

## Failure to issue notice in time can't be cured by resorting to deeming fiction of sec. 292BB; reassessment held void

**Summary – The Bangalore ITAT in a recent case of Ashed Properties & Investments (P.) Ltd., (the Assessee) held that where no notice under section 143(2) was issued within period of limitation, revenue could not take advantage of provisions of section 292BB; order of assessment under section 147 was annulled**

### Facts

- The assessee company was engaged in the business of property development and real estate.
- There was a search and seizure operation under section 132 in the case of one 'ZTC'. ZTC had booked a flat in a project that was being developed by the assessee. They had paid advance by account payee cheque to the assessee. To verify the genuineness of the claim of ZTC, a survey under section 133A was conducted in the business premises of the assessee by the revenue. Based on the material impounded during the survey, assessment was reopened for assessment year 2008-09 by issue of notice dated 11-8-2010 under section 148. The assessee *vide* letter dated 22-8-2010 requested the Assessing Officer to treat the original return filed on 30-9-2008 as a return filed in response to notice under section 148. The Assessing Officer completed the assessment by making an addition of Rs. 9,75,24,011 to the total income of the assessee.
- Aggrieved by the order of the Assessing Officer, assessee filed appeal before the Commissioner (Appeals). Amongst other grounds, assessee also challenged the validity of the proceedings completed under section 147 on the ground that no notice under section 143(2) had been issued to the assessee before completion of the assessment under section 147.
- The assessee challenged the validity of order passed under section 147 for non-issue/service of notice under section 143(2) within the time required, the Commissioner (Appeals) called for a remand report from the Assessing Officer.
- The Commissioner (Appeals), on the aforesaid issue, decided the issue against the assessee.
- Aggrieved by the aforesaid findings of the Commissioner (Appeals), the assessee had filed Cross Objection before the Tribunal.
- On appeal:

### Held

- It is clear that the only notice issued under section 143(2) was dated 13-10-2011 and the same was beyond the period contemplated under proviso to section 143(2)(ii). Two questions arise for consideration; (i) Whether notice under section 143(2) is mandatory before completion of proceedings under section 147 (ii) Whether provisions of section 292BB will come to the rescue of the revenue so as not to render the order of assessment under section 147 null and void?

- The two provisos in sub-section (1) to section 148 has been inserted with retrospective effect from 1st October, 1991. The gist of the two provisos may suitably be stated thus - Where a return has been furnished during the period commencing on 1-10-1991 and ending on 30-9-2005, in response to a notice of reassessment served under section 148, and subsequently a notice has been served under section 143(2) [or 143(2)(ii), as the case may be] after the expiry of twelve months as specified in the relevant proviso but before the expiry of the time-limit for making the assessment, reassessment or re-computation as specified in section 153(2), such (otherwise time-barred) notice shall be deemed to be a valid notice. Further, the new *Explanation* inserted with effect from 1-10-2005, specifically clarifies that the aforestated (newly inserted) provisos shall not apply to any return which has been furnished on or after 1-10-2005, in response to a notice served under section 148(1). The purpose of the amendment is to ensure that notices which were issued and barred by limitation and those which were not issued and which could not have been issued should be validated by the Finance Act, 2006 with retrospective effect from 1-4-1990 amending section 142 for the purpose of validating notices which were otherwise not issued or served within the time-limit. The invalidity of notice as well as the absence of any notice became fatal to the proceedings and are sought to be validated and justified by the retrospective amendments. The *Explanation* clarifies that the amended provisions will not apply to any return which has been furnished on or after 1-10-2005, in response to a notice served under section 148(1). Thus the legislature has accepted the position that issue and service of notice under section 143(2) within the time limit laid down in those provisions is mandatory.
- In the light of the precedents on the issue, it was observed that issue and service of notice under section 143(2) within the period of limitation contemplated under the proviso to section 143(2)(ii) is mandatory for validity of assessment under section 147.
- The next issue is with regard to applicability of provisions of section 292BB. It is clearly from the statutory provisions that these provisions only insulate the Assessing Officer from the proof of service of notice under section 143(2). It does not in any way insulate the Assessing Officer from default in issuing notice under section 143(2) within the period of limitation contemplated therein. When the records show that there was no issue of notice under section 143(2) within the period of limitation prescribed under the said proviso, the revenue cannot take advantage of the provisions of section 292BB. In other words, 'issue of notice' and 'service of notice' are two different aspects and what is covered by section 292BB is only 'service of notice'. Non-issue of notice under section 143(2) within the period of limitation would not be covered under the ambit of section 292BB. The decision of the Tribunal in the case of *Amithi Software Technologies (P.) Ltd. v. ITO* [IT Appeal No. 540 (Bang.) of 2012, dated 7-2-2014] clearly supports the plea of the assessee in this regard. Therefore, assessment proceedings are invalid for the reason that notice under section 143(2) had not been issued and served within the time limit prescribed by those provisions. Accordingly, the order of assessment is annulled.