IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : 'G' NEW DELHI

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
SHRI T.S. KAPOOR, ACCOUNTANT MEMBER

ITA Nos.1809, 1504, 1505 & 1506 /Del/ 2013
A.Ys. 2008-09, 2005-06, 2006-07, 2007-08

Dy. Commissioner of Income-tax Circle-31(1), New Delhi.	Vs.	M/s Silver Line 8, Babar Road, Bengali Market New Delhi-110001

C.O. Nos.122, 109, 107 & 108 /Del/2013
(In ITA Nos. 1809, 1506, 1504, 1505/Del/ 2013)
A.Ys. 2008-09, 2007-08, 2005-06, 2006-07,

ACIT Circle 31(1) New Delhi.	Vs.	Silver Line 18, Babar Road, Bengali Market, New Delhi ï 110001
(Appellant)		(Respondent)
Appellant by	:	Shri Ramesh Chandra, CIT D.R. And Shri Rakesh Kumar, Sr. D.R.
Respondent by	:	Shri Raj Kumar Gupta & Shri Sumit Goyal, C.A.

ORDER

PER BENCH

1. These four appeals at the instance of the Revenue as well as the identical number of Cross Objections of the assessee firm are directed against the appellate orders of the CIT (A)-XXVI, Delhi dated 31.12.2012 for the AYs 2005-06 to 2007-08 and dated 4.1.2013 for the AY 2008-09 respectively. The relevant assessment years are 2005-06 to 2008-09.

ITA Nos. 1504, 1505, 1506 & 1809/13 – Ays. 2005-06 to 2008-09:

2. The Revenue, in all the appeals, has raised identical grounds except for variance in figures. All the grounds related to a solitary issue, namely, whether the

CIT (A) was justified in deleting the addition made by the AO on account of bogus purchases.

C.O Nos. 107,108, 109& 122/13 – Ays. 2005-06 to 2008-09:

2.1. Similarly, the assessee firm, in its Cross Objections, had also raised more or less identical grounds. For ready reference the grounds raised in the cross objections for the AY 2005-06 are extracted as under:

(i) That the appealof the Revenue is non-maintainable on account of low tax effect in view of CBDT Instruction No.3/2011 dt.9.2.2011 (for the AY 2005-06 only);
(ii) That under the facts and circumstances, initiation of proceedings u/s 147/148 are illegal, without application of mind, mechanical, without jurisdiction and unsustainable in law as well as on merits; &
(iii) That the CIT (A) has been fully justified in law as well as on merits in deleting the addition of Rs.7,05,600/- for alleged bogus purchases.

3. Since common issues being involved in these appeals/cross objections and they pertain to the same assessee, they were heard together and disposed off by this consolidated order.

4. Briefly stated, the facts of the issues are as under:

The assessee firm is engaged in the business of trading in silver and gold jewellery and also in precious/semi-precious stones. The return of income furnished by the assessee for the AY 2005-06 was initially processed u/s 143(1) of the Act. In the meanwhile, the AO was in receipt of information from the DIT (Investigation), Jaipur that the party was making bogus purchases for which cheques were issued and bogus bills were obtained without any physical delivery of goods. Subsequently, the parties who had issued bills withdrew equal amount of cash which was given to the parties who had obtained those bills. It was the stand of the AO that the purchases shown were bogus and the purchase bills obtained havebeen used to suppress the profits. Accordingly, the assessments for the AYs under consideration were re-opened u/s 147 of the Act in case of the assessee by issuance of notices u/s 148 of the Act. After due consideration of the assessee's contentions put-forth during the course of reassessment proceedings for the AY 2005-06 and for the detailed reasons recorded therein, the AO had added a sum of Rs.7.05 lakhs to the total

income of the assessee on account of claiming wrong deduction. For similar reasons, additions were also made for the AYs 2006-07, 2007-08 and 2008-09 under re-assessment proceedings u/s 147 of the Act.

4.1. Aggrieved, the assessee firm took up the issue, among others, before the CIT (A) for all the AYs under dispute. After taking into account the assessee's elaborate submissions and for havingscrutinised the evidences produced, the CIT (A) had deleted the additions made by the AO for all the assessment years under dispute. The relevant portion of the findings of the CIT (A) for the AY 2005-06 is extracted, for ready reference, as under:

"15……
……..

(On page 14) The AO has not pointed out any discrepancy in the evidence filed by the appellant. He also did not reject books of accounts. These documents show that the purchases were evidence by proper purchase vouchers. These purchases have been sold which were already shown as income through sales. The payments were made through banking channels. The payment of purchase was made through account payee cheques on 15.09.2004 i.e., in a short period of 13 days from purchases. M/s. Touch stone is duly assessed to sales tax having TIN No also having PAN NO, registered to RST / CST. Further, the total purchases are of Rs.10.85 Cr. Sales are of Rs.12.73 Cr., the declared GP is @ 19.26% and NP as per P & L is of Rs.1.94 Cr. These facts and figures, otherwise also do not speak that the appellant would make bogus purchases to the extent of Rs.7,05,600/- only. The appellant has also filed copy of assessment order, CIT (A) order and the Hon'ble ITAT order of AY 2007-08. In this year also, additions for similar bogus purchases from Jaipur were made amounting to Rs.2,75,82,141/- and the addition made by the assessing officer was deleted by CIT (A) and further deletion stood confirmed by the Hon'ble ITAT. Under these facts, I am of the view that even on merits the purchases of Rs.7.05,600/- cannot be held as bogus purchases without bringing any adverse material on record. Therefore, the addition of Rs.7,05,600/- made by the assessing officer on account of bogus purchases is hereby deleted……..."

5. Aggrieved by the orders of the CIT (A) on the issue for all the AYs under consideration, the Revenue has come up before us with the present appeals.

6. In the meanwhile, during the course of hearing, the assessee firm in its identical applications for admission of additional ground dated 26.8.2013 sought the permission for the admission of additional ground for all the AYs under consideration. The identical additional ground sought to be raised for admission reads as under:

"1. That the following ground be please admitted as additional ground of appeal / C.O since the same is taken for the first time before Hon'ble ITAT:-

Additional Ground No.1

That in the absence of notice issued u/s 143 (2), the re-asst. proceedings and consequential assessment order is without jurisdiction and un-sustainable in law as well as on merits.

2. that it is a pure legal ground which goes to the root of the matter and no new facts are required to be investigated or placed on records for adjudicating the same. Under these circumstances, as per the following authorities, the additional ground deserves to be admitted:

National Thermal Power Company Ltd 229 ITR 383 (Del) &
Gedore Tools Pvt. Ltd 238 ITR 268 (DEL)

6.1. Since the additional ground raised by the assessee firm, according to us, being a legal issue which goes to the root of the matter, we were of the view that it was paramount to take up this issue for adjudication before addressing the other issues raised by the rival parties in their respective appeals/ cross objections [supra].

6.2. The learned DR, on his part, by extensively quoting theprovisions of s. 253(4) of the Act, argued that the assessee had failed to file a Memorandum of cross objection/additional ground against the any part of the CIT (A) within the time specifiedin sub-section (3) and, therefore, it cannot be acted upon now. He had, further, contended that whether a notice u/s 143(2) of the Act is issued or not was only a question of fact and not a question of law. It was also pointed out by the learned DR that the alleged non-issuance of a Notice u/s 143(2) of the Act was neither raised before the assessing officer or nor before the first appellate authority and, therefore, it was argued, a new case (issue) cannot now be raised before the Tribunal for the first time. In this connection, the learned DR had relied on the findings of the Tribunal in the case of Sandeep & Patel reported in 22 Taxman.com 288. It was the stand of the learned DR thatno findings of the CIT (A) on the issue can be impugned.It was, further, argued that, evenfor argument sake,the issue raised by the assessee firm is purely a question of law; the same cannot be raised/taken up in a Cross Objection.

6.3 Further, the learned D.R. has given a short written submission dated 06.08.2014 the content of the same is reproduced below:-

"Note on applicability of Delhi High Court judgment in Alpine Electronics Asia P Ltd. (341 ITR 247 Del) in CO No. 122/D/2013 in ITA 1809/D/2013 filed by Silverline for AY 2008-09

Before discussing as to how the facts of the Delhi High Court judgment in Alpine Electronics Asia Pvt. Ltd. (341 ITR 247 Del) are distinguishable it will be relevant to keep in mind the provisions of section 292BB of the Income Tax Act, 1961 which provide that after 31-04-2008 in a ease where assessee has appeared or co-operated in any inquiry relating to assessment or reassessment, he after the completion of the assessment/reassessment cannot question the notice service of any notice on the following grounds;

(a) that notice has not been served; or
(b) that notice has not been served in time; or
(e) that notice has been served upon him in an improper manner.

1.2 In the case before the High Court (as seen from para 26 of the Order), assessment proceedings had not got completed (only a draft order was proposed) by the time when service of notice u/s 143(2)(ii) was challenged before the High Court by way of Writ Petition. Since, the challenge has been there before the completion of the assessment or reassessment proceedings the High Court in para 28 held that benefit of saving as provided u/s 292BB is not available to Revenue and hence Writ of Certiorari was issued quashing the assessment proceedings.

02. In so far as the facts of the CO filed by assessee Silverline (AY 08-09) are concerned it would be relevant to take note that Notice u/s 148 was issued on 28-03-2011 and thereafter taking note of the compliance or non compliance made by the assessee, AO finalized the assessment proceedings on 28-12-2011. ***It may kindly be noted that till the conclusion of assessment proceedings validity or service of notice has not at all been questioned ill any manner.***

03. From the above facts it is clear that since the assessee did not challenge at all the service of notice till the conclusion of the assessment proceedings by virtue of provisions of section 292BB the assessee is estopped from challenging the re-assessment proceedings on account of non-service or improper service or non-service in time of notice u/s 143(2) of the Act.

04. From the above, it is clear that reliance placed by the Cc-Object on Delhi High Court judgment on Alpine Electronics Asia Pvt. Ltd. (341 ITR 247 Del) is misplaced and it on the contrary is in favour of Revenue. On this ground itself COs filed by the assessee Silverline

need to be dismissed with costs."

6.4. On the other hand, the learned AR submitted that during the course of reassessment proceedings, no notice u/s 143(2) of the Act was issued. To strengthen his argument, he had cited the re-assessment order dated 28.12.2011 [Para 3 for the AY 2005-06] and also produced a copy of the order-sheet obtained from the assessing authority [source: P 88 of PB-I]. According to the learned AR, the assessing authority had admitted also in response to a query under RTI Act that no notice u/s 143(2) of the Act was issued. Rebutting the learned DR's argument that the additional ground raised in Cross Objection cannot be acted upon in lieu of s. 253(4) of the Act, the learned AR had placed strong reliance on the judgment of the Hon'ble Gauhati High Court reported in 234 ITR 663 (Gau). The issue raised in the additional ground being a legal which goes to the rootof the matter, the learned AR contended that there was no difference between a cross objection and an appeal and, therefore, the additional ground raised by the assessee deserves to be admitted as it is within the parameter of law. It was, further, submitted that it was an undisputed fact that in the absence of a notice u/s 143(2) of the Act, whether the assessment prevails or not, is purely a legal issue. In this connection, the learned AR drew strength from the findings of the earlier Bench of this Tribunal in ITA No. 6020/Del/2012 dated 29.5.2014 in the case of B.R.Arora v. ACIT.

6.5 Further, it was submitted by the learned counsel that Section 292BB is applicable only from A.Y. 2008-09 onward in light of dictum laid down by the Hon'ble Special Bench of the Tribunal in case of Kuber Tabacco Products (Pvt.) Ltd. reported in 117 ITD 273 (Delhi) (S.B), which was affirmed by the Hon'ble Delhi H.C. by judgment dated 06.10.2010 in Writ Petition No. 1159 & 1161/2010. It was submitted further that when no notice u/s 143(2) is issued. Section 292BB does not have any application. For above proportion, the learned AR relied on the following case laws:

i) Manish Gupta 259 CTR 57 (All.) H.C.

ii) Parikalpana Estate Development (P) Ltd. 79 DTR 241 (All.)

6.6 In conclusion, it was contended that non-issuance of a notice u/s 143(2) of the Act, the assessment concluded u/s 147 of the Act becomes invalid. For this

proposition, the learned AR had placed strong reliance on the following case laws, namely:

(i) B.R.Arora v. ACIT in ITA No.6020/D/2012 dated 29.5.2014 ï ITAT, Delhi óÂôBench;
(ii) Alpine Electronics Asia Pte Ltd v. DGIT & Ors. (2012) 341 ITR 247 (Del);
(iii) ITO v. D.D. Ahuja & Brothers ï 158 TTJ (Lucknow) 54;
(iv) Sapthagiri Finance and Investments v. ITO (2013) 90 DTR 289 (Mad);
(v) Rajkumar Chawla 94 ITD 1 (Del) (SB);
(vi) CIT v. K.M.Ravji (Tax Appl No.771/2012, Order dt. 18.7.2011 ï Guj HC);
(vii) CIT v. Panorama Builders Pvt. Ltd (Tax Appl.No.435/2011 order dt. 30.8.2012)

6.7. The learned D.R., in reply filed a written submission dated 22.09.2014. The gist of same read as follows:-

"A Note on applicability of decisions/judgments relied by the assessee

1. The assessee has basically placed reliance on the following judgments/decisions:-

(i) Manish Gupta 259 CTR 57 All HC:

(ii) Parikalpana Estate 79 DTR 246) & P&H HC:

(iii) Kuber Tobacco Products P Ltd. Delhi HC 06.10.2010:

2.1 Before dealing with the applicability of the aforesaid judgments which hover around the provisions of section 143(2), 292BB in the context of issuance of the notice and service thereof etc. It is pointed out that all these provisions as contained in the Income Tax Act or the Income Tax Rules talk about the 'service of the notice' alone obviously become upon service issuance is implicit. That is why, the law also as contained u/s 143(2) etc. does not provide for the factum of issuance of the notice to be proved but just talk about the service of the notice. Further, law does not provide that notice intended to be served should necessarily be issued in writing or in a particular form (format).

2.2 Since the emphasis qua notice referred u/s 143(2) or 142(1) etc. is on 'service', section 292BB too talk about 'service'and not on the issuance. That is, to make the provisions of the Income Tax Act, 1961 really workable emphasis is on the service of the notice and not beyond. Reading the word issuance' u/s 292BBwhich law does not talk so would only tantamount to keeping oneself busy in writing the law which is the exclusive domain of the legislature and not of the Courts.

2.3 What fun would it make when the notice so issued is not even served. Kinldy appreciate without service the assessee cannot be legally expected to appear in the proceedings for which service of the relevant notice is a must. How an assessee can participate in the proceedings without there being any

notice (written or oral). Upon participation in the proceedings one can conclude that there was notice about which assessee had the knowledge.

2.4 Since, the Income Tax Act is silent for obvious reasons which even lay person (as shown above) can appreciate about the crucial aspect of the 'issuance of notice or the form (whether written or oral) in which it is to be served we have to form understanding with the help of other sources like Dictionaries which define the 'Notice' to mean information, knowledge of the existence of a fact or to apprise a person of some proceeding in which his interest are involved. Black's Law Dictionary (5th Edition) provides 'a person has notice of a fact if he knows the fact' and that it can be in many ways like implied, constructive etc. When seen in the context of the present case undisputed service of notice u/s 148 and thereafter participation of the assessee in assessment goes to show that it had the notice of the proceedings.

2.5 It is requested to kindly appreciate that section 292BB, 142(1), 143(2) are part of the machinery provided under the Income Tax Act to ascertain the correctness of the disclosures made in the return of income. That is, section 292BB is just a procedural provision unlike the charging sections which have intimate connection with the taxation of income per se just at the time of its accrual, arisal or receipt (and not mere quantum). Since, these are merely procedural provisions, they will apply to procedures which are initiated on or after the particular date from which it is brought on the statute which in this case was 01.04.2008.

2.6 As mentioned in this particular case the procedure of reassessment started with the service of notice u/s 148 (served on 28.03.2011) by which time amendment on the statute has already become effective. Accordingly, the procedural provisions of section 292BB which provide that there cannot be challenges like that notice has not been served; or that notice has not been served in time; or that notice has been served upon him in an improper manner once it is not agitated in the proceedings, will disable the assessee from impugning the notice u/s 143(2) in any manner that too at a belated stage before the Tribunal because of its participation in the proceedings without challenge as mandated in the laws.

2.7. In short, it is pointed out that law as contained u/s 143(2) etc. does not provide that notice intended to be issued has to be necessarily in writing or in a particular proforma. Participation in the proceedings is undisputedly the best evidence to prove issuance or service of the notice that is why section 292BB taking note of this crucial aspect post participation has disabled the participants from challenging the frivolous grounds of non service of the notice. Service of the written notice issued u/s148 and subsequent participation in the proceedings has to be taken conclusive of service notice which implicity include issuane too. In other words, undisputed service of notice u/s 148 and thereafter participation of the assessee in assessment proceedings goes to show that it had the notice of the proceedings.

3. About the date as to from which particular date or assessment year section 292BB (inserted w.e.f. 01.04.2008) would be applicable, it may kindly be

appreciated that Finance Act is always for the financial year for which budget is being laid before the Parliament. It is why, Finance Act is generally in the context of the income which has been earned on which likely revenue realization can be worked out as such except where it is specifically provided as to form which particular date that will apply. But this has no relation with the procedural provisions which would apply with effect from the date from which it is inserted on the statute book dealing with the procedures taking place on that date or thereafter.

4. Thus, the interpretation that law requires issuance of notice deserves to be rejected.

5.0 In the light of the aforesaid submission alone it would become clear that none of the decisions referred to in para 1 above are applicable. Though in view of the discussion made above it is clear that all the three judgments referred to above do not need further submissions yet for the sake of further clarity qua the inapplicability these are being dealt with in the following paragraph 5.1 to 5.3.

5.1 In so far as Delhi High Court judgment in Kuber Tobacco Products P Ltd. Delhi HC 06.10.2010 is concerned it is humbly submitted that this does not help the cause of the appellant assessee. Before elaborating this aspect further, it will be relevant to note as to what the High Court has held which is as under:

"In our view ITAT rightly held that 292BB is not retrospective as it creates disability by precluding assessee from taking a plea which otherwise could be taken as a matter of right. We hold that 292BB is applicable to AY 08-09 & later years."

Kindly note Law as contained u/s 292BB does not provides that it will apply for assessment year 08-09 and later years. Further, it may kindly appreciated that the issue as to from which assessment year the amendment will become applicable was not under consideration before the High Court. When it is so clearly the observations of the High Court "We hold that section 292BB is applicable to AY 08-09 and later years"are just obiter dictum. Even without these words the judgment of the High Court would have remained the same which further proves that above were just 'by the way remarks' and not the ratio which is a must for applying any High Court judgment. In this context, attention is invited to the Supreme Court judgment in Rekha Mukherjee v. Ashok Kumar Das {(2005) 3 SCC 427, 440-41 (para 29)} where it was held that the Court is bound by the ratio decidendi and not by mere observation. Very clearly thus judgment of the High Court does not help the appellant.

5.2 In so far as the Allahabad High Court judgment in the case of Manish Gupta {259 CTR 57 All HC} is concerned it is submitted that it proceded on the assumption that law mandates issuance of the notice whereas as a matter of fact (demonstrated above) the law does not lay emphasis on issuance at all.

5.3 Likewise the Punjab and High Court judgment in Parikalpana E-state 79 DTR 246) also proceeds on the assumption that law mandates issuance of the notice whereas (as demonstrated above) law does not lay emphasis on

issuance and instead lays stress on 'service' of the notice. Thus, this too is not applicable.

5. Submitted for kind consideration."

7. We have carefully considered the rival submissions with regard to the admissibility or otherwise of the additional ground sought to be raised by the assessee. At the out-set, we would like to point out that since the additional ground sought to be raised is legal in nature and goes to the root of the matter and also in view of the judgments of (i) the Hon'ble Supreme Court in the case of National Thermal Power Company Ltd 229 ITR 383 (SC) and (ii) the Hon'ble Delhi High Court in Gedore Tools Pvt. Ltd reported in 238 ITR 268 (Del), we are inclined to admit the same and taken up for consideration.

7.1. Now, the moot question for consideration is: Whether the non-issuance of a notice u/s 143(2) of the Act as alleged by the assessee-firm had vitiated the conclusion of the assessments u/s 147 read with s. 143(3) of the Act? On receipt of information from the DIT (Inv), Jaipur that there were alleged bogus purchases resorted to by the assessee firm, the AO had re-opened the assessments of the assessee for the assessment years under dispute by issuance of notices u/s 148 of the Act. Subsequently, notice u/s 142(1) of the Act along with questionnaire was issued to the assessee. In the reassessment proceedings, after having considered the asssessee's submissions, the AO had concluded the re-assessments making certain additions. While doing so, however, no notices u/s **143(2)** of the Act were issued to the assessee, even though notice u/s **142(1)** of the Act was ordered to be issued on 14.11.2011. This was apparent from the perusal of the Order Sheet for the AY 2005-06 [Source: P 88 of PB-I AR]. This fact has been admitted by the Revenue through a RTI query by the assessee firm [Refer: P 165 of PB AR (A.Y.2006-07)]. The above sequence of events categorically proves that notice u/s **143(2)** of the Act was neither issued nor served on the assessee.

7.2. We shall now proceed to analyse the judicial views on the issue, as under:

The Hon'ble Guwahati High Court in CIT v. Purbanchal Parbahan Gosthi (1998) 234 ITR 663 (Gau) has stated that there is no distinction between an appeal and a cross objection except for the time limit for filing the appeal being 120 days and that of CO

being 30 days. Therefore, the learned DR's objection that even a pure question of law cannot be taken up in a cross objection is without any merit. It has been observed by the Hon'ble Court as under:

"Sec. 253(4) clearly envisages the filing of cross-objections both by the assessee as well as by the AO against the order in appeal. Upon filing of such cross-objections it has been made obligatory upon the Tribunal to decide such memorandum of cross-objections as if it was an appeal. There is absolutely no ambiguity in the provision made under sub-s. (4). Rule 22 of the ITAT Rules makes it further clear that memorandum of cross-objections which has been so filed under sub-s. (4) of s. 253 shall be registered and numbered as if it was an appeal. These two provisions stand on a better footing than the provisions made in O. 41, r. 22 of the CPC which deals with filing of cross-objections. Whereas there is no provision in the CPC to number the cross-objection as an appeal, such a provision has been made by the rule-making authority in the ITAT Rules, 1963. A combined reading of s. 253(4) and r. 22 makes it abundantly clear that any party aggrieved against the order of the appellate authority can file a memorandum of cross-objections against any part of the order of the Dy. CIT(A). In other words, cross-objections need not be confined to the points taken by the opposite party in the main appeal. The words "against any part of the order of the Dy. CIT" are wide enough to cover a situation where the Revenue has challenged the order of the Dy. CIT(A) on the merits regarding the quantum of the tax liability, but the assessee in cross-objections can challenge the order of the Dy. CIT not only on the quantum of tax amount but on other points also. In view of the aforementioned discussion it can safely be held on a point of law that there is absolutely no difference between an appeal and a cross-objection……"

7.3. Further, in the absence of a notice u/s 143(2) of the Act, the assessment prevails or not is to be examined:Whether it is a legal question or not?.In an identical issue to that of the issue under consideration, the earlier Bench of this Tribunal in the case of B.R.Arora v. ACIT in ITA No.6020/Del/2012 dated 29.5.2014 has decided the issue in favour of the assessee. The issue, in brief, wasthat the assessee had filed an application before the Tribunal for admitting additional ground and proceeding sheet of assessment as additional evidence to the following effect:

"1. That following ground be please admitted as additional ground of appeal

<u>Additional ground:</u> 'That in the absence of notice issued u/s 143 (2), the reassessment proceedings and consequential assessment order is without jurisdiction and unsustainable in law as well as on merits.

2.that it is a pure legal ground which goes to the root of the matter and no new facts are required to be investigated or placed on records for adjudicating the same. Under these circumstances, as per the following authorities, the additional ground deserves to be admitted."

After having considered the rival submissions,the Hon'ble earlier Bench of this Tribunal had held that *"2.2. Since the additional ground sought to be admitted is legal in nature and goes to the root of the matter (and) in view of Hon'ble Supreme Court judgment in the case of NTPC (supra)* -[National Thermal Power Company Ltd v. CIT 229 ITR 383 (SC)] *– we are inclined to admit the same."*

With regard to non-issuance of a notice u/s 143(2) of the Act, the earlier Bench had, after analysing the submissions of either of the party, recorded its findings as under:

> ***"6. (On Page 13)……..Apropos, the issue of notice u/s 143(2) from the assessment order and the proceedings sheets filed by the assessee, it is clear that no notice u/s 143(2) was either issued or served on the assessee. In view of these facts, respectfully following Hon'ble Delhi High Court judgment in the case of Alpine Electronics Asia Pte Ltd (supra) and V.R. Educational Trust (supra), we hold the reassessment invalid for not serving mandatory notice u/s 143(2) on the assessee. The ressessment is quashed accordingly."***

7.4. The Hon'ble Allahabad High Court in Civil Misc. Writ Petition No.1071 of 2005 [judgment dated 25.1.2006] had held that the Tribunal was not justified in not entertaining the additional ground raised by the assessee. The additional ground raised by the assessee was ó*whether the assessment order is invalid on account of non-service of a notice u/s 143(2) within the stipulated time?* It was held by the Hon'ble Court as under:

> ***"Having heard learned Counsel for the parties, in my view, order of Tribunal is not sustainable. There is no dispute that before passing the assessment order under section 143(3) of the Act, issuance of notice under section 143(2) of the Act within the specified time, is mandatory and in case if it is not issued, assessment order passed stand illegal. Thus, in my opinion, ground which has been raised and sought to be added in the grounds of appeal is a legal ground which goes to the root of the matter, and thus, the Tribunal ought to have allowed the application and the ground sought to be added be permitted to be added in the grounds of appeal. In the case of National Thermal Power Company Ltd v. Commissioner of Income-tax (supra), the Apex Court held as follows:***
>
> **'The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal (vide, e.g., CIT v. Anand Prasad (1981) 128 ITR 388 (Del), CIT v. Karamchand Premchand P. Ltd (1969) 74 ITR 254 (Guj), and CIT v. Cellulose Products of India Ltd (1985) 151 ITR 499 (Guj) (FB). Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But wherethe Tribunal is only required to consider a**

question of law arising from the facts which are on record in the assessment proceedings, we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability.'

The argument of learned Standing Counsel that it is not correct to say that the notice under section 143(2) of the Act has not been issued within the specified time, may be correct, but this aspect of the matter has to be adjudicated by the Tribunal after entertaining the ground in this respect and for the purposes of admission of new ground, this aspect of the matter is not relevant.

In the result, petition is allowed. Order of Tribunal dated 26.5.2005 (Annexure – I to the writ petition) is quashed. The application for addition of additional ground, which is Annexure-2 stand, allowed……..."

7.5. In the case of **Alpine Electronics Asia Pte. Ltd v. DGIT and Others** (supra), the Hon'ble Delhi High Court has held as under:

"It is now well-settled that service of notice under s. 143(2) within the statutory time-limit is mandatory and is not a procedural requirement, which is inconsequential. Sec. 143(2) is applicable to proceedings under s. 147/148. Proviso to s. 148 protects and grants liberty to the Revenue to serve notice under s. 143(2) before passing of the assessment order for returns furnished on or before 1st Oct., 2005. In respect of returns filed pursuant to notice under s. 148 after 1st Oct., 2005, it is mandatory to serve notice under s. 143(2), within the stipulated time limit. ……"

7.6. While dealing with the above case, the Hon'ble Delhi High Court had referred to the judgment of the Hon'ble Supreme Court in the case of the Asst. CIT v. Hotel Blue moon (2010) 321 ITR362 (SC). In the said case, it has been held by the Hon'ble Supreme Court that:

"……...if an assessment is to be completed under s. 143(3) r/w s. 158BC, notice under s. 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under s. 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under s. 143(2) cannot be dispensed with. The other important feature that requires to be noticed is that the s. 158BC (b) specifically refers to some of the provisions of the Act which requires to be followed by the AO while completing the block assessments under Chapter XIV-B. This legislation is by incorporation. This section even speaks of sub-sections which are to be followed by the AO. Had the intention of the legislature was to exclude the provisions of Chapter XIV; the legislature would have or could have indicated that also. A reading of the provision would clearly indicate, if the AO, for any reason, repudiates the return filed by the assessee in response to notice under s. 158BC (a), the AO must necessarily issue notice under s. 143(2) within the time prescribed in the proviso to s. 143(2). Where the legislature intended to exclude certain provisions from the ambit of s. 158BC(b) it has done so specifically. Thus, when s. 158BC (b) specifically refers to s. 143(2),

applicability of the proviso thereto cannot be excluded. The clarification given by CBDT in its Circular No. 717, dt. 14th Aug., 1995, has a binding effect on the Department, but not on the Court. This circular clarifies the requirement of law in respect of service of notice under sub-s. (2) of s. 143. Accordingly, even for the purpose of Chapter XIV-B, for the determination of undisclosed income for a block period under the provisions of s. 158BC, the provisions of s. 142 and sub-ss. (2) and (3) of s. 143 are applicable and no assessment could be made without issuing notice under s. 143(2). The submissions of the counsel for the Revenue that the expression 'so far as may be apply' indicates that it is not expected to follow the provisions of s. 142, sub-ss. (2) and (3) of s. 143 strictly for the purpose of block assessments cannot be accepted, since there is no reason to restrict the scope and meaning of the expression 'so far as may be apply'. Sec. 158BH provides for application of the other provisions of the Act. This is an enabling provision, which makes all the provisions of the Act, save as otherwise provided, applicable for proceedings for block assessment. The provisions which are specifically included are those which are available in Chapter XIV-B, which includes s. 142 and sub-ss. (2) and (3) of s. 143—Hotel Blue Moon (IT Appeal No. 41 of 2004, decided by the Gauhati High Court on 9th Feb., 2007) and CIT vs. Pawan Gupta & Ors. (2009) 223 CTR (Del) 487 : (2009) 22 DTR (Del) 291 affirmed; Smt. Bandana Gogoi vs. CIT (2007) 209 CTR (Gau) 31 : (2007) 289 ITR 28 (Gau) approved.

7.7. The judgment t of the Hon'ble Supreme Court in the case of Hotel Bluemoon (supra) has been followed in the following cases:

(i) In the case of Virendra Dev Dixit vs. ACIT reported in (2010) 233 CTR (All) referring to s. 143(2), 158BC, 292B, the Hon'ble Court had held that ***"The service of notice on the assessee under s. 143(2) within the prescribed period of time is a pre-requisite for framing the block assessment under Chapter XIV-B. It is mandatory. Non-issuance of notice is not a mere procedural irregularity and the same is not curable. For the purpose of Chapter XIV-B for the determination of undisclosed income for a block period under the provisions of s. 158BC the provisions of s. 142 and sub-ss. (2) and (3) of s. 143 are applicable and no assessment could be made without issuing notice under s. 143(2) within the time specified. Where the AO in repudiation of the return filed under s. 158BC (a) proceeds to make an enquiry, he has necessarily to follow the provisions of s. 142 and sub-ss. (2) and (3) of s. 143. Admittedly, in the present case, the notice under s. 143(2) has not been issued. The period of limitation has already expired and, therefore, such notice cannot be issued. Thus, the remand of the case to the AO to cure the defect by issuing a fresh notice is wholly unjustified. The view of the Tribunal that the proviso of s. 143(2), which provides limitation for serving of the notice, does not apply to the block assessment under s. 158BC under Chapter XIV-B is erroneous. The order of the Tribunal as well as***

the order of the authority below is set aside.—Asstt. CIT vs. Hotel Blue Moon (2010) 229 CTR (SC) 219 : (2010) 35 DTR (SC) 1 : (2010) 321 ITR 362 (SC) followed.

(ii) In the case of Rajan Gupta vs. C IT, the Hon'ble Delhi High Court reported in (2010) 233 CTR (Del) 230 referring to S. 143(2), 153, Expln. 1(v), 158BC, 158BE, 245C, 245D,has held as under:

> ***"Clause (v) of Expln. 1 to s. 153 provides that the period commencing from the date on which an application is made under s. 245C and ending with the date on which an order under sub-s. (1) of s. 245D is received by the CIT under sub-s. (2) of that section, shall be excluded in computing the period of limitation for, inter alia, making an order of assessment under s. 143. This clause will obviously apply in a case where an application is made before the Settlement Commission under s. 245C and in the event such an application is rejected by the said Settlement Commission or is not allowed to be proceeded with by it. It is pertinent to note herein that the exclusion of time consumed before the Settlement Commission is in respect of computing the period of limitation, for making an order of assessment under s. 143. It does not pertain to exclusion of time for the purposes of serving a notice on the assessee under s. 143(2).(Para 14)"***

(iii) The Hon'ble Karnataka High Court in the case of Pai Vinod vs. DCIT reported in(2013) 353 ITR 622 (Karn) had held that***"(Para 3)…..omission on part of AO to issue notice u/s. 143(2) was not procedural irregularity and the same was not curable. Therefore requirement of notice u/s. 143(2) could not be dispensed with. No assessments could be made without issuance of notice u/s. 143(2) where AO in repudiation of return filed u/s. 158, proceeded to make enquiry he had to necessarily follow provisions of Sections 142 and143(2) and (3). Assessment order passed in violation of said mandatory provision would illegal and liable to be set aside."*** It was, further, held that ñ***[conclusion]Even for the purpose of Chapter-XIV of the Act, for determination of the undisclosed income for the block assessment under the provisions of Section 1583C****[sic. 158BC]****, the provisions of Section 142 and sub-Section (1) & (3) of sub-Section 143 were applicable, No assessments could be made without issuance of notice u/s. 143(2) of the Act where the AO in repudiation of the return filed u/s. 158, proceeded to make an enquiry he had to necessarily follow the provisions of Section 142, sub-Sections (2) and (3) of Section 143. Thus if there was violation of the mandatory provision then the assessment order passed was illegal and liable to be set aside. Assistant Commissioner of Income-Tax and Another vs. Hotel Blue Moon reported in (2010) 321 ITR 362(SC), relied on (para3&4).***

7.8. Further, the provisions of s. 292BB of the Act are not applicable in the case of non-issuance of a notice u/s 143(2) of the Act. For this proposition, we refer to the (i) judgment of the Hon'ble Gujarat High Court in the case of CIT v. K.M.Ravji [Tax Appeal No.771/2010 dated 18.7.2011 wherein the Hon'ble High Court has held that ñ*Section 292 BB does not save non-issuance of Notice before the expiry of limitation period. In our view, section 292 BB can cure only a defect in service, service within time, or improper service of notice. It is not aimed at curing the defect of non-issuance of notice within the statutory period.*"

(ii) Yet another ruling in the case of CIT v. Panorama Builders Pvt Ltd [Tax Appeal No.435/2011 dated 30.08.2012], the Hon'ble Gujarat High Court had, further, emphasised that "*Section 292BB of the Act does not apply to issuance of notice, neither it cures the defect or enlarges statutory period where a mandatory notice under section 143(2) of the Act is required to be issued within limitation fixed under Act.*"

(iii) The issue before the Hon'ble P & H High Court [CIT v. Cebon India Ltd reported in 347 ITR 583 (P & H), was that the Revenue proposed to raise following substantial questions of law:

> ***"1. Whether on the facts and in the circumstances of the case, the learned Tribunal is right in law in holding that there was no valid service of notice under s. 143(2) before the due date even though the AO had issued the notice under s. 143(2) on 11/13th Nov., 1997 vide dispatch No. 2640 and subsequently, the assessee participated in the proceedings ?"***
>
> ***2. Without prejudice to above, whether the Tribunal is right in not treating the defect if any in service of notice under s. 143(2) as an irregularity curable under s. 292BB of the IT Act, 1961 ?"***

Briefly, the assessee filed return for the A.Y in question on 30.11. 1996, which was processed under s. 143(1)(a) on 30.5.1997. Thereafter, assessment was framed u/s. 144 of the Act, which was affirmed in appeal. The Tribunal, however, remanded the matter to CIT (A). The CIT (A) allowed the appeal on the ground that there was no evidence to show that notice u/s. 143(2) of the Act had been served on the assessee before 30.11.1997 i.e. within one year of the filing of the return. It was accordingly held by the CIT(A) that the assessment was void. The finding of the CIT(A) has been affirmed by the Tribunal. It was submitted by the revenue that a notice has been duly dispatched to the assessee on 13.11.1997 and the irregularity or defect in issuing

notice was curable under s. 292BB of the Act.Afterhaving considered the rival submissions, the Hon'ble Courthas held as under:

"5. We find that concurrent finding has been recorded by the CIT(A) as well as the Tribunal on the question of date of service of notice. Notice was not served within the stipulated time. Mere giving of dispatch number will not render the said finding to be perverse. In absence of notice being served, the AO had no jurisdiction to make assessment. Absence of notice cannot be held to be curable under s. 292BB of the Act."

iv) Naval Kishore & Sons Jewellers Vs. CIT 79 DTR 241(All)

"When the notice u/s 143(2) was not issued question of service, or improper service is no relevant. Therefore, Sec. 292BB is not attracted."

v) CIT Vs. Parikalpana Estate Development (P) Ltd. 79 DTR 246 (All.)

In this case also, it has been held that where Asstt. Has been framed without issuance of notice u/s. 143(2), Asstt. is invalid, Sec 292BB is not attracted in such cases.

vi) ***Manish Prakash Gupta Vs. CIT 68 DTR 112 (All.)***
CIT Vs. Mukesh Prakash Agarwal 345 ITR 29 (All.)
CIT Vs. Biharilal Agarwal 346 ITR 67 (All.)

In these cases it has been held that Sec. 292BB is a rule of evidence which validates the notice in certain circumstances. In this case, since, no notice u/s. 143(2) was issued, therefore, the AO did not have the jurisdiction to proceed further and make the Asstt.

(vii) The Hon'ble ITAT of Agra Bench, in the case of ITO v. Aligarh Auto Centre reported in 152 TTJ (Agr) 767, on an identical issue that of the present issue, has recorded its findings as under:

"5. We have considered the rival submissions and the material on record. It is not in dispute that the assessee filed original return of income and at the reassessment proceedings, the assessee contended before the AO that the original return filed earlier may be treated to have been filed in response to the notice u/s. 147, which is also supported by order sheet entry dated 09.08.2006 (PB-20). It is also not in dispute that AO never issued any notice u/s. 143(2) of the IT Act. The Revenue merely contended that the CIT (A) should have appreciated the provisions of section 292BB of the IT Act. Section 292 BB of the IT Act provides as under:

"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. "

The above provision has been inserted by the Finance Act, 2008 w.e.f. 01.04.2008. ITAT, Delhi Special Bench in the case of Kuber Tobacco Product Pvt. Ltd. vs. DCIT, 117 ITD 273 held that section 292BB has been inserted by Finance Act, 2008, has no retrospective effect and is to be construed prospectively. The assessment order under appeal is 2001-02. Therefore, the provision of section 292BB of the IT Act would not apply in the case of the assessee. Further, no notice u/s. 143(2) has been issued or served upon the assessee. Therefore, the decision of Hon'ble Punjab & Haryana High Court in the case of Cebon India Ltd. (supra) squarely applies against the revenue. It was held in this case that absence of notice is not curable defect u/s. 292BB of the IT Act. Considering the above discussion and the case laws cited above, the sole objection of the Revenue is not maintainable. Therefore, the ld. CIT (A) was justified in setting aside the entire assessment order. We, therefore, do not find any infirmity in the order of the ld. CIT (A) for interference."

(v) The Hon'ble Mumbai Bench of the ITAT has, in the case of Sanjeev R Arora v. ACIT [IT (SS)A No.103/Mum/2004 dated 25.7.2012], recorded its findings as under:

"Even, the irregularity in proper service of notice which can be treated as curable under section 292B of the Income-tax Act is only in the cases where the notice under section 143(2) was issued properly and within the period of limitation and the assessee did not raise any objection regarding the service of the notice during the assessment proceedings and also participated in the assessment proceedings then at a later stage the assessee is precluded from raising such objection. Therefore, the provisions of section 292B are not applicable in the case where the assessing officer has not at all issued notice under section 143 (2) within the period as prescribed."

7.9. Taking into account the facts and circumstances of the issue as deliberated upon in the fore-going paragraphs and also in view of the judicial pronouncements (supra), we are of the view that the re-assessments made for the assessment years

under consideration have become **invalid** for not having served the mandatory notices u/s 143(2) of the Act on the assessee. It is ordered accordingly.

7.10. We have since decided that the re-assessment proceedings concluded u/s 147 r.w.s. 143(3) of the Act were **invalid** for the AYs under dispute, the issues raised by the revenue in its appeals and also the Cross objections of the assessee firm based on the invalid assessment orders have not been addressed to.

7.11. Before parting with, we would like to mention here that the proviso (1) and (2) to s. 148 (1) of the Act were inserted with retrospective effect from 1.10.1991 vide Finance Act, 2006. For ready reference, it has been clarified that ï

Proviso (1) provides that where 148 return has been furnished during 1.10.1991 to 30.9.2005, the notice issued u/s 143(2) even after the expiry of 12 months from the end of the month in which the return is filed i.e., after the expiry of time specified as per the proviso to s. 143(2) in such cases even if notice u/s 143(2) has been issued after such specified time, it shall be deemed to be a valid notice.

(applicable for the cases up-to 31.5.2002 i.e., prior to substitution of s. 143(2) by the Finance Act, 2002, w.e.f. 1.6.2002).

Proviso (2) provides that where 148 return has been furnished during the same period i.e., 1.10.1991 to 30.9.2005, the notice issued u/s 143(2) even after expiry of 12 months from the end of the month in which the return is filed i.e., after the expiry of time specified as per the proviso to clause (ii) to s. 143(2), in such cases even if notice u/s 143(2) has been issued after such specified time, it shall be deemed to be a valid notice.

(applicable for the cases from 1.6.2002 up-to 30.9.2005 i.e., on account of substitution of s. 143(2) by Finance Act, 2002 w.e.f. 1.6.2002).

However, in the Finance Act, 2006, an Explanation was added which clarifies that *for the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.*

It is, therefore, explicit that there is always a requirement of issuing of a notice u/s 143(2) of the Act in a case of an assessment u/s 147 of the Act. Relaxation has been given for issuance of such a notice where a notice u/s 148 was issued between 1.10.1991 to 30.9.2005. In other words, notice issued u/s 148 of the Act on or after

1.10.2005; a notice u/s 143(2) has to be issued within the time stipulated in 143(2) of the Act.

This aspect of law and the interpretation relating thereto has been dealt with by the Hon'ble Delhi High Court in the case of Alpine Electronics Asia Pte Ltd (supra). For ready reference, the relevant portion of the Hon'ble Court's ruling is extracted verbatim as under:

> ***"24. Sec. 143(2) is applicable to proceedings under ss. 147/148 of the Act. Proviso to s. 148 of the Act protects and grants liberty to the Revenue to serve notice under s. 143(2) of the Act before passing of the assessment order for returns furnished on or before 1st Oct., 2005. In respect of returns filed pursuant to notice under s. 148 of the Act after 1st Oct., 2005, it is mandatory to serve notice under s. 143(2) of the Act, within the stipulated time limit".***

7.12. Further, we notice that there is a judgment of Hon'ble jurisdictional High Court in favour of the revenue, namely, CIT v. Madhya Bharat Energy Corporation Ltd reported in (2011) 337 ITR 389 (Del) which states that the non issuance of notice u/s 143(2) does not vitiate the assessment. However, there are also two subsequent judgments of Hon'ble jurisdictional High Court directly in favour of the assessee, as regards the service of notice u/s 143(2). The Hon'ble H.C. held that service of notice u/s 143(2) is mandatory. The two subsequent judgment of the Delhi H.C. as follows.

(i) Alpine Electronics Asia Pte. Ltd. V. DGIT 341 ITR 247 (Del); &

(ii) V.R.Educational Trust in ITA NO.510/2011 Order dated 10.02.2012

The Hon'ble Karnataka High Court in the case of Yaragatti v. Vasant reported in (1987)2KAR L.J. 9 (FB) [Source: Article from Hon'ble Justice N.K.Jain - http://justicenagendrakjain.com/Law_of_Precedents5.php]has held that *"in case of conflict between two Supreme Court decisions by the Benches of equal strength, the later decision would be binding on the High Court, it having impliedly overruled the earlier decision. Merely because the earlier decision was not brought to the Court's notice, the latter decision is not rendered in-curiam."*Therefore, we follow the two subsequent judgments of the Hon'ble jurisdictional High Court, namely, (i) Alpine Electronics Asia Pte. Ltd. V. DGIT 341 ITR 247 (Del); & (ii) V.R. Educational Trust in ITA NO.510/2011 - Order dated 10.02.2012 which are directly in favour of the

assessee. Further, it has been held by the Hon'ble Apex Court in the case of CIT v. Vegetable Products Ltd., reported in 88 ITR 192 (SC) while interpreting a taxing statute when two views are possible, the one in favour of the assessee is to be followed. For aforesaid reasons, we allow the additional grounds raised in the cross objection.

8. **In the result**:

(i) the cross objections (additional grounds) of the assessee firm for all the AYs under dispute are partly allowed.

(ii) The revenue's appeals for the AYs 2005-06, 2006-07, 2007-08 and 2008-09 and the other issues raised by the assessee firm in its Cross Objections are treated as rejected for not having adjudicated for the reasons mentioned in paragraph 7.10 [supra].

Sd/-
(T.S. KAPOOR)
Accountant Member

Sd/-
(GEORGE GEORGE K.)
Judicial Member

Dated 26.09.2014

Copy of the order forwarded to:-

1. Appellant
2. Respondent
3. CIT (Appeals) concerned
4. CIT concerned
5. D.R., ITAT,

ASSISTANT REGISTRAR