rule 27 of the Appellate*

Tribunal Rules (hereinafter referred to as 'the Rules'), the assessee submitted that they had a right to agitate the issue regarding reopening of the assessment before the Tribunal. In this regard it was submitted that the original assessment was completed under section 143(3) of the Act on 15-2-1999, that subsequently, a notice under section 148 of the Act was issued on 25-2-2003, which was beyond four years from the end of the assessment year, that there was no failure on the part of the assessee to disclose any material facts and that the reopening was not valid in law A reference was placed on the decisions of this court in case of CIT v Elgi Finance Ltd (2006) 155 Taxman 124 / 286 ITR 674 (Mad.) and in the case of CIT v Premier Mills Ltd (2009) 179 Taxman / (2008) 296 ITR 157 (Mad.).

10. The revenue, on the other hand, contended that the said issue was squarely covered in favour of the department in the light of the decision of Hon'ble Supreme Court in the case of Pandian Chemicals Ltd v. CIT (2003) 129 Taxman 539/262 ITR 278.

11. The Tribunal took up for consideration the contentions advanced by the assessee that in terms of Rule 27 of the Rules, they were entitled to agitate the issue regarding the correctness of the reopening of assessment under section 147 of the Act. After referring to Rule 27 of the Rules, it was pointed out that a plain reading of Rule 27 of the Rules would clearly show that even if the respondent had not filed any appeal or cross objection, they could still agitate the points, which were decided against them. Further it was pointed out that if any issue was not adjudicated by the Appellate Authority, then it was deemed to have been decided against the appellant. Following the said principle, the Tribunal held that the issue of reopening, having not been decided by the CIT(A), should be taken as decision against the assessee and that they were entitled to agitate the issue before the Tribunal, even if appeal was filed by them.

12. With the above reasoning, the Tribunal proceeded to decide the validity of the reopening under section 147 of the Act. After taking note of the Proviso to section 147 of the Act, it was pointed out that if the original assessment was completed under section 143(3) of the Act, then such assessment could not be reopened beyond four years unless and until there was a failure on the part of the assessee to disclose any material fact. The Tribunal proceeded to take note of the findings rendered by the CIT(A) on the issue regarding the relief sought for by the assessee under section 80-I of the Act and after extracting the relevant particulars, the Tribunal held that the particulars regarding dividends and short term capital gains were clearly available before the Assessing Officer during the original assessment proceedings and that the Revenue had not brought any material before it, which was not disclosed by the assessee in the original return of income. Thus, the Tribunal concluded that there was no failure on the part of the assessee to disclose any material fact relevant for the reassessment and that the assessment could not have been reopened. Following the decisions in the case of Elgi Finance Ltd and Premier Mills Ltd (supra), the reopening of the assessment was annulled.

13. In our view, the Tribunal need not have proceeded further in the matter because having wholly annulled the reassessment, nothing more remains to be considered. Nevertheless, the Tribunal proceeded to take a decision on merits and affirmed the order passed by the CIT(A).

14. Challenging the order passed by the Tribunal, the Revenue preferred this appeal, which was admitted on 31.3.2009 on the aforementioned substantial questions of law.

15. The substantial questions of law framed can be bunched up together, as they pertain to the interpretation of Rule 27 of the Rules and the power of the Tribunal to decide the issue of validity of reopening of assessment, which was not decided by the CIT(A). If substantial question of law Nos.1 to 3 are to be answered in favour of the Revenue, there may be necessity to consider substantial question of law No. 4. If we take a decision against the Revenue in respect of substantial question of law Nos. 1 to 3, then there would be no necessity for us to decide substantial question of law No.4. With this caveat, we proceed to consider the case before us.

16. We have elaborately heard Mr. Karthik Ranganathan, learned Standing Counsel for the appellant/Revenue and Mr. Vikram Vijayaraghavan learned counsel appearing on behalf of M/s. Subbaraya Aiyar Padmanabhan, learned counsel appearing for the respondent/assessee.

17. It was argued by Mr. Karthik Ranganathan, learned Senior Standing Counsel for the appellant/Revenue that the issue relating to the validity of the reopening of assessment was not adjudicated by the CIT(A) and without filing any appeal against the said order, the assessee was not entitled to agitate the issue before the Tribunal in an appeal filed by the Department. It was further submitted that the Tribunal travelled beyond the scope of Section 254 of the Act by adjudicating the issue relating to the validity of reopening of assessment, when the CIT(A) had not decided the said issue on the merits of the matter. It was vehemently contended that the CIT(A) erred in granting relief to the assessee under section 80-I of the Act on sum of Rs. 9.89 crores ignoring the fact that the Assessing Officer pointed out to the CIT(A) that the assessee was not at all entitled to relief under section 80-I of the Act on account of loss in business. Further, it was submitted that the Tribunal ought to have taken note of the fact that the Assessing Officer had given an enhancement proposal to the CIT(A) and it should have been considered and if it was done, the decision allowed under section 80-I of the Act in the reassessment proceedings had to be reversed as being incorrect and against law.

18. To substantiate the stand of the Revenue that the assessee was not entitled to any relief under section 80-I of the Act, the learned Senior Standing Counsel referred to the decisions in the cases of

> *(i) CIT v Seshasayee Paper & Board Ltd (1994) 73 Taxman 80/207 ITR 80 (Mad.)*

(ii) IPCA Laboratory Ltd v. Dy. CIT (2004) 135 Taxman 594/266 ITR 521 (SC)

(iii) CIT v Ravindranathan Nair (2007) 165 Taxman 282/295 ITR 228 (SC)

(iv) Liberty India v. CIT (2009) 183 Taxman 349/317 ITR 218 (SC) and

(v) Reliance Trading Corporation v ITO (2015) 61 Taxman.com 267/376 ITR 53 (Raj) (FB).

19. Mr. Vikram Vijayaraghavan, learned counsel appearing for the appellant-assessee, while seeking to sustain the order passed by the Tribunal with regard to the validity of the reassessment, placed reliance on the decisions in the case of

(i) CIT v. Abdul Rahman Sait (2008) 306 ITR 142 (Mad.)

(ii) Deep Channel Kothari v CIT (1987) 35 Taxman 223 / (1988) 171 ITR 381 (Raj.)

(iii) Dahod Sahakari Kharid Vechan Sangh Ltd v. CIT (2005) 149 Taxman 456 / (2006) 282 ITR 321 (Guj.)

(iv) Tanmac India v Dy. CIT (2017) 78 Taxman.com 155 (Mad.) and

(v) Cit v. Kelvinator of India Ltd (2010) 187 Taxman 312/320 ITR 561 SC.

20. To sustain the finding rendered by the Tribunal on the entitlement of the assessee for relief under section 80-I of the Act, the learned counsel for the respondent/assessee referred to the decision of in the cases of

(i) CIT v. Nima Specific Family Trust (2001) 115 Taxman 106/248 ITR 29 (Bom)

(ii) CIT v TTK Pharma Ltd (TCA No.298 of 2004, dated 23.12.2009) and

(iii) Synco Industries Ltd v Assessing Officer, Income Tax (2008) 168 Taxman 224/299 ITR 444 (SC).

21. As prefaced by us earlier, we first proceed to decide the correctness of the order passed by the Tribunal in permitting the assessee to argue the validity of the reassessment under section 147 of the Act, which issue was not decided by the CIT(A), without filing a separate appeal challenging that portion of the order of the CIT(A) dated 30-12-2004. A decision on this issue will cover substantial question of law Nos. 1 to 3.

22. In the case of Kiran Singh v. Chaman Paswan (AIR 1954 SC 340), the Hon'ble Supreme Court held that it is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity and that its

invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. It was further pointed out that a defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties.

23. This decision was taken note of in the core of Deep Channel Kothai (supra) wherein one of the substantial questions framed, was as to whether, in the proceedings initiated under section 147(a) of the Act, the validity of the notices and proceedings taken in pursuance thereof was raised before the Income-tax Officer (ITO) and the appeal of the assessee was accepted on merits, the Tribunal was legally not right in not allowing the objection as to the jurisdiction of the ITO to initiate the notice and as to the validity of the proceedings taken in pursuance thereof to be raised? While answering the said question, it was pointed out by the Division Bench of the Rajasthan High Court that it was not in dispute that the jurisdiction of the ITO was duly challenged by the assessee before the ITO himself and also in the memorandum of appeals filed before the Appellate Commissioner, who did not touch on the said point nor decided the appeal on merits in favour of the assessee. ***It was held that it would be deemed that the Appellate Commissioner decided the point of jurisdiction against the assessee and the point of jurisdiction was raised before the Tribunal therein referring to Rule 27 of the Rules. It was further pointed out that Rule 27 of the Rules provides that the respondent though he may not have appealed, may support the order appealed against on any of the grounds decided against him. Thus, it was held that the assessee was entitled to support the order of the Appellant Commissioner for not clubbing the said two incomes on the said ground of lack of jurisdiction.*** *The Court noted the decision in the case of CIT v. S. Nelliappan (1967) 66 ITR 722 (SC), wherein it was held that the Tribunal may allow new grounds to be urged before it.*

24. In the decision in the case of Dahod Sahakari Kharid Sangh (supra), wherein one of the substantial question of law framed for consideration was as to whether, the Tribunal was right in law in holding that it was necessary for the assessee to file cross-objection in spite of fully succeeding in appeal and therefore, it could not challenge the finding by the CIT(A), as the assessee being guilty of concealment of income and/or furnishing inaccurate particulars?

25. While considering the said question, the Gujarat High Court held that the Tribunal squarely lost sight of the fact that the assessee had succeeded before the CIT(A), that when the appeal had been allowed and the penalty levied by the Assessing Officer was decided in entirety, there was no occasion for the assessee to feel aggrieved, that it was not necessary for the assessee to prefer an appeal and that the position in law was well settled that a cross-objection, for all intents and purposes, would amount to an appeal and the cross-objector would have the same rights, which an appellant has, before the Tribunal. It was further pointed out that in case a party, having succeeded before CIT(A), opts not to file cross objection even when an appeal has been preferred by the

other party, from that it is not possible to infer that the said party has accepted the order or the part thereof, which was against the respondent.

26. Section 253 of the Act provides for appeal to the Tribunal. Under sub-section (1), an assessee is granted right to file an appeal. Under sub-section (2), the CIT is granted a right to file an appeal by issuing necessary direction to the Assessing Officer. Sub-section (3) prescribes the period of limitation, within which an appeal could be preferred. Section 253(4) of the Act lays down that either the Assessing Officer or the assessee, on receipt of notice that an appeal against the order of CIT(A) has been preferred under Sub-section (1) or sub-section (2) by the other party, may, notwithstanding that no appeal had been filed against such an order or any part thereof, within 30 days of the notice, file a memorandum of cross-objections verified in the prescribed manner and such memorandum shall be disposed of by the Tribunal as if it were an appeal prescribed within the period of limitation prescribed under sub-section (3). Therefore, it transpires that a party has been granted an option or a discretion to file cross-objection.

27. It was pointed out by the Gujarat High Court that the Tribunal in the said case, had drawn the inference, which was not supported by the plain language employed by the said provision, that if the inference drawn by the Tribunal was accepted as a correct proposition, it would render Rule 27 of the Rules redundant and nugatory and it was not possible to interpret the provision in such manner and that the right granted to the respondent by the Rules could not be taken away by the Tribunal by referring to the provisions of section 253(4) of the Act.

28. We respectfully agree with the proposition laid down in the aforementioned two decisions. The language employed in Rule 27 of the Rules is clear and it deals with cases where the respondent may support the order on the grounds decided against him. Rule 27 of the Rules states that though the respondent may not have appealed, he may support the order appealed against on any of the grounds decided against him. As pointed out by us earlier, the CIT(A) has recorded that the validity of the reassessment proceedings was hotly debated before him. However, the CIT(A) proceeded to take up the issue relating to the relief, which the assessee would be entitled to under section 80-I of the Act and proceeded to grant the same on the close of its order and the CIT(A) would state that since the appeal has been allowed on merits under section 80-I of the Act, there is no necessity for him to give a finding on the issue of reopening of assessment under section 147 of the Act.

29. Thus, the CIT(A) did not adjudicate the correctness of the reassessment proceedings, which was challenged by the assessee. It is deemed that the said issue was decided against the assessee and that the assessee was entitled to canvass the said issue before the Tribunal without independently filing an appeal in the light of the Rule 27 of the Rules. Therefore, the Tribunal was right in permitting the assessee

> ***to argue on the issue relating to the validity of the reassessment proceedings."***
>
> ***[Emphasis supplied]***

12. Therefore, Ld. AR prayed that the assessee's application must be allowed. Ld. DR for revenue could not controvert Ld. AR's pleadings and the decision quoted. After consideration, we agree that the assessee's application is permissible in terms of Rule 27 as decided by their Lordship of Hon'ble Madras High Court in ***India Cements Ltd*** (supra). Therefore, we allow assessee's application and proceed to adjudicate the ground raised therein on merit.

13. At first, we re-narrate the facts which are relevant to decide the ground. The AO issued notice dated 08.08.2019 u/s 148 for re-opening assessee's case u/s 147. In response to this notice, the assessee filed return of income on 05.10.2019. Thereafter, the AO passed assessment-order dated 09.01.2020 u/s 144 r.w.s. 147 r.w.s. 153(6) after making addition of Rs. 42,01,80,700/- without issuing notice u/s 143(2) [although the AO issued notices u/s 142(1)]. We may mention here that the factum of non-issuance of notice u/s 143(2) is accepted by Ld. DR by filing AO's letter dated 27.01.2025 wherein the AO has accepted that no notice u/s 143(2) was issued to assessee. Ld. AR drew us to Para 3 of assessment-order wherein the AO has made an adverse observation that in response to notice u/s 148, the assessee did not file return. Ld. AR submitted that this observation by AO is factually incorrect because the assessee in fact filed return on

05.10.2019 although it was a belated return having been filed after expiry of 30 days' time period allowed by AO in the notice u/s 148. Ld. AR then submitted that even if the return filed by assessee was belated, the same cannot be treated as a non-est return; the AO cannot ignore the same; and the AO cannot dispense with the requirement of issuing mandatory notice u/s 143(2) if the AO wanted to make assessment u/s 143(3) or 144. In support of these contentions, Ld. AR relied upon following decisions:

(a) ITO Vs. M/s Shri Krishna Dutta Academy, ITA No. 565, 566 and 568/LKW/2011 order dated 28.05.2013 (ITAT, Lucknow):

"*4. The facts in brief borne out from the orders of the lower authorities are that the assessee derives income from running of school upto intermediate standard and furnished its return of income showing excess income over expenditure at Rs. 20,08,243 in assessment year 2004-05 and claimed exemption under section 10(23C)(vi) of the Act and Nil total income was declared. The assessment was completed at Nil total income.* ***After original assessment, it was noticed that the Institution was not approved under section 10(23C)(vi) of the Act and accordingly on the basis of the reasons recorded under section 147 of the Act, notice under section 148 of the Act was issued and served upon the assessee on 4.3.2010. Accordingly the due date for furnishing of the return of income was 3.4.2010 i.e. within 30 days from the date of service of notice under section 148 of the Act as already specified therein. The assessee furnished the return of income on 13.4.2010 at Nil income after claiming exemption under section 11 of the Act, but it was not treated by the Assessing Officer as return of income in response to notice under section 148 of the Act being return of income not filed within 30 days specified time period provided in the notice under section 148 of the Act. He accordingly treated the return as non-est and denied benefit of exemption under section 11 of the Act.***

5. The assessee preferred an appeal before the ld. CIT(A) with the submission that the return of income furnished by it after the due date as specified in the notice under section 148 of the Act cannot be treated as non-est, as interest under section 234A(3) of the Act can be charged on delayed return. He further placed reliance upon the order of the Luknow Bench of the Tribunal in the case of M/s Preet Leasing Private Limited vs. ACIT. The ld. CIT(A) re-examined the issue in the light of assessee's contention and being convinced with the

explanations of the assessee, he granted exemption under section 11 of the Act after having observed that there was no finding of the Assessing Officer of any violation of the nature specified in the provisions of section 13 of the Act.

6. Against the grant of exemption, the Revenue has preferred appeals before the Tribunal with the submission that since the return was not filed within the time prescribed under section 148 of the Act, the Assessing Officer has rightly treated the return to be non-est and ignored the claim of exemption under section 11 of the Act raised therein. The ld. D.R. further contended that the ld. Commissioner of Income-tax has allowed exemption under section 11 of the Act without affording opportunity to the Assessing Officer to examine the claim under section 11 of the Act independently with reference to section 13 of the Act. The ld. CIT(A) has observed in his order that there is no finding of the Assessing Officer with regard to the violation of the provisions of section 13 of the Act, therefore, the assessee is entitled for exemption under section 11 of the Act. The ld. D.R. submits that when the Assessing Officer has not examined the claim of exemption under section 11 of the Act, there is no question of examination of any violation of any provision of section 13 of the Act. The Assessing Officer has out rightly rejected the claim of the assessee with regard to the exemption claimed under section 11 of the Act after treating the return filed in response to notice under section 148 of the Act as non-est in law. The ld. D.R. further contended that even if the return is treated to be a valid return, the matter may be restored back to the file of the Assessing Officer with a direction to re-examine the claim of exemption under section 11 of the Act in the light of provisions of section 13 of the Act.

7. The ld. counsel for the assessee besides placing heavy reliance upon the orders of the ld. CIT(A) has contended that the Assessing Officer has wrongly treated the return filed in response to notice under section 148 of the Act as non-est only for the reason that it was delayed by few days. The ld. counsel for the assessee further contended that there is no specific provision in the Act which says that if the return is not filed within time prescribed under section 148 of the Act, it is a non-est return in law. He further invited our attention to the provisions of section 234A(3) of the Act with the submission that this section provides that if the return is delayed, interest under this section can be charged. Once interest is charged on the delayed return, the same cannot be called to be a non-est return in law.

8. Having heard the rival submissions and from a careful perusal of the orders of the lower authorities, we find that undisputedly the return was not filed by the assessee within the time prescribed under section 148 of the Act. But for that reason, can the return be called to be non-est in law as held by the Assessing Officer? We have also examined the provisions of section 234A of the Act, according to which if the return is filed late, interest can be charged. Therefore, there is no intention of the Legislature to hold the return to be non-est if it is not filed within the period prescribed in the notice issued under section 148 of the Act, but the ld. CIT(A) while accepting the return granted exemption under section 11 of the Act without verifying the fact whether there is any violation of the provisions of section 13 of

the Act. The right course for the ld. CIT(A) would have been to call for the remand report asking the Assessing Officer to make a proper verification with regard to the claim of exemption under section 11 of the Act, but the ld. CIT(A) instead of doing this exercise has outrightly granted exemption under section 11 of the Act, which is not correct as per law. In the above circumstances, the matter should have been referred to the Assessing Officer to examine the claim of exemption of the assessee in the light of the provisions of section 13 of the Act. We accordingly set aside the orders of the ld. CIT(A) and restore the matter to the file of the Assessing Officer with a direction to re-adjudicate the claim of exemption under section 11 of the Act in the light of the relevant provisions of the Act after affording proper opportunity of being heard to the assessee. Accordingly both the appeals of the Revenue stand allowed for statistical purposes."

(b) CIT Vs. Nagendra Prasad (2023) 156 taxmann.com 19 (High Court of Patna):

"1. The appeal is filed against the order of the Tribunal setting aside an order under section 143(3)/147 of the Income- tax Act, 1961.

2. The assessee had initially moved the High Court relying on the decision of the Hon'ble Supreme Court in Assistant Commissioner of Income-Tax v. Hotel Blue Moon [(2010) 321 ITR 362 (SC)] which writ petition was dismissed refusing invocation of the extraordinary remedy and relegating the assessee to the statutory remedy.

3. The Tribunal found, relying on the decision in Hotel Blue Moon (supra) that the proceedings are liable to be struck down. It was held that the return was filed by the assessee in response to the notice under section 148 ***though delayed*** *and in such circumstance, there should have been a notice issued under section 143(2) as has been held in Hotel Blue Moon (supra).*

4. The only question of law arising in the facts and of the case is whether notice should have been issued under section 143(2) of the Income-tax Act?

5. Admittedly, the notice was issued by the Assessing Off icer under section 148 of the Act on 14.07.2008 requiring the assessee to file a return within thirty days. A return was filed much later on 31-3-2009, after eight and a half months.

6. On identical facts, in M.A. No. 239 of 2011 titled as Chand Bihari Agrawal v. Commissioner of Income Tax, Central, Patna decided on 25-7-2023, this Court considered the issue and held against the revenue.

7. We find that the question of law has to be answered in favour of the assessee and against the revenue. Hotel Blue Moon (supra) governs the issue which has been followed in Chand Bihari Agrawal (supra)."

(c) PCIT Vs. Kamla Devi Sharma, DB Income-tax Appeal No. 197/2018 (Rajasthan High Court):

"1. By way of this appeal, the appellant has assailed the judgment and order of the tribunal whereby tribunal has allowed the appeal of the assessee.

2. Counsel for the appellant has framed following substantial questions of law:-

(i) ***Whether on the facts and circumstances of the case the ITAT was right in quashing the reassessment proceeding u/s 147/144 {mistakenly mentioned 143(3)} for the reason of non-issuance of notice u/s 143(2) before finalizing reassessment whereas the assessee did not file her return of income within the period of 30 days stipulated by notice issued u/s 148?***

(ii) Whether on the facts and in circumstances of the case the ITAT was right in quashing the reassessment proceeding u/s 147/144 {mistakenly mentioned 143(3)} for the reason of non-issuance of notice u/s 143(2) wherein the assessee filed her return of income on 22.4.2014 which is 10 months 17 days beyond 5.7.2013 i.e. after expiry of 30 days' time from service of notice on 6.6.2013 stipulated in the notice issued u/s 148?

(iii) Whether on the facts and in circumstances of the case the AO was under statutory obligation to issue notice u/s 143(2) before completing the assessment u/s 144 wherein the assessee filed her return of income 10 months 17 days beyond the 30 days' time allowed by notice issued u/s 148 which expired on 5.7.2013 as the notice was served upon on 6.6.2013?

(iv) Whether on the facts and circumstances of the case the ITAT was right in quashing the reassessment proceeding u/s 147/144 {mistakenly mentioned 143(3)} relying upon the decision of Delhi High Court in the case of PCIT vs. Jai Shiv Shankar Traders Pvt. Ltd. 383 ITR 448 whereas the facts of the case are distinguishable that the return of income in the present case was not filled within the time allowed in the notice u/s 148 and the case was completed u/s 144?

(v) Whether on the facts and circumstances of the case mentioning of completion of order "u/s 147/143(3) instead of '144' in the order is not a mistake curable u/s 292BB when the case was completed u/s 144?

3. The facts of the case are that the assessee is an individual. The assessee had purchased the land on 30.4.2008 for a consideration of Rs.1,01,20,000/- and paid in cash. Notice u/s 148 of the Income Tax Act, 1961 (in short the Act) was issued on 31.5.2013. Notice was served on 6.6.2013 through notice

server. Return of income was filed on 22.4.2014. Notice u/s 142(1) of the Act was issued alongwith questionnaire on 30.4.2014. The assessment was made on 5.3.2015 at Rs.1,01,20,000/-, that is the amount paid for purchase of the agricultural land, treated as unexplained investment. The ld. CIT(A) has confirmed the action of the Assessing Officer.

4. While considering the matter, the tribunal has observed as under:-

> *"5. A written submission was also made by the ld AR of the assessee on the issue of non-issue of notice U/s 143(2) of the Act prior to finalization of the assessment u/s 143(3) of the Act. The submissions of the ld AR on this issue is reproduced hereunder:*
>
> *In these grounds of appeal, assessee has challenged the action of Ld. C1T(A) in confirming the action of ld. AO in completing assessment without issuing notice u/s 143(2), which is sine qua non once assessee furnished return of income. Since all these grounds of appeal are inter related, thus have been dealt with together for the sake of convenience. Brief facts as stated above are that the case of assessee was reopened by issue of the notice u/s 148 of the Act and thereafter the assessment was completed without issue of notice u/s 143(2) though the assessee had filed the return of income in response to such notice u/s 148. The chronology of the events are as under:*
>
> *-on 31.05.2013 notice u/s 148 was issued and served upon assessee on 06.06.2013;*
>
> *-on 03.04.2014, notice u/s 142(1) was issued fixing date of hearing on 16.04.2014;*
>
> *-on 22.04.2014, Return of Income was filed by assessee;*
>
> *-on 30.04.2014, further Query letter u/s 142(1) as well as show cause notice u/s 271(1)(b) was issued;*
>
> *-notices u/s 142(1) were issued on 17.11.2014 and 06.02.2015 and the proceedings were attended by the A/R of the assessee from time to time*
>
> *-Assessment order was passed u/s 143(3)/ 147 of the Act by Ld. AO vide order dated 05.03.2015.*
>
> *From the perusal of the summary of chronological events it is clearly evident that notice u/s 143(2) was never issued by ld.AO before completion of the assessment and this fact has categorically been admitted by ld.AO in remand report submitted before the ld. CIT(A) (APB 15-18).*
>
> *With this background of chronological events, kind attention of Hon'ble bench is invited to the provisions of section 148 of the Act, which reads as under:*

148. [(1)] Before making the assessment, reassessment or re-computation under section (4 of 13) [ITA-197/2018]

147. the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, [* *] as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 :]*

Provided further that in a case--

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub- section (2) of section 143, but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in subsection (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.] On perusal of above, it is evident that section 148 specifically provides that all the provisions of Act shall be applicable in respect of return of income u/s 148 as if the same was return furnished u/s 139. Going further, first and second provisos to section 148, provides the time limit for issuance of notice u/s 143(2) on the basis of date of filing return of income. Thus, it is not discretionary rather mandatory for an assessing officer to issue notice u/s 143(2) once the return of income is filed by assessee. The only relaxation in the case of re assessment is that notice u/s 143(2) can be issued at any time before the expiry of time limit for completing assessment/ re assessment and the same would be deemed as valid notice. However, as stated above, no notice u/s 143(2) was ever issued in the case of the assessee even though the return of income was filed by the assessee. Thus the completion of the re- assessment proceedings and completion of the assessment is without any valid jurisdiction and therefore the order passed is void ab initio. This contention was also raised (5 of 13) [ITA-197/2018] before ld.CIT(A) who sought remand report from ld. AO in this regard. The ld. AO in remand report dated 12/02/2016 at page 2 in last para observed that: (APB -17)

"During the assessment proceedings in this case for the assessment year under consideration, the assessee or her authorized representative did not oppose that the notice u/s 143(2) of the income Tax Act, 1961 was not issued after filing return of

income in response to the notice u/s 148 of the Income Tax Act, 1961. Therefore, under the provisions of Income Tax Act, 1961, the notice u/s 148 can't be issued.....

Ld. CIT(A) confirmed the validity of assessment order so passed without issue of notice u/s 143(2) by observing that assessee had attended the hearing on several occasions and no objection was raised during the proceedings before the ld. AO, thus non issuance of notice u/s 143(2) of the Act would not make assessment order invalid. Ld. CIT(A) further held that such mistake of ld. AO of non issue of notice u/s 143(2) is curable u/s 292BB of the Act.

At this juncture, provisions of section 292BB of the Act are reproduced herewith for the sake of convenience:

292BB. Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was--

(a) not served upon him; or (b) not served upon him in time; or

(c) served upon him in an improper manner:

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment.]

In this regard, it is submitted that section 292BB provides that a notice shall be deemed to be served in a situation that assessee has cooperated/ attended / participated in assessment/ re assessment proceedings and no objection regarding non receipt of notice was filed during assessment stage. It is worth noticing here that section nowhere provides that "a notice required to be issued, shall be (6 of 13) [ITA-197/2018] deemed to be issued". Thus, it is evident that deeming provisions of section 292BB are with respect to notices issued but not served/ not served in time / not served in proper manner. It does not cure the defect so far as notice has not been issued at all.

In this regard, it is further submitted that there are catena of judicial pronouncements, which hold that Omission to issue notice u/s 143(2), is not a procedural irregularity and the same is not curable. Further, ld. AO in the remand report dated 12/02/2016 (APB 15-18) has stated that return of income has been filed belatedly thus he not required to issue such notice mandatorily. Your honours would appreciate that it has nowhere been provided in the Act that AO 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. Thus, so far as return of income has been filed, AO ought to have issued notice u/s 143(2), which has not been done in the instant case.

In this regard, reliance is placed on: Assistant Commissioner of Income Tax v. Hotel Blue Moon 321 ITR 362 (SC) (Case laws Paper book pages 93-99)

Search and Seizure -- Undisclosed Income Detected - Block Assessment -- Issue of Notice u/s 143(2) within prescribed time - Mandatory - Income Tax Act, 1961, ss. 132, 143(2), 158BA, 158BC, 158BH - CBDT Circular No. 717 Dated 14.08.1995.

Though in the above case, assessment was completed by ld.AO u/s 153A, without issuing notice u/s 143(2), the same is applicable to assessments completed under Act, irrespective of the fact under which section assessment is to be completed as legislature has provided for issuance of such notice before completion of assessment under whatever section it may be. CIT v. Salarpur Cold Storage (P.) Ltd. [2014] 50 taxmann.com 105 (All)

"10. Section 292BB of the Act was inserted by the Finance Act, 2008 with effect from April 1, 2008. Section 292BB of the Act provides a deeming fiction. The deeming fiction is to the effect that once the assessee has appeared in any proceeding or cooperated in any enquiry relating to an assessment or reassessment, it shall be deemed that any notice under the provisions of the Act, which is required to be (7 of 13) [ITA-197/2018] served on the assessee, has been duly served upon him in time in accordance with the provisions of the Act. The assessee is precluded from taking any objection in any proceeding or enquiry that the notice was (i) not served upon him; or (ii) not served upon him in time ; or (iii) served upon him in an improper manner. In other words, once the deeming fiction comes into operation, the assessee is precluded from raising a challenge about the service of a notice, service within time or service in an improper manner. The proviso to section 292BB of the Act, however, carves out an exception to the effect that the section shall not apply where the assessee has raised an objection before the completion of the assessment or reassessment. Section 292BB of the Act cannot obviate the requirement of complying with a jurisdictional condition. For the Assessing Officer to make an order of assessment under section 143(3) of the Act, it is necessary to issue a notice under section 143(2) of the Act and in the absence of a notice under section 143(2) of the Act, the assumption of jurisdiction itself would be invalid.

In the same decision in CIT v. Salarpur Cold Storage (P.) Ltd. (supra), the Allahabad High Court noticed that the decision of the Supreme Court in Asst. CIT v. Hotel Blue Moon (supra) where in relation to block assessment, the Supreme Court held that the requirement to issue notice under section 143(2) was mandatory. It was not "a

procedural irregularity and the same is not curable and, therefore, the requirement of notice under section 143(2) cannot be dispensed with".

[2017] 390 ITR 167 (Ker) Travancore Diagnostics (P) Ltd. Vs. ACIT (Case laws Paper book pages 58-61)

Reassessment- Notice- Validity- Reassessment can be made within time for regular assessment- Reassessment under section 147 read with section 143(3)- Condition precedent- Notice u/s 143(2) Omission to issue notice under section 143(2)- Deject not curable - Section 292BB not applicable- Reassessment not valid- Income Tax Act, 1961, ss. 143,147,292BB 336 ITR 678 - CIT V/s Rajeev Sharma (Allahabad) (Case laws Paper book pages 62-

68) Reassessment - Procedure - Return in response to Notice u/s 148 - Assessing Officer (8 of 13) [ITA-197/2018] must apply his mind and issue Notice u/s 143(2) - Procedure must be followed strictly

-- Income Tax Act, 1961, ss. 143, 148. It is further submitted that even if the return of income was filed after the issue of notice u/s 142(1), the Hon'ble Delhi court in the case of PCIT-08 vs. Shri Jai Shiv Shankar traders Pvt. Ltd. reported in 383 ITR 448 - (Delhi) (Case laws Paper book pages 29-31) 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 30.03.2010, in response to which no return of income was filed. On 01.10.2010, Ld.AO issued notice u/s 143(2), which was duly served. Subsequently notices u/s 142(1) were also issued on certain occasions. Authorized representative of 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 AO 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), thus is squarely covered by the decision of Hon'ble Delhi high court, as stated above.

Further reliance is placed on the following:

323 ITR 249 - DIT V/s Society for Worldwide Inter Bank Financial Telecommunications (Delhi) (Case laws Paper book pages 49-50) Assessment - Enquiry - Notice - Only upon Examination of Return - Notice u/s 143(2) served upon assessee before filing of Return -

Not valid - Assessment completed on basis of Notice invalid - Income Tax Act, 1961, s. 143(2) 90 DTR 289 - Saptha Giri Finance & Investments V/s ITO (Madras) Reassessment -- Validity - Absence of notice u/s 143(2) - In completing the assessment u/s 148, compliance of the procedure laid down under ss. 142 and 143(2) is mandatory

- Once the admitted fact that beyond notice u/s 142(1), there was no notice issued u/s 143(2) and that admittedly the assessee had requested the officer to accept the original return as a return filed in response to s. 148, there was total failure on the part of the Revenue from complying with the procedure (9 of 13) [ITA-197/2018] laid down u/s 143(2) which is mandatory -- In the absence of notice u/s 143(2), reassessment could not be held to be validly made.

The facts of that case were that a notice under section 148 of the Act was issued to the assessee seeking to reopen the assessment for the assessment year 2000-01. However, the assessee did not file a return and therefore a notice was issued to it under section 142(1) of the Act. Pursuant thereto, the assessee appeared before the Assessing Officer and stated that the original return filed should be treated as a return filed in response to the notice under section 148 of the Act. The High Court observed that if thereafter, the Assessing Officer found that there were problems with the return which required explanation by the assessee then the Assessing Officer ought to have followed up with a notice under section 143(2) of the Act. It was observed that:

"Merely because the matter was discussed with the assessee and the signature is affixed, it does not mean the rest of the procedure of notice under section 143(3) of the Act was complied with or that on placing the objection the assessee had waived the notice for further processing of the reassessment proceedings. The fact that on the notice issued under section 143(2) of the Act, the assessee had placed its objection and reiterated its earlier return filed as one filed in response to the notice issued under section 148 of the Act and the Officer had also noted that the same would be considered for completing of assessment, would show that the Assessing Officer has the duty of issuing the notice under section 143(3) to lead on to the passing of the assessment. In the circumstances, with no notice issued under section 143(3) and there being no waiver, there is no justifiable ground to accept the view of the Tribunal that there was a waiver of right of notice to be issued under section 143(2) of the Act."

Recently Jaipur bench of ITAT in the case of Cameron (Singapore) Pte Ltd Vs. ADIT in ITA No. 2/JP/14 vide orders dt. 27/7/2017 held that where notice u/s 143(2) is not served upon the assessee within the stipulated time period, the

consequent order passed cannot be sustained. In that case though the notice u/s 143(2) was issued but the same was not served upon the assessee within the (10 of 13) [ITA-197/2018] stipulated time period however, in our case the notice u/s 143(2) was never served upon the assessee.

The Hon'ble ITAT Delhi bench in the case of DR. S.B. KALIDHAR Vs. ITO in ITA No. 1082/Del/2016 dated 27.11.2017 has given a finding in favour of the assessee, by placing reliance on the decision of the Hon'ble ITAT, SMC-2, Delhi Bench dated 16.10.2015 passed in ITA Nos. 4171- 4175/Del/2015 ((AY 2003-04) in the case of Ms. Meenakshi Aggarwal vs. ITO & Ors(Case laws paper book pages 7-9) in which reliance was placed on the decision of the Hon'ble ITAT, 'C' Bench, Bangalore dated 10.10.2014 in the case of Shri GN Mohan Raju vs. ITO passed in ITA No. 242 & 243(Bang)2013, wherein it was held as under:

"7. This brings us to the crux of the issue i.e. whether notices under section 143(2) is mandatory in a reopened procedure and whether notices 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 the 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 applicable 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 AO to treat the return which was already subject to a processing u/s 143(1) of (11 of 13) [ITA-197/2018] 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 AO 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 returns as one filed pursuant to the notice u/s 148 of the IT Act. In the former two scenarios, AO 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 AO chose to accept assessee's request, he can indeed make an assessment under section 143(3). In the case before us, assessments were completed under section 143(3) read with section 147. Or in other words AO 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 05- 10-2010. Any issue of notice prior to that date cannot be treated as a notice on a return jiled 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 assessments were 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.AO 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)/ 147 deserves to be Quashed.

6. On the other hand, the ld DR has relied on the orders of the authorities below and pleaded that the order of the ld. CIT(A) may be sustained.

7. The Bench have heard both the sides on this issue and perused the material available on the record. The Hon'ble Delhi High Court in the case of Pr.CIT Vs Jai Shiv Shankar Traders Pvt. Ltd. 383 ITR 0448 (Delhi), in the similar circumstances, has held as under:

"No notice under Section 143(2) of the Act was issued to the Assessee after 16th December 2010, the date on which the Assessee informed the AO that the return originally filed should be treated as the return filed pursuant to the notice under Section 148 of the Act. (Para 12)

The Madras High Court held likewise in Sapthagiri Finance & Investments v. ITO (2013) 90 DTR 289 (Mad). The facts of that case were that a notice under Section 148 of the Act was issued to the Assessee seeking to reopen the assessment for AY 2000-01.However, the Assessee did not file a return and

therefore a notice was issued to it under Section 142 (1) of the Act. Pursuant thereto, the Assessee appeared before the AO and stated that the original return filed should be treated as a return filed in response to the notice under Section 148 of the Act. The High Court observed that if thereafter, the AO found that there were problems with the return which required explanation by the Assessee then the AO ought to have followed up with a notice under Section 143(2) of the Act. (Para 17)

As already further noticed, the legal position regarding Section 292BB has already been made explicit in the aforementioned decisions of the Allahabad High Court. That provision would apply insofar as failure of "service" of notice was concerned and not with regard to failure to "issue" notice. In other words, the failure of the AO, in re-assessment proceedings, to issue notice under Section 143(2) of the Act, prior to finalising the re- assessment order, cannot be condoned by referring to Section 292BB of the Act. (Para 18)

The resultant position was that as far as the present case was concerned the failure by the AO to issue a notice to the Assessee under Section 143(2) of the Act subsequent to 16th December 2010 when the Assessee made a statement before the AO to the effect that the original return filed should be treated as a return pursuant to a notice under Section 148 of the Act, was fatal to the order of re-assessment. (Para 19) Consequently, there (13 of 13) [ITA-197/2018] was no legal infirmity in the impugned order of the ITAT. No substantial question of law arises. The appeal was dismissed." (Para 20) Thus, the facts of the assessee's case are similar to the facts of the case involved in the decision of the Hon'ble Delhi High Court wherein it has been categorically held that the issue of notice U/s 143(2) in reassessment proceedings, prior to finalizing re-assessment order, cannot be condoned by referring to Section 292BB and is fatal to the order of re-assessment. Respectfully following the same, we hereby set aside the order of the to 4 of the assessee's appeal.

8. Since we have quashed the reassessment proceedings, therefore, there is no need to adjudicate the issues raised in Grounds No. 5 to 9 of the appeal".

5. In our considered opinion, the tribunal is bound by the decision of Delhi High Court in the case of Pr. CIT vs. Jai Shiv Shankar Traders Pvt. Ltd. reported in 383 ITR 448 (Delhi) and has rightly followed the same, which is not challenged.

6. In that view of the matter, we are in complete agreement with the view taken by the tribunal. Hence, no substantial question of law arises.

7. The appeal stands dismissed."

14. Ld. DR for revenue contended that the assessee filed return belatedly after expiry of the time specified by AO in the notice u/s 148 and therefore the AO is justified in framing assessment u/s 144 without issuing notice u/s 143(2). However, the contention of assessee that even in case of belated filing of return after expiry of time limited given in notice u/s 148, the return filed by assessee cannot be treated as non-est and that the AO was duty bound to the issue notice u/s 143(2), is clearly supported by abovecited decisions relied by Ld. AR. There is no decision cited from revenue's side to contradict these decisions. Respectfully following the view taken in the decisions quoted by Ld. AR, we are inclined to accept that the assessment-order framed by AO in present case without giving notice u/s 143(2) to assessee is illegal. We accordingly quash the assessment-order made by AO. The assessee's ground is allowed.

15. Resultantly, the revenue's appeal is dismissed and at the same ground raised by assessee in application under Rule 27 is allowed.

Order pronounced in open court / by putting on notice board

as per Rule 34 of ITAT Rules, 1963 on 28/02/2025

Sd/- Sd/-

(UDAYAN DAS GUPTA) (B.M. BIYANI)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 28/02/2025
Dev/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore