Reassessment held invalid as notice was issued to HUF under a PAN issued in name of individual

Summary – The Pune ITAT in a recent case of Dnyaneshwar Govind Kalbhor (HUF), (the Assessee) held that where HUF of assessee was not in existence nor return of income was filed by it either before initiation of reassessment proceeding or subsequent thereto, initiation of reassessment proceeding based on return of income filed by assessee in individual capacity would be bad in law

Facts

- For the year under consideration, a return of income was filed by assessee DGK in his individual capacity whereas no return of income was filed by the assessee as HUF.
- The Assessing Officer found that a developer N.D. construction, was entered into a development agreement with the assessee and purchased land worth of Rs. 5.76 crore from the assessee. The developer took possession of land and started construction and booking of flats. The assessee had not paid capital gain tax on transfer of aforesaid land to the developer firm. The Assessing Officer issued notice under section 148 to the assessee-HUF.
- In response to the said notice, the assessee denied its liability to capital gain on the ground that transfer envisaged under section 2(47) had not taken place by virtue of such impugned development agreement.
- The assessee-HUF did not file return of income in response to impugned reassessment notice. As a sequel to said notice, notice under sections 143(2) and 142(1) was issued and assessment was completed. Long-term capital gain amounted to Rs. 5.64 crore was, consequently, brought the amount to tax in the hands of assessee-HUF.
- On appeal, the Commissioner (Appeals) upheld the action of the Assessing Officer.
- On the assessee's appeal to the Tribunal:

Held

- The jurisdiction of Assessing Officer to open an assessment under section 148 depends on issuance of valid notice. If the notice issued by the Assessing Officer is invalid for any reason, consequential proceedings taken by him would become *void* for want of jurisdiction. It is the case of the assessee that the notice under section 148 vesting jurisdiction with the Assessing Officer has been addressed to the HUF entity namely DK (HUF) whereas the PAN Number mentioned in the notice pertains to the DK obtained in his individual capacity. The contention of the assessee that the entire basis to proceed for reassessment is founded upon the return of income belonging to the Individual. The contention put up on behalf of the assessee that the HUF was not in existence at all during the relevant assessment year 2007-08 and no return of income was filed by the HUF at all either before the initiation of re-assessment proceedings or subsequent thereto remains un-rebutted. Further, the reasons have been recorded under section 148(2) in the name of the Individual 'DK' whereas the

notice has been issued in the name of HUF *i.e.* 'DK (HUF)'. The fact of non-existence of HUF is paramount and strikes to the very root of purported jurisdiction sought to be acquired by the Assessing Officer under section 147. In the background of these discernible facts, it is manifest that the notice issued under section 148 purporting to grant jurisdiction to the Assessing Officer is *void ab initio* and bad in law. Consequent order passed by the Assessing Officer without jurisdiction thus is a nullity.

- The notice under section 143(2) dated 13-12-2010 consequent upon the notice under section 148 was addressed to the HUF entity on the premise that that some information are required in connection with return of income submitted by the assessee HUF on 28-1-2008 for the assessment year 2007-08. The entire reassessment proceedings have been carried out on the basis of such notice. The re-computation of assessed income under section 147 is also based on this return of income dated 28-1-2008. As noted earlier, the return of income was not filed by the assessee HUF at all. The return of income referred to in the aforesaid notice dated 28-1-2008 pertains to DK in his individual capacity. Thus, the very basis for issuance of notice under section 143(2) is extraneous and unfounded. In the absence of return of income, issuance of notice under section 143(2) is contrary to statutory fiat and would not legitimize the action. Clearly, impugned notice issued under section 143(2) is without any objective consideration of underlying records and seeks to chase a will-o-the-wisp. Return of income is concomitant for issue of notice under section 143(2). The Assessing officer has not proceeded on the basis of non-filing of return by assessee HUF but has founded his entire action based on return filed in individual capacity while making additions of purported escapement of income. To reiterate, in the absence of return of income filed by the assessee, the impugned action taken under section 143(2) is a complete non-starter. Section 148 confers jurisdiction merely to issue notice and calling for a return in cases where income has escaped assessment for making assessment as provided under section 147. Notice issued under section 143(2) must be a valid notice and not a mere empty formality to grant jurisdiction to complete assessment. It is not the case of the Assessing Officer that the assessee has not filed any return of income to say that notice under section 143(2) was not required at all. Thus, on this score also, the action of the Assessing Officer in completing the assessment under section 143(3) read with section 147 is vitiated in law.
- On a close scrutiny of the reasons recorded, it was noticed that the Assessing Officer has nowhere indicated the quantum of income which has escaped or is likely to have escaped assessment. Thus, the entire process so initiated appears to be vague and listless. The formation of 'reason to believe' is expected to be *qua* the quantum of income that has escaped assessment on *prima facie* consideration of relevant material. On this ground also, the action of the Assessing Officer in issuing notice under section 147 cannot be approved. The provisions of section 147 are structured with inbuilt safeguards and requirements of the provision need to be strictly complied with. Apparently, the Assessing officer has pre-supposed the existence of capital gains without acquiring objective knowledge about the cost of acquisition of assets. In the absence of cost of acquisition available, it is

nearly impossible to visualize with some degree of certainty as to whether such transaction has resulted in any gain at the first place or not to allege escapement thereof. Thus, the action of the Assessing Officer is marred on this score also.

- There is a marked distinction between want of basic and inherent jurisdiction and irregular exercise of jurisdiction. Defect on irregular exercise of jurisdiction alone can possibly be cured by taking shelter of section 292B. As noted, the action of the Assessing Officer starting from issuance of notice to the completion of reassessment suffers from multi faceted defects of cardinal nature in serious transgression of statutory requirements. The notice was issued to HUF under a wrong PAN while the underlying reasons giving cause of action thereon were recorded in the hands of other person, *i.e.*, Individual. Thus, legally speaking, the reasons were not recorded *qua* the HUF. Similarly, the basis for issuance of notice under section 143(2) addressed to HUF is found to be non-existent as the HUF is stated to have not taken birth in the impugned assessment year. Invalid notice under section 143(2) was issued without any return of income from the assessee-HUF. Such fundamental infirmities of substantive nature while usurping jurisdiction cannot be called a mere technical defect or a procedural irregularity. Such vital infirmities, cannot be cured or obliterated by taking shelter of section 292B. Section 292B does not empower the Assessing Officer to act without jurisdiction. The aforesaid proposition can be deduced from the decision of the Bombay High Court in the case of *CIT* v. *Salman Khan* [IT Appeal No. 508 of 2010, dated 6-6-2011] relied upon by the assessee. Support from the decision in the case of *P.N. Sasikumar* v. *CIT* [1988] 170 ITR 80/[1987] 35 Taxman 131 (Ker.), *CIT* v. *Norton Motors* [2005] 275 ITR 595/146 Taxman 701 (Punj. & Har.) and *Spice Entertainment Ltd.* (*supra*) was drawn, wherein it has been held that illegality of notice cannot be waived by resorting to section 292B. Relevant here to note that section 292BB has been brought to statute prospectively with effect from assessment year 2008-09 and thus not applicable to the impugned assessment year in question and thus not deliberated upon.
- In the light of aforesaid discussion, the impugned notice issued under section 148 suffers from inherent defects and does not meet the requirement contemplated under section 147/148. Such notice is thus null and void and as a corollary reassessment proceedings consequent thereto is without jurisdiction. The Assessing Officer has misdirected himself in law in initiating the re-assessment proceeding without any legal foundation. In this view of the matter, impugned assessment made under section 143(3) read with section 147 is liable to be set-aside and cancelled.