IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 180/CTK/2018
Assessment Year : 2008-2009

Birabar Jena, Plot No.678, Ankita Villa, Malipada near Sum Hospital, Bhubaneswar.	Vs.	ITO, Ward 3(1), Bhubaneswar.
PAN/GIR No.AESPJ 5839 C		
(Appellant)	..	(**Respondent**)

Assessee by : None (written submission)
Revenue by : Shri Subhendu Datta, DR

Date of Hearing : 04/09/ 2018
Date of Pronouncement : 07 /09/ 2018

O R D E R

Per N.S.Saini, AM

This is an appeal filed by the assessee against the order of the CIT(A)-2, Bhubaneswar dated 22.9.2017 for the assessment year 2008-09.

2. The appeal filed by the assessee is barred by limitation by 132 days. The assessee filed a writ petition before the Hon'ble Orissa High Court to condone the delay in filing the appeal before the Tribunal. Accordingly, the Hon'ble High Court by disposing the writ petition on 11.5.2018 directed the assessee to file appeal within 15 days from the date of issue of the order. As per the said

direction of Hon'ble High Court, the assessee has filed the appeal before the Tribunal on 25.5.2018, which is within the time limit. We, therefore, condone the delay of 132 days in filing the appeal before the Tribunal and admit the appeal for hearing.

3. The assessee has raised the following grounds of appeal:

> "1. For that, the assessment order passed by the Ld. A.O. is illegal, arbitrary and without jurisdiction
> 2. For that, the Ld. AO is erred in making of assessment"! without issuance of notice U/s.148 of the I.T. Act in clear/ violation of natural justice leads to quashing order of assessment.
> 3. For that, the Ld. AO is erred in not following due procedure of law for making an assessment U/s.147 of the IT Act in clear violation of Sec-148(l), Sec-148 need with Sec.282(l) and Sec-153(2] as well as order-Ill Rule-6 CPC 1908.
> 4. For that, the Learned AO without invoking Sec. 131 or U/s. 133 [a] of the I T Act has not allowed development expenses and interest on borrowed capital leads to arbitrary exercise of power thereby order of assessment ought to be set aside.
> 5. For that any other grounds incidental to the grounds of this case may kindly be permitted to urge at the time of hearing of the case.
> 6 For that, any other evidences incidental to the grounds of this case may kindly be permitted to adduce at the time of hearing of the case."

4. The Assessing Officer observed that the assessee was a doctor in postal department and was posted at Kota, in Rajasthan. He had a house property at Kota. The property was sold by him for Rs 22,00,000/- on 19.03.2008 which was valued by the stamp duty authorities at Rs 22,08,844/-. This information was received by the assessing officer from Sub Registrar at Kota. The assessing officer found that the assessee has not filed return of income for

A.Y. 2008-09 and therefore, he had reason to believe that income chargeable to tax of Rs 22,08,844/-/- has escaped assessment. Therefore, the Assessing Officer issued notice u/s.148 of the Act and completed the assessment u/s.147/144 of the Act on 29.3.2016 computing the assessed income at Rs.8,34,810/- raising a demand of Rs.4,40,120/- on the assessee.

5. On appeal before the CIT(A), the assessee questioned the jurisdiction of the Assessing officer. Hence, the CIT (A) called for remand report from the Assessing Officer vide his letter dated 16.08.2017. The Assessing Officer has submitted his remand report vide his letter dated 4.9.2017. The relevant portion of the remand report is as below.-

> ' *The notice u/s. 148 was issued to the assessee on 30.3.2015 after taking necessary approval but the proof of serving the notice is not mentioned in the file. However, as per record and page number mentioned in each paper in the file there is an envelope with an AD in which it is mentioned notice U/s. 148 and addressed to the assessee. Notice u/s. 142(1) was issued on 27.1.2016 and served on the assessee and the assessee has given it reply to the assessing officer on 25.02.2016."*

6. The remand report was forwarded to the assessee for rejoinder. The assessee has filed the rejoinder on 20.9.2017. The relevant portion is as below:-

> " *That, as mentioned in my letter dated 28.08.2017 addressed to the Ld AO Vide para-4, the assessment proceedings are illegal and void as held by Hon'ble Supreme Court in the case ofY. Narayan Chetty V.ITO (1995) 35 ITR*

388 (SC) CIT v. Thayaballi Mulla Jevaji Kaposi (1967) 66 ITR 147 (SC) CIT Vs. Kurban Hussain Ibrahim Ji Mithiberwala (1971) 82 ITR 821 (SC) and CITvs Major Tikka Khushwant Singh (1995) 212 ITR 650 (Sc). But the Ld AO did not mention anything in this regard. Hence, the 147 proceedings is void. "

7. The CIT(A) confirmed the action of the Assessing Officer by observing as under:

" I have carefully examined the assessment order, remand report and submissions of the appellant. I find that the appellant had sold the property in Kota, but, had not filed the return of income declaring capital gain. The assessing officer came to know the instant the sale of property by the information received from Sub Registrar, Kota. The assessing officer issued the notice u/s. 148 of I.T Act, 1961, on the last known address of the appellant, being 10, Binayak Complex, Dadabai Extention, Kota. This notice was returned by postal department with comment 'left'. Thereafter, the assessing officer issued notice u/s. 142(1) at his Odisha address being Plot No 678, Malipada, Near Sum Hospital, Bhubaneswar, Odisha. In response to this notice, the appellant wrote letter dated 25.02.2016, to transfer his case to the Income Tax Officer, Ward -1(1), Bhubaneswar. This letter was received by the Income Tax Officer, Ward-1 2) Kota on 29.02.2016. It is seen that the assessing officer could not have transferred the proceed to the Income Tax Officer, .Ward-1(1), Bhubaneswar as time barring date in this a was 31.03.2016. Moreover, the appellant ought to have made request to : Commissioner of Income Tax, having jurisdiction over the Income Tax Officer, Wai 1(2), Kota, u/s. 127 of I. T Act, 1961, for transfer of his case to the Income Tax Office Ward-1(1), Bhubaneswar. The appellant has not filed any evidence in this regard, to such an application was made by him. The appellant had not informed about the change of address, to the Income Tax Officer, Ward-1(2), Kota. Further, according to the provisions of 292BB of IT Act, 1961, the appellant is precluded for making objection to reassessment proceeding, as he responded to the assessing officer's notice u/s. 142 of IT Act, 1961. The decisions relied upon by the appellant are of the period before 01.04.2008 when section 292 BB of IT

Act, 1961 was in operation. Considering these aspects, the order u/s. 147/144 of IT Act, 1961 dated 29.03.2016 is held as valid."

8. Before us, ld A.R. of the assessee has filed written submission, which reads as under:"

1. That on 31/01/2007, the Appellant while working as Chief Medical Officer, P&T Dispensary, Kota, Rajasthan superannuated from Government service on reaching the age of retirement and, after retirement he has been residing at Flat No. 202, Lomani Villa Apartment, At Malipada, Bhubaneswar, Dist.Khurda.

2. That while working at Kota, Rajsthan, he had purchased a core house at the cost of Rs. 13, 74 073/- out of which by availing loan from State Bank of Bikaner and Jaipur, at Kota of Rs. 12,00, 000/-; for which an amount of Rs. 3, 29, 940/- was paid by the Appellant to the Bank towards interest. On 19/03/2008, he sold the property at Rs. 22, 00,000/- which was valued by the stamp duty authorities at Kota at Rs. 22, 08, 844/-.

3. That after retirement he had shifted to Bhubaneswar/Odisha. Therefore, by making application dated 25/02/2016, he has passionately prayed the Assessing Officer to transfer his case to the Income Tax Officer, Ward 1(1), Bhubaneswar which was received by the Assessing Officer on 29/02/2016. But for the reasons best known, the Assessing Officer, neither transferred the case to the ITO Ward 1(1), Bhubaneswar nor made any communication thereon to the Appellant, in compliance with the principles of natural justice.

4. That on 27/01/2016 notice u/s.142 (1) of the I.T. Act, 1961 was issued to the Appellant. But without examining service of notice issued U/s 148 of the I.T. Act and without taking any action on the application submitted by the Appellant for transfer of the records to Bhubaneswar, the Assessing Officer passed the order U/s.147/144 of the I.T.Act, on 29/03/2016 for AY 2008-2009 *ex parte* computing the assessed income of Rs. 8, 34, 810/- thereby demanding tax of Rs. 4, 40, 120/-.

5. That after coming to know the order of assessment, the appellant filed appeal before the CIT (A), Kota which was, on request, transferred to CIT (A)-2, BBSR and numbered as 0299/2016-17 in which by filing the documents/materials the Appellant has substantiated that order of the Assessing Officer was without competency and jurisdiction for the same being

passed in gross violation of the statutory and mandatory provisions of the I.T. Act and the principles of natural justice and the order of the assessment amounts reason to suspicion rather the reason to believe.

6. That the CIT (A)-2, BBSR without considering as to whether notice u/s.148 of the I.T. Act, 1961 was really served on the Appellant, within the period of time barred, giving adequate opportunity to the Appellant, in compliance with the basic principle of natural justice as per sec. 148 (1) of the I.T. Act, the CIT (A)-2,BBSR confirmed the order of assessment vide order dated 22/09/2017.

7. That 30/03/2015 was the last day o issuance of notice under section 148 of the I.T. Act, 1961 for the A.Y. 2008-2009. The Appellant specifically raised the ques ion of non receipt of the notice alleged to have been issued U/s. 148 of the I.T. Act, 1961 within the specified time period provided under the Act before the Learned Commissioner of Income Tax (Appeals) 2, BBSR. This pertinent question was set at rest by the Commissioner of Income Tax (Appeals) 2, BBSR on the basis of the report submitted by the Assessing Officer on remand that "the notice u/s. 148 was issued to the assessee on 30/03/2015 after taking necessary approval but the proof of serving the notice is not mentioned in the file. However, as per record and page number mentioned in each paper in the file **there is an envelope with an AD in which it is mentioned notice U/s. 148 and addressed to the assessee** In other words, it was clearly established that the notice was returned unserved otherwise; the envelope and AD could not be made available in the file. But the Commissioner of Income Tax (Appeals) 2, BBSR without ascertaining the mode of service viz. whether registered post or speed post and if it is so when it was issued upheld the order passed by the AO which is per se illegal and is not sustainable in the eyes of law.

8. That from the order and the facts stated above, it is proved that the notice u/s. 148 of the I.T. Act, 1961 was never served on the Appellant within the stipulated period provided in the Act in compliance with the mandatory provision under section 148(1) of the I.T. Act, 1961. It is also emphatically submitted that the notice under section 148 of the I.T. Act, 1961 was never issued on 30/03/2015 although approval was taken for issuance of the same because had it been issued on the same date the authority concerned would not have hesitated to provide the registration no and date along with the report. The order of assessing officer is conspicuously silent on this particular issue. Thus, the order of the AO is not sustainable in the eyes of law.

9. That notice to an Assessee under Section 148 and 142 (1) of the Act is different with each other when notice U/s. 148 has not served on the appellant issuance of notice U/s. 142 of the Act is redundant. Service of notice on the Assessee strictly in terms of Section 148 read with Section 282 (1) of the Act is a jurisdictional requirement. Section 153 [2] of the Act made it clear that **without such service of notice** the AO could not proceed to make the re-assessment. The onus was on the Revenue to show that service of notice had been effected on the Assessee. The failure to serve such notice would lead to the inevitable result of invalidating the assessment order.

10. That Section 148 of the Act is a jurisdictional requirement. The relevant portion of Section 148 (1) provides that "148. Issue of notice where income has escaped assessment - (1) Before making the assessment, reassessment or recomputation under Section 147, the Income-tax Officer **shall serve** on the Assessee a notice containing all or any of the requirements which may be included in a notice under subsection (2) of Section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a no ice issued under that sub-section." The Hon'ble Apex Court in very many cases have explained that there was a distinct shift in the scheme of the provisions of the 1961 Act in comparison with the corresponding provision i.e. Section 34 under the 1922 Act under which the mandatory requirement was that both the issuance and service of notice had to be completed within the prescribed period. Consequently, the service of notice within the limitation period was the foundation of jurisdiction under he 1922 Act. In *Y. Narayana Chetty v. Income Tax Officer, Nellore* ***[1959] 35 ITR 388 (SC)*** the Supreme Court observed in the context of Section 34 of the 1922 Act,: "The notice prescribed by section 34 of the Income tax Act for the purpose of initiating reassessment proceedings is not a mere procedural requirement; the service of the prescribed notice on the assessee is a condition precedent to the validity of any reassessment made under section 34. If no notice is issued or if the notice issued is shown to be invalid then the proceedings taken by the Income- tax Officer without a notice or in pursuance of an invalid notice would be illegal and void."

11. That the Hon'ble Supreme Court explained that "the mandate of Section 148 (1) is that reassessment shall not be made until **there has been service."** However, the said decision does state that jurisdiction becomes vested in the AO to proceed with the assessment once notice is issued within a period of limitation. It also emphasized that no reassessment shall be made "until there has been service." The legal position therefore, even under the 1961 Act, is that service of notice under Section 148 is a

jurisdictional requirement for completing the re-assessment. This has been emphasized in several other decisions of the High Courts as well.

12. That relying on the decision in ***N. Narayana Chetty, 56 ITR 250 (Mys)*** the Hon'ble High Court observed that "There is no doubt that a notice prescribed under section 148 of the Act for initiating reassessment proceedings is not a mere procedural requirement; the **service of the prescribed notice** on the assessee is a condition precedent to the validity of any reassessment made under section 147. If no notice is issued or if the notice issued is shown to be invalid, then the proceedings taken by the Income tax Officer without a notice or in pursuance of an invalid notice would be illegal and void."

15. That the learned CIT [A] upheld the order of the learned Assessing Officer by applying the provision under section 292 BB of the I.T. Act which came into effect from 1.4.2008 on the pretext that as the assessment was after introduction of section 292 BB of the IT Act and notice issued on 30.3.2016 U/s.148 of the Act, notwithstanding the period of assessment [2008-2009], service of notice U/s 148 the order of assessment is valid. In this regard, it is respectfully submitted that the learned CIT (A) is erred in law to the effect that the ground so implanted to make an order which is void ab initio from the beginning is against the sound principle of law laid down in the case of **Commissioner of Income Tax (Central) I v Chetan Gupta** by the Hon'ble High Court of Delhi dated 15.9.2015 in ITA 72 of 2014 holding that the provision inserted under section 292 BB of the I.T. Act is prospective in nature because the assessment in question relates to the period prior to coming into force the provision under section 292 BB of the I.T. Act. Hence the order of the CIT (A), BBSR is not sustainable in the eyes of law.

In view of the above the orders of the Learned AO and CIT (A) are liable to be quashed."

9. Ld D.R. relied on the order of the CIT(A) and filed during the course of hearing xerox copy of the envelope and the postal receipt evidencing the fact that notice u/s 148 was returned unserved to the Assessing Officer with the remark "Left".

10. After considering the rival submissions and materials available on record, we find that it is not in dispute that notice u/s.148 of the Act was not served on the assessee and hence no jurisdiction was assumed by the Assessing Officer for passing the reassessment order u/s. 147 r.w.s 143(3) of the Act. Further, the provisions of section 292BB does not apply in the instant case because in pursuance to 148 proceedings, the assessee never appeared before the Assessing Officer nor filed any return of income. In the facts of the case, it cannot be held that the assessee has co-operated with the Assessing Officer in the proceedings initiated u/s 148 of the Act. In fact, the assessment was made u/s.144 r.w.s. 147 of the Act. Thus, Section 292BB is found not to be applicable in the instant case. Therefore, the reassessment order passed is without any jurisdiction and hence, bad in law.

11. Before parting, we would like to state that Hon'ble Chhattishgarh High Court in the case Ardent Steel Limited vs ACIT, Writ Petition (T) No.168 of 2016 Order dated 4-5-2018 has held as under:

> 19. "" Section 148(1) of the IT Act provides for issuance of notice when income has escaped assessment and service of notice. Section 149 provides time limit for notice. Notice

must be issued within the limitation period prescribed in Section 149(1), however, service of notice within the limitation period is not a prerequisite for conferment of jurisdiction on the assessing officer. A clear distinction has been made out between 'issue of notice' and 'service of notice' under the IT Act. Section 149 prescribes the period of limitation. It categorically prescribes that no notice under Section 148 shall be issued after the prescribed limitation has lapsed. Section 148(1) provides for service of notice as a condition precedent to making the order of reassessment. Once a notice is issued within the period of limitation, jurisdiction becomes vested in the Assessing Officer to proceed to reassess. The mandate of Section 148(1) is that reassessment shall not be made until there has been service. The Delhi High Court in the matter of **Commissioner of Income-tax (Central)-I v. Chetan Gupta**7 culled the principles relating to Section 148 of the IT Act as under: -

"46. To summarize the conclusions:

(i) Under Section 148 of the Act, the issue of notice tothe Assessee and service of such notice upon the Assessee are jurisdictional requirements that must be mandatorily complied with. They are not mere procedural requirements.

(ii) For the AO to exercise jurisdiction to reopen an assessment, notice under Section 148 (1) has to be mandatorily issued to the Assessee. Further the AO cannot complete the reassessment without service of the notice so issued upon the Assessee in accordance with Section 282 (1) of the Act read with Order V Rule 12 CPC and Order III Rule 6 CPC.

(iii) Although there is change in the scheme of Sections 147, 148 and 149 of the Act from the corresponding Section 34 of the 1922 Act, the legal requirement of service of notice upon the Assessee in terms of Section 148 read with Section 282 (1) and Section 153 (2) of the Act is a jurisdictional pre-condition to finalizing the reassessment.

> (iv) The onus is on the Revenue to show that proper service of notice has been effected under Section 148 of the Act on the Assessee or an agent duly empowered by him to accept notices on his behalf. In the present case, the Revenue has failed to discharge that onus.
>
> (v) to (vii) xxx xxx xxx"

20. The requirement of issue of notice is satisfied when a notice is actually issued within the period of limitation prescribed. Service of notice under the Act is not a condition precedent to conferment of jurisdiction on the Assessing Officer to deal with the matter but it is a condition precedent for making of the order of assessment.

21. In the matter of **R.K Upadhyaya v. Shanabhai P. Patel**8, the Supreme Court has held that the word 'issue' employed in Section
149 of the IT Act does not mean service of notice and observed as under:

> "... A clear distinction has been made out between 'issue of notice' and 'service of notice' under the 1961 Act. Section 149 prescribes the period of limitation. It categorically prescribes that no notice under Section 148 shall be issued after the prescribed limitation has lapsed. Section 148(1) provides for service of notice as a condition precedent to making the order of assessment. Once a notice is issued within the period of limitations, jurisdiction becomes vested in the Income Tax Officer to proceed to reassess. The mandate of Section 148(1) is that reassessment shall not be made until there has been service. The requirement of issue of notice is satisfied when a notice is actually issued. ..."

The principle of law laid down in **R.K. Upadhyaya** (supra) has been followed by a three-Judge Bench of the Supreme Court in the matter of **Commissioner of Income Tax and another v. Major Tikka Khushwant Singh**9. Similarly, the High Court of Gauhati in the matter of **Commissioner of Income Tax v. Mintu Kalita**10, placing reliance upon

R.K. Upadhyaya (supra) has held in no uncertain terms that service of notice under Section 148 of the IT Act for the purpose of initiating proceedings for reassessment is not a mere procedural requirement but it is a condition precedent for initiation of proceedings for reassessment under Section 147. However, service of notice under Section 148 of the IT Act is an integral part of the cause of action arising out of initiation of proceeding under Section 147 (see **CESC Ltd. v. DCIT**."

12. In view of the foregoing reasons, we cancel the reassessment order passed u/s.147/144 of the Act dated 29.3.2016 and allow the grounds of appeal of the assessee.

13. In the result, appeal filed by the assessee is allowed.

Order pronounced on 07 /09/2018.

Sd/- sd/-

(**Pavan Kumar Gadale**) **(N.S Saini)**
JUDICIALMEMBER **ACCOUNTANT MEMBER**

Cuttack; Dated 07 /09/2018
B.K.Parida SPS

Copy of the Order forwarded to :

1. The Appellant : Dr Birabar Jena, Flat No.202, omani village Apartament, Near Times Gurukul College, Malipada, Bhubaneswar.
2. The Respondent. ITO, Ward 3(1), Bhubaneswar.
3. The CIT(A)-2 Bhubaneswar
4. Pr.CIT-2, Bhubaneswar.
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr. Pvt. Secretary,
ITAT, Cuttack