IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G" NEW DELHI
BEFORE SHRI S.V. MEHROTRA : ACCOUNTANT MEMBER
AND
SHRI H.S. SIDHU: JUDICIAL MEMBER

ITA no. 1643/Del/2008
A.Y. 2003-04

Income-tax Officer, Ward 9(2), New Delhi.	Vs.	M/s Staunch Marketing Pvt. Ltd., A-402, Krishna Kunj, Naseerpur Road, Dwarka, Phase-I, New Delhi. PAN: AAFCS 3105 C

AND

C.O. No. 151/Del/2009
(In ITA no. 1643/Del/2008)
A.Y. 2003-04

M/s Staunch Marketing Pvt. Ltd., A-402, Krishna Kunj, Naseerpur Road, Dwarka, Phase-I, New Delhi.	Vs.	Income-tax Officer, Ward 9(2), New Delhi.
(Appellant)		(Respondent)

Department	by :	Shri Ramesh Chander CIT (DR)
Assessee by	:	Shri Ved Jain Adv. & Shri Venketsh Mohan Choursia CA
Date of hearing	:	13-04-2015
Date of order	:	12-05-2015.

O R D E R

PER S.V. MEHROTRA, A.M:-

This appeal, by the department and the cross-objection by the assessee, are directed against the order dated 19-2-2008 passed by the ld. CIT(A)-XII, New Delhi in appeal no. 72/06-07 relating to A.Y. 2003-04.

2. Brief facts of the case are that notice u/s 148 was issued to assessee company on 19-9-2005 on the basis of information received from CIT, Delhi-XIII, New Delhi vide letter F.No. CIT-XIII/Fraud. Refund/2622 dated 14-3-2005 and from the Addl. CIT, Range-37, New Delhi vide letter F. No. Addl. CIT/Range-37/2004-05/925 dated 18.2.2005, enclosing therewith copy of letter No. ITO, Ward 37(1)/2004-05 dated 9.2.2005 of Shri Krishan, Income-tax Officer, Ward 37(1), New Delhi stating that M/s Staunch Marketing Pvt. Ltd. had paid incentives to Shri Surender Singh and Shri Ravinder Singh who were assessed with Ward 37(1), New Delhi. In the income-tax return filed in the name of Shri Surender Singh and Shri Ravinder Singh, refund was claimed against TDS certificates issued by this company. On enquiry by the ITO Ward 37(1), New Delhi, it was found that Shri Surender Singh and Shri Ravinder Singh had not filed returns in their names but Shri Hoshiar Singh, who was a director of M/s Staunch Marketing Pvt. Ltd. had actually filed the income-tax returns in the names of Shri Surender Singh and Shri Ravinder Singh. TDS certificates issued by M/s Staunch Marketing Pvt. Ltd., showing month wise payment of incentives and tax deducted on it was attached. The incentives allegedly paid to Shri Surender Singh and Shri Ravinder Singh by M/s Staunch Marketing Pvt. Ltd. were declared as professional receipt at Rs. 17,16,500/- and Rs.

16,48,890/- respectively. Statements were recorded and after coming to the conclusion that bogus returns in the names of different persons were filed by Shri Hoshiar Singh, notice u/s 148 was issued to the company on 19-9-2005, requiring the company to file the return of income for AY 2003-04. The assessee did not comply with this notice. Therefore, notice u/s 142(1) was issued to furnish evidence of income-tax return filed by the company, its directors and was also required to furnish tax audit report and other details by 5-12-2005. However, assessee did not respond to the notice. Subsequently, Shri Hoshiar Singh, director of the company was contacted on telephone who then attended the office on 23-1-2006; filed a copy of return of income for AY 2003-04 and claimed that original return was filed on 2-12-2003 vide acknowledgement no. 3680 with Addl. Commissioner of Income-tax, Range-9, New Delhi. However, copy of acknowledgment for filing the return was not filed. The AO, accordingly, issued final show cause notice, which has been reproduced at pages 3 to 5 of the assessment order. In this show cause notice the AO pointed out that in the absence of necessary documents/ books of a/c, vouchers, he was left with no other alternative but to complete the assessment ex-parte.

3. In respect of this notice the AO has observed as under:

> *"In response to it, Shri Hoshiar Singh, Director attended the office on 27-1-2006, filed copy of PAN Card and copy of Identity Card issued by Supdt.*

Of Customs (Police), New Customs House, New Delhi for 'category' 1st H Chance and bearing Sl. No. 393/2005 dated 11/06 with the address R09/02, Ruhela Associates. He sought further adjournment and the case was then adjourned for 31.1.2005.

An income-tax return form was submitted by the assessee which is placed on record. The statement of income enclosed therein stated as under:-

Profit & per P&L Account	*(242171.92)*
Add: Depreciation as per Companies Act, 1956	*247716.00*
Less: Depreciation as per Income Tax Act, 1961	
143597.91	
Add: Disallowance as per form 3cd	*52067.40*
	(85986.43)

Gross Total Income Rs. NIL
Tax due Rs. NIL
Tax paid u/s 14A Rs. NIL

Unabsorbed Depreciation Carried Forward u/s 32 85,986.43"

4. The AO has further pointed out that after this return was filed no compliance was made to the notice issued u/s 142(1) and summons u/s 131. Therefore, the AO in para 4.3 observed that he was left with no other alternative but to complete the assessment ex parte. The assessment was accordingly completed at a total income of Rs. 4,86,08,295/-. Ld. CIT(A) partly allowed the assessee's appeal.

5. Being aggrieved with the order of ld. CIT(A), the department is in appeal before us and assessee has filed cross objection.

6. The revenue in its appeal has raised following grounds of appeal:

1. "On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 57,21,746/- (included in the total amount of Rs. 2,67,25,498/-) claimed to have been paid by the assessee as incentives to 19 parties but could not substantiate the same by producing the details i.e

mode of payments and dates of payments etc. and hence failed to discharge its primary onus to vouch the payments."

2. "On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 44,500/- (included in the total amount of Rs. 3,44,500/-) made u/s 68 whereas the assessee could not furnish any documentary evidence to substantiate the issue of shares and raising of share capital."

7. The assessee in its cross objection has taken following solitary ground:

"On the facts and circumstances of the case, the order passed by the learned AO is bad in law and is liable to be quashed, as the statutory notice under section 143(2) was not issued to the assessee"

8. We first take up the cross objection because that goes to the very root of jurisdiction to pass the assessment order.

9. Ld. counsel for the assessee pointed out that no notice u/s 143(2) was issued and, therefore, the assessment order passed by AO was illegal. He relied on following case laws:

- ACIT Vs. Hotel Blue Moon (Civil appeal no. 1198 of 2010 (SC) dated 2-2-2010);
- Mrs. Mudra G. Nanawati Vs. DCIT (2009) 30 DTR (Mumbai)(Trib)217;
- Jyoti Pat Ram Vs. ITO 92 ITD 423 (Luck.);
- ACIT Vs. Smt. Jyoti Devi 84 TTJ (Jai) 689;
- Ms. C. Malathy Vs. ITO 88 ITD 37 (Chennai);
- Smt. Amarjeet Kaur Vs. AcIT 17 DTR (Del)(Trib) 127;
- Aegis Chemical Ind. Ltd. Vs. ITO 65 ITD (Mum) 147;
- Sat Narain Vs. ITO 94 TTJ (Del) 499;

- Shringer Verlag GmbH v. DCIT 97 TTJ 269;
- DCIt Vs. Indian Syntans Investments Pvt. Ltd. 107 ITD 457 (Chennai);
- ACIT Vs. Santosh Kumar & Ors. 87 ITD 107 (All);
- CIT Vs. Pawan Gupta & Ors. 22 DTR 291 (Del);
- CWT Vs. HUF of H.H. Late Shri J.M. Scinida 300 ITR 193.

10. Ld. CIT(DR) submitted that the provisions of section 292BB makes it clear that 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 imporoper manner.

10.1. He further pointed out that as per proviso to section 292BB, the operation of this section does not come into play if the assessee has raised such objection before the completion of such assessment or the reassessment. He pointed out that no such objection was raised before AO till completion of assessment.

10.2. Ld. CIT(DR) further submitted that admittedly assessee did not raise any such issue before ld. CIT(A) also either in statement of facts or in grounds of appeal and, therefore, the ground raised by assessee in the cross objection does not arise out of CIT(A)'s order. He further submitted that cross objection has been filed belatedly and suffers from latches.

10.3. Ld. CIT(DR) referred to the provisions of section 253(4) of the Act and submitted that assessee failed to file a memorandum of cross-objection/ additional ground against any part of the CIT(A)'s order within the time specified in sub-section (3) and, therefore, cannot be acted upon. He further submitted that whether a notice u/s 143(2) of the Act is issued or not is only a question of fact and not a question of law and, therefore, it could not be raised on the premise that a legal issue can be raised at any stage of proceedings.

10.4. Ld. CIT(DR) further referred to section 124(3) to submit that the issue regarding jurisdiction of the AO can be raised only within 30 days from the date on which assessee was served with a notice u/s 142(1) or 143(2). Ld. CIT(DR) submitted that by way of cross objection no new case can be made out. He relied on the decision of the ITAT in the case of Sandeep M. Patel 22 Taxmann.com 288.

11. Ld. counsel for the assessee in the rejoinder submitted that all the objections raised by ld. CIT(DR) were also raised in the case of DCIT Vs. M/s Silver Line (ITA nos. 1809 /Del/2013 & ors; and CO nos. 122,109,107 & 108/Del/2013) wherein the ITAT in paras 7.2, 7.3 and 7.4 of its order dated 26-9-2014 has observed as under:

> 7.2. We shall now proceed to analyse the judicial views on the issue, as under:
>
> The Hon'bleGuwahati 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 Uponfiling 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-so (4). Rule 22 of the ITAT Rules makes it further clear that memorandum of cross-objections which has been so filed under sub-so (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/De1/2012 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
> Additional ground: 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 reassessment is quashed accordingly. "

7.4. The Hon'ble Allahabad High Court in Civil Misc. Writ Petition No.1 071 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 '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 wheretlie 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 "

11.1. Ld. counsel further relied on the order of ITAT in the case of ITO Vs. Naseman Farms Pvt. Ltd. (ITA no. 1175/Del/2011 & CO no. 174/Del/2011) wherein the ITAT in para 9 of its order dated 8-4-2015 has observed as under:

> 9. We have heard both the parties and perused the relevant records especially the order passed by the Revenue Authorities along with the documentary evidence filed by the assessee attaching therewith the various documentary evidence supporting the claim of the assessee as well as the various decisions rendered by the Hon'ble Supreme Court on the legal issue in dispute. Regarding admission of this additional ground before us, which is challenging the very jurisdiction of the AO to pass the reassessment order, is no longer res-integra and it is well settled that an assessee can raise a legal ground at any stage of the proceedings as held by Apex Court in the case of CIT Vs. Varas International reported in 284 ITR 80(SC) and National Thermal Power Co. Ltd. Vs. CIT reported in 229 ITR 383 (SC)and the Special Bench decision in the case of DHL operators reported in 108 TIJ 152 (SB). Keeping in view the facts and circumstances of the present case and the arguments raised by the Id. counsel, we are of the view that the issue raised in additional ground regarding the non-issuance of notice u/s. 143(2) of the Act which goes to the root of the matter, needs to be admitted and should be taken up first and decided, so we will adjudicate this issue".

12. We have considered the rival submissions and have perused the record of the case. As far as ld. CIT(DR)'s objection that this issue could not be

raised by way of CO, we find that Tribunal in the case of M/s Silver Line (supra) has exhaustively considered this issue with reference to the decision of Hon'ble Guwahati High Court in the case of Purbanchal Parbahan Gosthi (supra).

12.1. It has been clearly held that even if the issue has not been considered by CIT(A) still by filing cross-objection, the assessee can raise this issue. The plea of ld. CIT(DR) that it is purely a question of fact as to whether 143(2) notice was issued or not, is misplaced inasmuch as the non-issuance of notice u/s 143(2) results in raising a question of law as to whether the same results into invalidating the assessment order per se or not. Therefore, this issue is a mixed question of law and fact and goes to the very root of jurisdiction of passing of the assessment order.

12.2. Ld. CIT(DR) has also referred to section 124(3), which, in our opinion, is relevant only when the jurisdiction of an AO is challenged on the basis of area and not otherwise as is evident from sub-section (1) of section 124. The objection raised with reference to section 292BB is also not tenable because the present assessment year under consideration is 2003-04, whereas section 292BB is applicable from AY 2008-09. We find that all the objections raised by ld. CIT(DR) have been duly considered by the ITAT in the case of M/s Silver Line (supra) and, therefore, we proceed to decide the issue raised in the cross objection.

12.3. Admittedly no notice u/s 143(2) was issued to the assessee and only notice u/s 142(1) was issued and on this aspect the ITAT in the case of Silver Line (supra) in para 7.1 of its order has observed as under:

> "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 ARl. 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 assesee."

12.4. Further we find that in the case of Naseman Farms Pvt. Ltd. (supra), the ITAT in para 15 of its order has observed as under:

> 15. In the light of the above, we are of the view that the AO has not issued notice u/s. 143(2) of the Act which is mandatory. We are also of the view that in completing the assessment u/s. 148 of the Act, compliance of the procedure laid down u/s. 142 and 143(2) is mandatory. As per record, we find that there was no notice issued u/s. 143(2) of the Act which is very much essential for reassessment and it is a failure on the part of the AO for not complying with the procedure laid down in section 143(2) of the Act. If the notice is not issued to the assessee before completion of the assessment, then the reassessment is not sustainable in the eyes of law and deserves to be cancelled. In view of above facts and circumstances of the present case,

the issue in dispute raised in additional ground relating to non issue of the mandatory notice u/s. 143(2) of the Act is decided in favour of the assessee and we hold that the impugned assessment order dated 31.12.2009 passed u/s. 147/143(3) of the Act by the AO as invalid. Our view is supported by the various judgments of the Hon'ble Supreme Court, and Hon'ble Jurisdictional High Court. The relevant portion of the head-notes of various judgments of the Hon'ble Courts are reproduced as under:-

> "ACIT & Anr. VS. Hotel Blue Moon: [(2010) 321 ITR 362 (SC)]
>
> HELD: "It is mandatory for the AO to issue notice u/s 143 (2). The issuance and service of notice u/s 143 (2) is mandatory and not procedural. If the notice is not served within the prescribed period, the assessment order is invalid Reassessment-----Notice---- -Assessee intimating original return be treated as fresh return--- Reassessment proceedings completed despite assessee filing affidavit denying serviced of notice under section 143(2)---- Assessing Officer not representing before Commissioner (Appeals) that notice had been issued---- Reassessment order invalid due to want of notice under section 143(2)--- Income-tax Act, 196I,ss.143, 147, 148{I), prov.---- ITOv. R.K. GUPTA [3081TR49 (Delhi) Tribu., "

CIT vs. Vishu & Co. Ltd. In ITA No. 470 of 2008 (2010) 230 CTR (Del) 62

Assessment - validity - Non Service of notice under section 143(2) within time - Notice served on the last date after office hours by affixture as no authorized person was present at assessee's premises - is not a valid service of notice - Assessment framed in pursuance of such notice is not valid - It is immaterial that the assessee appeared in the proceedings."

CIT Vs. Cebon India Ltd. (2012) 347 ITR 583 (P&H)

5. We find that concurrent finding has been recorded by the CIT{A) as well 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 oetvetse. In absence of notice being setveo. the AO had no jurisdiction to make assessment. Absence of notice cannot be held to be curable under s 29288 of the Act.

CIT Vs.Mr. Salman Khan, ITA No.508 of 2010

I. In the present case, reassessment order passed under section 143(3) r/w 147 of the Income Tax Act, 1961 is held to be bad in law in view of the fact that the assessing officer has not issued notice under section 143(2) after issuing notice under section 148 of the Income Tax Act, 1961. This Court in the case of The Commissioner of Income Tax Vis. Mr. Salman Khan [Income Tax Appeal NO.2362 of 2009) decided on 1st December, 2009 has considered similar question and has held that in the absence of notice under section 143(2) (prior to the insertion of section 29288), the reassessment order cannot be sustained. In the present case, the reassessment year involved relates to the period prior to the insertion of Section 29288. In this view of the matter, the appeal is dismissed with no order as to costs.

DCIT Vs. M/s Silver Line, ITA No. 1809, 1504, 1505 & 1506/De1/2013

vii. The Hon'ble ITAT of Agra 8ench, in the case of ITO v. Aligarh Auto Centre reported in 152 ITJ (Agra) 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 nove been filed in response to the notice u/s. 10

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, 171TD 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 Id. CIT (A) was justified in setting aside the entire assessment order. We, therefore, do not find any infirmity in the order of the Id. 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/MumI2004 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 2928 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 views of the judicial pronouncements (supra), we are of the view that the re-assessment's made for the assessment years under consideration have become invalid for not having served the mandatory notice u/s 43(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 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."

12.5. Respectfully following the decisions cited in the case of Naseman Farms Pvt. Ltd. (supra), the ground raised in the cross objection is allowed

and the impugned assessment order is cancelled. In the result, the assessment order is held to be void ab initio. The grounds raised by the department in its appeal have become infructruous and are treated accordingly.

13. In the result, revenue's appeal is dismissed and the asessee's cross objection is allowed.

Order pronounced in open court on 12-05-2015.

Sd/-	Sd/-
(H.S. SIDHU)	(S.V. MEHROTRA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 12-05-2015.

MP: Copy to :

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR