VALIDITY OF NOTICE u/s 143(2)/148 – CRUCIAL FOR ASSUMING JURISDICTION FOR ASSESSMENT/REASSESSMENT – WHEN SECTION 292BB CAN BE PRESSED INTO SERVICE FOR ATTRACTING DEEMING FICTION OF VALID NOTICE

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1. To challenge validity of notice/assessment proceedings is not very uncommon in the proceedings under the Income Tax Act.

2. In multiple cases of an individual and other entities these issues are coming up very frequently.

3. In chapter XV of the Income Tax Act, in the avatar of section 159, we find the mechanism to assess the liability of a legal representative. The said section provides that when a person dies, his legal representative shall be liable to pay any sum which the deceased would have been liable to pay, if he had not died, in the like manner and to the same extent as the deceased. However, this is not a start/end of the process to assess legal representative. Before that Assessing Officer must assume jurisdiction by issuing /serving proper notice as per the requirement of the law to all the legal heirs. Any casual action taken by the Assessing Officer can prove incurable though the legislature has inserted section 292B/292BB in the Act as a deeming fiction to treat the improper service of notice etc. as a valid notice.

4. These sections are not adequate to safeguard each action taken by the Assessing Officer mistakenly or to some extent even if one can say the action was taken in a bona-fide manner. As per section 292BB, the assessee and not the legal representative is barred to raise any objection against validity of the notice if the condition mentioned in the said section is met.

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5. Section 2(29) of the act defines the term "Legal Representative". If we refer this definition, it takes us to the meaning assigned to it in clause (11) of section 2 of the Code of Civil Procedure 1908. This is mentioned here just for reference purpose and not relevant in the context of write up herein below.

6. Recently I came across a writ petition decided by the Hon'ble Delhi High Court in the case of SAVITA KAPILA, LEGAL HEIR OF LATE SHRI MOHINDER PAUL KAPILA W.P.(C) 3258/2020 – TS -343-HC -2020.

7.In the said writ petition, the petitioner had sought a direction from the Hon'ble High Court to the respondent to quash the notice dated 31st March, 2019 issued to the deceased-assessee (father of the petitioner) under Section 148 of the Income Tax Act, 1961 and the consequential proceedings emanating therefrom.

8.Before going to see what the takeaways from this decision are, let us see the following facts, in the backdrop of which, the proceedings were challenged.

9. FACTS OF THE CASE

9.1 The relevant facts of the present case are that, information was received by the Assessing Officer in Financial Year 2011-12 i.e. AY 12-13, that the assessee had certain bank deposits/receipts- as per Form 26AS. It was noticed that no return had been filed and the source of the said deposits and receipts remained unexplained and had escaped assessment. Accordingly, the case was selected under section 147/148 of the Act, after recording of the reason and approval of PCIT-15, Delhi on 28th March 2019. The impugned notice could not and was never served upon deceased assessee i.e. Shri Mohinder Paul Kapila. The assessee had already expired on 21st December 2018. The deceased assessee is survived by two sons and two daughters.

9.2 The notice dated 31st March 2019 under section 148 of the Act 1961 for A.Y. 2012-2013 was issued, i.e. on the last date of limitation, in the name of the deceased assessee and was sent at his last known address to the Income Tax Department.

9.3 Thereafter, ACIT, Circle 43(1), Delhi issued notices dated 22nd August 2019, 27th August 2019, & 18th September 2019, to the deceased assessee. The said notices were neither served upon the assessee nor upon any of his legal heirs.

9.4 On 10th October 2019, a show-cause notice was issued to the deceased assessee to explain why penalty under Section 271(1)(b) of the Act 1961 should not be imposed for failure to comply with notice issued under Section 142(1) of the Act 1961.

10. Pursuant to another notice issued under section 133(6) of the Act, 1961, to the banks of the deceased assessee, it was revealed to the Income Tax Department that the same address of the deceased was mentioned in the KYC and further from the documents made available by the banks, a telephone number was traced and a phone call was made to the present Petitioner i.e., Savita Kapila who for the first time informed that she is the daughter of the assessee and that the assessee had passed away on 21st December, 2018.

For the first time the death certificate confirming the above was uploaded by the Petitioner on the E-Portal of the Income Tax Department on 15th October, 2019.

11. Assessing Officer passed an order dated 21st November 2019, whereby penalty u/s 271(1)(b) of the Act, 1961 was imposed upon deceased-assessee through legal heir for non-compliance of notices issued to the deceased assessee.

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12. A final show-cause notice dated 25th November 2019 was issued to the assessee, through legal heir, directing to file the return and produce relevant documents by 28th November 2019, failing which the AO shall pass the assessment order under section 144 of the Act.

13. Proceedings were transferred to PAN of one of the legal heirs of the deceased assessee-Ms. Savita Kapila [Petitioner] on 27th December 2019 and on the same date the impugned assessment order was passed in her name and PAN, whereby an addition was made, and demand was raised.

CONTETIONS ON BEHALF OF THE PETITIONER

14. In the afore stated facts petitioner contended that the impugned notice under section 148 of the Act, 1961 was issued subsequent to the death of the assessee, the statutory requirement of service under section 148 of the Act, 1961 had not been fulfilled. Reliance was placed on the decision of Delhi High Court **Braham Prakash vs. ITO 2004 (9) TMI 49 (Delhi)/ (2005) 275 ITR 242.**

15. It was pointed that notice under section 148 of the Act, 1961 was not issued to the petitioner or any other legal representative of the deceased-and the proceedings were simply transferred to the petitioner's PAN vide letter dated 27th December, 2019 ignoring the fact that there were other legal heirs of the deceased-assessee too.

16. In any event, it was submitted that the proceedings against the petitioners were barred by limitation by the said date i.e. 27th December 2019 as per Section 149(1)(b) of the Act, 1961. As per section 149(1)(b) the six years' time is lapsed on 31st March 2019 from the end of the relevant assessment year AY 12-13.

17. When department argued that the proceedings are valid in view of section 159, learned counsel for the petitioner emphasized that section 159 of the Act would not apply to the facts of the present

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case in as much as the said provision would be applicable in those situations wherein the proceedings had been initiated/pending against an assessee when he/she was alive and after his/her death their legal representatives had stepped into their shoes. In support of this contention, reliance was placed upon the judgment of Delhi High Court in Vipin Walia v. ITO 2016 (2) TMI 524 (Delhi).

CONTENTIONS ON BEHALF OF THE DEPARTMENT

18. The first contention of the department was challenging the writ proceedings. It was submitted that instead of entertaining the writ, the petitioner be directed to agitate the matter before Appellate Commissioner u/s 246A. Obviously this contention has been rejected. The court has held - it is a well settled law that an alternative statutory remedy does not operate as a bar to maintainability of a writ petition in at least three contingencies, namely, i) where the writ petition has been filed for the enforcement of any of the Fundamental Rights or ii) where there has been a violation of the principles of natural justice or iii) where the order or notice or proceedings are wholly without jurisdiction or the vires of an Act is challenged. [See **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, (1998)8 SCC 1**].

19. Further, the fact that an assessment order has been passed and it is open to challenge by way of an appeal, does not denude the petitioner of its right to challenge the notice for assessment if it is without jurisdiction. If the assumption of jurisdiction is wrong, the assessment order passed subsequently would have no legs to stand. If the notice goes, so does the order of assessment. It is trite law that if the Assessing Officer had no jurisdiction to initiate assessment proceeding, the mere fact that subsequent orders have been passed would not render the challenge to jurisdiction infructuous. The decision of Calcutta Discount Co. Ltd. Vs. Income Tax Officer,

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Companies District I Calcutta and Another, AIR 1961 SC 372 (SC) was relied upon.

20. It was submitted by the department that under section 159 of the Act, 1961 the legal representative is liable for the liabilities of the deceased-assessee and therefore, it cannot be said that the present assessment proceedings are null and void merely because impugned notice under section 148 of the Act dated 31st March, 2019 was issued by the Assessing Officer, completely unknown of the fact that the assessee had died on 21st December, 2018.

21. The Counsel for the respondent emphasized that the factum of the death of the assessee was communicated to the Revenue for the first time on 15th October, 2019 and not before the expiry of limitation period i.e. 31st March, 2019 and therefore, there was no way that the Revenue could have known about the death of the assessee. In this context, it was argued that there was a different statutory authority under the Registration of Births and Deaths Act, 1969 which was responsible for maintaining the register of births and deaths and that the Revenue was not obliged under the law to Suo moto maintain such record of 44.50 crore PAN card holders in the country. Therefore, it was incumbent upon the legal representatives of the late assessee to intimate about his death to the revenue.

22. However, the Court has held that there is no statutory requirement imposing an obligation upon legal heirs to intimate the death of the assessee.

23. At this juncture , I would like to draw attention to the provision of section 139 A(5)(d), in the context, that it requires intimation to the Assessing Officer of any change in the address of PAN holder or in the name and nature of business. No further statutory requirement is given in the act about intimation of any other change as such.

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24. The department's counsel also relied upon the following decisions while buttressing the arguments that notice is not invalid–

24.1 Commissioner of Income Tax v. Maruti Suzuki India Limited (2019) 416 ITR 613 (SC) – This decision was relied upon for the proposition that where the notices were quashed for issuance to non-existent entities, the information of non-existence of such entities was available with Assessing Officer which is not the fact in the extant case so attempt was made to distinguish the facts of this case.

The Hon'ble High Court has held that the said judgment nowhere states that there is an obligation upon the legal representative to inform the Income Tax Department about the death of the assessee or to surrender the PAN of the deceased assessee.

24.2 Smt. Sudha Prasad v. Chief Commissioner of Income Tax, (2005) 275 ITR 135 (Jharkhand) – This case was relied upon for proposition that under similar circumstances, the court had set aside the proceedings for de novo assessments instead of quashing the same, on account of bona-fide mistake since notice was issued to a dead person out of ignorance of assessee' s death which was not intimated to the Revenue. Following the ratio of this case the proceedings be set aside and should not be quashed. The Hon'ble High Court has come to conclusion that the decision is inapplicable. The reason for inapplicability of this decision is referred in other part of this article.

24.3 Skylight Hospitality LLP v. Assistant Commissioner of Income Tax, Circle-28(1), New Delhi, (2018) 405 ITR 296 (Delhi) – This decision was relied upon for the proposition that the Revenue had acted bona fide at the time of issuance of notice under Section 148 of the Act as it had no knowledge of the death of the assessee to submit that even if there was any defect in the notice, it would be a bona- fide curable defect under Section 292B of the Act, 1961.

The Hon'ble High Court has already held that this is being jurisdictional issue is incurable so section 292B is of no help.

The Hon'ble High Court has held that the issuance of a notice under Section 148 of the Act is the foundation for reopening of an assessment. Consequently, the sine qua non for acquiring jurisdiction to reopen an assessment is that such notice should be issued in the name of the correct person. This requirement of issuing notice to a correct person and not to a dead person is not merely a procedural requirement but is a condition precedent to the impugned notice being valid in law. [See Sumit Balkrishna Gupta Vs. Asstt. Commissioner of Income Tax, Circle 16(2), Mumbai & Ors., (2019) 2 TMI 1209 Bombay High Court] Chandreshbhai Jayantibhai Patel Vs. The Income Tax Officer, 2019 (1) TMI 353 Gujarat High Court

Section 292BB

25. Amongst the various contentions which were raised by the respondent department the following interesting contention was raised. That contention was the proviso to section 292BB of the Act would be attracted to the present case and the petitioner would be prevented from questioning the validity of the notice since she had "co-operated in any enquiry relating to an assessment or reassessment" by uploading the death certificate of the deceased-assessee.

26. For the sake of completeness to understand the implication of this proposition of the department the provision of section 292BB is reproduced herein below:

> 292BB. Notice deemed to be valid in certain circumstances.— Where an assessee has appeared in any proceeding or cooperated 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.

26.1. The aforesaid section has been inserted by the Finance Act 2008 w.e.f. 1 April 2008 applicable from AY 2008-09.

27. In the context of section 292BB, there was one more settled controversy, which is not relevant in this case. The point was section 292BB is only confined to service of notice and does not apply to issuance of notice - CIT vs. Panorama Builders (P) Ltd (2014) 45 taxmann.com 159 (Guj)

28. Coming back to the point in the extant case, in light of wordings of this section, the point for consideration of the Hon'ble High Court was, whether action of uploading death certificate can be regarded as "Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment." By virtue of this plea, if sustained, the objection of bad service of notice could be set aside and notice could not be quashed.

In rejoinder the counsel of the petitioner has placed reliance on the decision of - **Rajender Kumar Sehgal v. ITO 2018 (12) TMI 697 (Delhi)**

29. The High Court has rightly not appreciated the plea of the department. In this context it has been held as follows:

"This Court is also of the view that Section 292BB of the Act, 1961 is applicable to an assessee and not to a legal representative. Further, in the present case one of the legal heirs of the deceased assessee, i.e. the petitioner, had neither cooperated in the assessment proceedings nor filed return or waived the requirement of Section 148 of the Act, 1961 or submitted to jurisdiction of the Assessing Officer. She had merely uploaded the death certificate of the deceased assessee.

30. Very apparently the plea of the department appears to be overextended. The court has rightly rejected the same.

31.In the same context there is one more relevant decision of Hon'ble Mumbai bench which has interpreted the meaning of the expression "Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment " - what is the situation where this expression is said to be attracted to catch the case in the commonds of section 292BB has been considered by the Hon'ble Mumbai Bench in the decision of - Prakash Ramji Gavali vs. INCOME TAX OFFICER (2012) 138 ITD 0001 (Mum) –
Extracted from para 7.4 of ITAT's order:

"The Hon'ble Mumbai bench has held that "A conjoint reading of the above ingredients of section 292BB (supra refer para 26) abundantly brings out that an assessee cannot argue that any notice required to be issued as per the provisions of this Act, was not served on him or was not served on him in time or served on him in an improper manner, where he appears in the proceedings or co-operates in the inquiry relating to assessment or reassessment. In such circumstances, even though there was no service or late service or improper service of notice, it shall be deemed that such notice has

been properly served on the assessee. The assessee will be prohibited from taking any such objection in the matter of service of notice where such objection is not taken before the completion of assessment. Proviso to this section makes it clear that where the assessee has raised such objection about the improper or no-service of notice before the completion of such assessment or reassessment, then the mandate of deemed service of notice shall not apply. From the above discussion it is patent that in order to invoke the provisions of section 292BB, it is essential that the assessee must have either appeared in any proceedings or co-operated in any inquiry relating to assessment or reassessment. In other words, if the assessee does not appear in any proceedings at all or does not co-operate in any inquiry relating to assessment or reassessment, then the command of section 292BB shall not apply. In such a situation, it will be incumbent upon the authorities to prove the service of notice upon the assessee well within time as per the requisite provisions of the Act. It means that section 292BB is of no assistance to the Revenue unless it is shown that the assessee appeared in any proceedings or co-operated in any inquiry relating to assessment or reassessment. If the assessee fails to appear or co-operate in any inquiry relating to assessment or reassessment, then it is open to him to require the Assessing Officer to prove the service of requisite notice on him in time. Turning to the assessment order, it is found that there is a mention on the first page that: "On account of change of incumbent officer, notice u/s 142(1) of the I T Act was issued on 14.7.2010 calling for information. Nobody attended the proceedings. The order is being finalized on the basis of information gathered from bank and other enquiries". Thereafter, the Assessing Officer has referred to certain AIR information about the deposits in bank account. Eventually the assessment order was finalized by determining total income at Rs 2.59 crore. A careful perusal of the assessment order reveals that the assessee did neither appear before the A.O. nor co-operated in any inquiry relating to assessment. The learned Departmental Representative candidly admitted that the assessee did not appear in any proceedings. He,

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however, hotly argued that the service of notice on the assessee u/s 142(1), should be construed as his co-operation in inquiry relating to assessment. This contention put forth on behalf of the Revenue, in our considered opinion, is sans merits. Co-operation in any inquiry by the assessee can take place only when any information demanded by the A.O. is supplied or any other material is adduced in support of his case. The words "co-operated in any inquiry" are succeeded by the phrase "relating to an assessment or reassessment". Simple receipt of notice u/s 142 cannot be termed as co-operation in any inquiry relating to an assessment. Co-operation will come forth only when certain inquiry is made by the AO and that is properly or improperly replied by the assessee. Further such inquiry must relate to an assessment or reassessment. If an inquiry is made but no reply is given, it cannot be said that the assessee "co-operated in any inquiry relating to an assessment". From the assessment order it is amply borne out that the assessee neither appeared in any proceedings relating to assessment nor extended any co-operation whatsoever in any inquiry relating to an assessment. Except for service of notice u/s 142(1) on the spouse of the assessee, there is no semblance of any sort of co-operation by the assessee. We are unable to accept the contention advanced by the learned Departmental Representative that the mere fact of service of notice u/s 142(1) on the assessee should be construed as "co-operation" by the assessee in any inquiry relating to an assessment. Since the assessee did neither furnish nor cause to be furnished any reply to the AO's questionnaire inquiring about various aspects concerning the assessment, the deeming fiction contained in section 292BB about the proper service of any notice under the provisions of this Act, cannot be held to have been activated in the present circumstances. Though section 292BB which has been inserted by the Finance Act, 2008 is technically applicable to the year in appeal, being assessment year 2008-2009, but because of non-fulfilment of the primary condition of the assessee appearing in or co-operating in an inquiry relating to assessment, the consequential mandate of this section will not apply.

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The contention of the learned Departmental Representative about the deemed service of notice u/s 143(2) on the assessee in the present circumstances would have been valid if the assessee, despite no valid service of such notice, had appeared before the A.O. or co-operated in any inquiry relating to assessment with or even without notice u/ss 143(2) or 142(1). The change in law as introduced by section 292BB with effect from assessment year 2008-2009, is inapplicable in the peculiar facts and circumstances prevailing in this case."

32 CONCLUSIONS / TAKEAWAYS

32.1 In the extant case of Savita Kapila, mere action of uploading death certificate on 15th October 2019 by legal heir to call it as co-operation within the meaning of section 292BB certainly appears to be overextended plea. Hon'ble Mumbai bench (supra) also interpreted this expression and after detail discussion on the point has held that mere service of notice u/s 142(1) does not amount to co-operation extended in any enquiry related to assessment or reassessment. Submission of reply/ answering show- cause notice issued by the Assessing Officer can only be regarded as co-operation /appearance in any proceedings/assessment/reassessment.

32.2 Even though the Hon'ble High Court has held that there is no statutory obligation on the legal heirs to inform death of deceased assessee, to avoid litigation and pragmatically , steps should be taken by legal heirs to cancel the PAN of deceased or send intimation of death of the assessee to the Assessing Officer. If any refunds etc are pending in the name of deceased, after cancellation of PAN, how do they get realised will be another procedural aspect to consider.

32.3 Section 176 dealing with various provisions related to discontinued business, sub section (3) of the section provides for notice of discontinued business within fifteen days of discontinuance. This sort of provision for intimation of death of the

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assessee to the Assessing Officer is missing in the statute. When a person dies, near and dear ones of the deceased assessee are usually otherwise also remain depressed for some time. In this natural way of life, there is a prevailing tendency that legal heirs miss the bus of intimation to the Income Tax Department / initiate process for cancellation of PAN. There is general lack of knowledge that PAN is required to cancel. This is practical way of life.

32.4 The Hon'ble Court has held in favour of the assessee for one more practicality of life that in the absence of a statutory provision it is difficult to cast a duty upon the legal representatives to intimate the factum of death of an assessee to the Income Tax Department. After all, there may be cases where the legal representatives are estranged from the deceased assessee or the deceased assessee may have bequeathed his entire wealth to a charity. Consequently, whether PAN record was updated or not or whether the Department was made aware by the legal representatives of death of the assessee or not is irrelevant.

32.5 The last one more interesting point which has been dealt by the Hon'ble High Court that while taking the cognizance of case of Smt. Sudha Prasad (supra) cited by the department's counsel , the said case held to be inapplicable because in that case the petitioner had challenged the assessment order and demand notice only. Neither non-issuance of notice was challenged, nor the issue of proceedings being barred by limitation was raised or decided. Consequently, the said judgment is held to be inapplicable to the present case and is therefore, of no help to the revenue. The striking point from this discussion here is, before challenging assessment order and notice of demand, challenging validity of issuance of notice/ service of notice/ point of limitation period of notice can turn out to be as an important twist in the proceedings. If proper due diligence is not exercised of challenging validity of notice, the step could be missed out and then the fate of the matter could be different. Instead of

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quashing the proceedings, the matter may be set aside for de-novo assessment.

32.6. One more thought, may be a louder thought, action on the part of the legal heirs of filing appeal before Commissioner Appeal, without appearing in assessment proceedings due to cause of non-receipt of notice etc. can it be considered as co-operation in assessment within spirit of section 292BB? Can department argue that appeal proceeding is continuation of assessment proceedings? Submission is filed /reply is submitted/evidences are produced before CIT(A) in response to show cause of AO as an additional evidence or response to issues raised in the assessment order is submitted and hence this action culminates in co-operation in relation to assessment only. Whether section 292BB can be pressed into service as in the case of this writ petition uploading of death certificate on e -portal was argued to be co-operation in relation to inquiry in assessment or reassessment. Based on discussion above, and the conclusion reached in this writ petition as well as the decision of Hon'ble Mumbai bench in Prakash Ramji Gavali 138 ITD 0001 (Mum), I am of the view that it will not stand judicial scrutiny.

32.7 We need to be mindful which action can be fit to construe as co-operation extended for the purpose of section 292 BB. One must be careful in avoiding the situation which can be termed as co-operation in relation to inquiry in assessment to remain out of rigours of section 292BB, when notice issued is invalid.

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