IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "SMC", HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

I.T.A. No.1146/HYD/2017
Assessment Year: 2007-08

B.M.Land Developers & Builders, HYDERABAD [PAN: AAHFB7801M]	Vs	Income Tax Officer, Ward-11(4), HYDERABAD
(Appellant)		**(Respondent)**

For Assessee : Shri V. Siva Kumar, AR
For Revenue : Shri Nilanjan Dey, DR

Date of Hearing : 11-06-2019
Date of Pronouncement : 30-08-2019

O R D E R

PER Smt. P. MADHAVI DEVI, J.M. :

This is assessee's appeal for the AY. 2007-08, against the order of the Commissioner of Income Tax (Appeals)-5, Hyderabad, dated 24-05-2017.

2. Brief facts of the case are that the assessee is a partnership firm, carrying on the business of property development. It filed its return of income electronically on 29-10-2007, declaring an income of Rs.14,53,123/-. Subsequently, the assessment was reopened u/s.147 of the Income Tax Act [Act] and accordingly a notice u/s.148 of the Act was issued on 26-03-2014 and allegedly served on the

assessee. Since there was no compliance to the notice u/s.148 of the Act, the Assessing Officer (AO) issued notice u/s.142(1) of the Act on 30-07-2014. As there was no compliance to the above notices, a letter dt.06-01-2015 along with notice u/s.142(1) of the Act was issued to assessee, asking him to furnish the required information. Finally, a show cause letter dt.17-02-2015 was issued to the assessee as a final opportunity.

2.1. In response to the said notice, the assessee's representative appeared and requested to furnish the reasons for reopening and permission for examination of the assessment record. As requested by the assessee, the reasons for reopening were communicated to him vide letter dt.24-02-2015 and the assessee was also permitted to inspect the records on 25-03-2015. Thereafter, the assessee was directed to produce the books of account, copies of purchase deed and sale deeds and development agreements with land lords and also the copy of the return of income, including Trading and Profit and Loss Account, Form No.3CD and 3CB and vouchers for expenses. In response to the same, assessee filed the copy of the return along with computation of income, audited reports in Form 3CB & 3CD and copies of unregistered development agreement cum GPA dt.27-03-2006. No books of accounts along with supporting vouchers were submitted. The AO, thereafter, based on the material available on record, observed that the assessee has allegedly entered into a development agreement with land owners by way of unregistered deed and that they have subsequently, registered

plots in favour of the land lords to give a clear title over plots allotted to them and the consideration mentioned in sale deed dt.16-11-2006 is irrelevant. The AO observed that the assessee is referring to the unregistered development agreement cum GPA dt.27-03-2006, whereas the registered sale deed dt.16-11-2006 has not been filed during the course of assessment proceedings. He held that since agreement of sale cum GPA is un-registered, assessee does not get any clear title. He also observed from the sale deed that the vendor has already paid the sale consideration of Rs.13,44,000/- and acknowledged the receipt of the same. Hence, he held that the contention that - *the consideration mentioned in sale deed is irrelevant*, and hence is not acceptable. He also held that - *the title over the property passes on only through a registered document and since the development agreement is not registered, the title over the property remained with the owner only and as such there is no need to execute a separate sale deed to give a clear title to the owners*. In view of the same, he held that there is a transfer of property and the assessee has earned income over the same. Therefore, he considered the sale consideration to be at Rs.13,44,000/- and after allowing 40% of the sale value as assessee's expenditure towards development, brought the balance of Rs.8,06,400/- to tax.

2.2. Aggrieved with the above order, the assessee preferred an appeal before the CIT(A). The Ld.CIT(A), however, confirmed the order of AO. Hence, the assessee is in second appeal before us.

3. The Ld.Counsel for the assessee submitted that assessee had filed the return of income as is evident from the acknowledgement, which is filed at Page 20 of the Paper Book. He submitted that the AO had issued a letter dt.12-12-2013, asking the assessee to explain as to whether he has filed any return of income and also the details regarding the sale in favour of land owners. He submitted that assessee has given a response on 30-12-2013, stating that the return has been filed and also that sale deed has been executed on 16-11-2006. He referred to the reasons recorded by the AO for reopening of the assessment, wherein the AO has recorded that the assessee has not filed the return of income and also that assessee has not admitted the capital gains on the said property. He submitted that these reasons themselves show that there is no application of mind by the AO to the documents on record since the assessee has filed the return of income. Further, he submitted that the alleged notice u/s.148 of the Act dt.26-03-2014 was never served on the assessee. He referred to Page 32 of the Paper Book, wherein the tracking record of the notice sent to the assessee is placed and brought to our notice that the delivery was un-successful due to insufficient address. Therefore, it is submitted that notice u/s.148 of the Act was not served on the assessee. As regards the findings of AO that the notice was served by affixture also, he pointed out that the AO has neither taken any initiative to find out the correct address of the assessee nor the notice by affixture witnessed by any independent witnesses. He also referred to the docket order of the assessment proceedings, wherein there is no noting that the notice u/s.148 of the Act has been served by

way of affixture. Therefore, according to him, this notice has never been served on the assessee. He further submitted that the address at which the alleged notice is allegedly affixed (though is correct), could not be served on the assessee, because the assessee-firm had become defunct and there was nobody working at that address. Therefore, according to him, this assessment itself is void due to non-service of notice u/s.148 of the Act to the assessee. He submitted that assessee had raised these grounds before the CIT(A), but he has simply and summarily brushed aside the issue stating that the assessee has taken this ground to evade the tax. For this purpose, Ld.Counsel for the assessee placed reliance on the following decisions:

i. Sanjay Badani Vs. DCIT (2014) [50 taxmann.com 457] (Mumbai-Trib);
ii. Shobareddy Tikkavarapu Vs. ITO, ITA No.1445/Hyd/2016, dt.18-04-2018;

3.1. As regards the merits of addition, the Ld.Counsel for the assessee submitted that assessee being a developer, had taken land from the land lords for development by way of un-registered development agreement and subsequently, sale deed was executed on 15-11-2006 to transfer the land in favour of assessee and on the very next day, i.e., 16-11-2006 the assessee has registered the plots in the name of landlords/vendors in favour of vendees. He submitted that the vendors and the vendees i.e., the land lords are the same who were the executants of the sale deed dt.15-11-2006, by which

it is clear that there was no transfer but in order to transfer a valid title over the plots only, the document was registered. It is submitted that there was no exchange of any consideration and hence the transaction is not a transfer. Further, alternatively, Ld.Counsel for the assessee also submitted that even if it is to be considered that there is a sale of property, assessee should have given deduction of cost of acquisition of the property. It is submitted that the AO has failed to consider that the assessee had purchased the property on 15-11-2006 in acres and on 16-11-2006, part of the said property was again registered in favour of land owners, in square yards. He submitted that Document dt.15-11-2006 was filed before the CIT(A). But the same was not considered by the Ld.CIT(A) and also not allowed the cost of acquisition even though assessee specifically raised such ground before the CIT(A). Therefore, without prejudice to his challenge to the service of notice u/s. 148 of the Act, he prayed that the assessment may be set aside and addition may be deleted.

4. Ld.DR, on the other hand, supported the orders of authorities below, submitted that the notice u/s.148 of the Act was within time and final notice was also served by affixture at the assessee's premises and therefore, there is a valid notice. In support of this contention, he placed reliance upon the following case law:

i. Sudev Industries Ltd., Vs. CIT (2018) [99 taxmann.com 109] (SC);

ii. CIT Vs. Sudev Industries Ltd., (2018) [94 taxmann.com 373] (Delhi);

5. Having regard to the rival contentions and material on record, we find that for the relevant assessment year before us is AY.2007-08 for which, notice u/s.148 could be issued on or before 31-03-2014. In the case before us, the AO has issued notice u/s.148 of the Act on 26-03-2014. Therefore, it is within the period of six years from the end of relevant assessment year. However, it is clear that assessee has not been served notice u/s.148 of the Act and even the notice by affixture was also served on 04-04-2014. But as rightly pointed out by the Ld.Counsel for the assessee, there is no report of the AO, which contains the names and addresses of the witnesses, who have identified the property. Further, it is also not recorded in the docket order of the assessment records. Therefore, it is not clear as to whether notice by affixture has really been served on assessee. Further, the Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Avi-oil India Pvt. Ltd., (2010) [323 ITR 242] (P&H) has held that – *notice should not only be issued but should also have been served on the assessee within the stipulated period and in the absence of a valid notice, the assessment is initiated.* The Co-ordinate Bench of the Tribunal at Pune in the case of Anil Kisanlal Marda in ITA No.1763/PUN/2013, dt.01-07-2019 has held as under:

"17. We have gone through the relevant material on record. In this regard, it is observed from the assessment order that the assessee filed his return on 31-10-2009 showing total income at Rs.87,06,746/-. It has been recorded in the assessment order that "notice u/s. 143(2) dated 08/09/2010 was issued and served on the

assessee. Subsequently, notice u/s.143(2) dated 11-11-2011 was again issued and served on the assessee". Proviso to section 143(2) of the Act at the material time provided that "no notice under the said section shall be served on the assessee after the expiry of six months from the end of the relevant assessment year". The assessment year under consideration is 2009-10. Period of six months from the end of the relevant assessment year expires on 30-09-2010. It means that a valid notice u/s.143(2) could have been issued on or before 30-09-2010 enabling the AO to proceed with the assessment u/s. 143(3) of the Act. The AO has referred to two notices u/s. 143(2) dated 08-09-2010 and 11-11-2011. It is obvious that the second notice u/s. 143(2) dated 11-11-2011 is of no consequence as having been issued after a period of six months from the end of the relevant assessment year. Now we need to find out as to whether notice u/s. 143(2) dated 08-09-2010 was actually issued and served on the assessee on or before 30-09-2010.

18. As against the mentioning in the assessment order of the issue and the service of notice u/s. 143(2) dated 08-09-2010 on the assessee, the ld. AR contended that such notice was never served. The ld. DR was requested to place on record the evidence of service of notice. She invited our attention towards an envelope containing notice u/s.143(2) dated 08-09-2010 which was issued but returned by the postal authorities with remarks recorded on 27-09-2010 that the addressee is not living at the given address and the further address is not known. On a perusal of such envelope, it is observed that the notice was sent to the assessee at the address 39/11, Budhwar Peth, Solapur, Maharashtra 413002. As against this, the assessee filed his return with Pune address of F-304, Vrundawan Apartments, Model Colony, Shivajinagar, Pune – 411 016. The AO has also recorded the Pune address of the assessee in the assessment order passed on 30-12-2011. On a pertinent query, the ld. DR admitted that the address given in the return is the same which has been mentioned in the assessment order. On a further question as to how the notice was sent at the Solapur address of the assessee when the return of income contained Pune address, the ld. DR submitted that the Solapur address has been given by the assessee in his PAN details and the system generating notice u/s. 143(2) took up such address from the PAN database. The ld.DR took us through Rule 127 which provides that notice etc. may be delivered on any of the addresses which, inter alia, include the address available in the PAN database of the addressee under sub-clause (i) of Rule 127(2)(a). She submitted that the notice sent by the Department on the address given by the assessee in PAN database was accordingly in order. She also invoked Section 27 of the General

Clauses Act, 1897 to buttress her submission of valid service of notice, once a notice is sent through registered post.

19. Considering the wide spectrum of arguments put forth by the ld. DR, we need to ascertain –

i. Whether the notice u/s 143(2) was actually issued ?
ii. Whether `issue' of notice is equal to `service' of notice ?
iii. Whether the notice can be considered as served by post?
iv. Whether the notice u/s 143(2) can be deemed to have been issued/served ?

i. Whether the notice u/s 143(2) was actually issued ?

20. The AO has recorded in the assessment order that notice u/s 143(2) dated 08.09.2010 was issued and served on the assessee. On perusal of the assessment records produced by the ld. DR, it is seen as an admitted position that such notice was though issued at Solapur address as against the Pune address given in the return of income, but the same was returned by the postal authorities and thereafter no other notice was issued within the stipulated period. Thus it is palpable that the notice issued and returned by the postal authorities coupled with no further notice issued by the Department has in substance the net effect of non-issuance of notice.

ii. Whether `issue' of notice is equal to `service' of notice ?

21.1. The next leg of the argument of the ld. DR was that once it was established that the notice u/s 143(2) was admittedly `issued' before the close of the stipulated period of six months from the end of the relevant assessment year, which is further evidenced from the fact that the same was returned by postal authorities, then such `issue' of notice should be considered as `service' of notice. For this proposition, she relied on V.R.A. Cotton Mills (supra).

21.2. We have gone through the judgment in the case of V.R.A. Cotton Mills (supra) in which it has been clearly laid down that the date of notice as required to be "served" u/s.143(2) is to be considered as the "date of issue of notice" by the AO, which supports the view point of the ld. DR. In reaching this conclusion, the Hon'ble High Court relied on the judgment of the Hon'ble Supreme Court in Banarasi Devi Vs. ITO (1964) 53 ITR 100 (SC) and dissented with its own judgment in CIT Vs. Avi- oil India Pvt. Ltd. (2010) 323 ITR 242 (P&H) in which it was held that notice u/s.143(2) should not only be issued but also served within the stipulated period and in the absence of such a valid service, the assessment is vitiated.

21.3. Similarly, the Hon'ble Gujarat High Court in Shanabhai P. Patel vs. R. K. Upadhyaya, ITO (1974) 96 ITR 141 (Guj) dealt with a situation in which reassessment notice was issued within time-limit but served beyond the prescribed period of four years. The Hon'ble High Court held that sec. 149 enjoins that a notice should be issued within prescribed period. It held that the words "service of notice" or "issuance of notice" have no fixed connotation but are interchangeable and same meaning should be given to both the words used in ss. 148 and 149. In reaching this conclusion, their Lordships also relied on Banarsi Debi vs. ITO (1964) 53 ITR 100 (SC). The Revenue carried the matter before the Hon'ble Summit Court. In R. K. Upadhyaya, ITO vs. Shanabhai P. Patel (1987) 166 ITR 163 (SC), their Lordships highlighted the difference in the language of the 1922 Act under which the judgment in Banarsi Debi vs. ITO (supra) was rendered and the 1961 Act. It observed that : 'A clear distinction has been made out between the "issue of notice" and "service of notice" under the 1961 Act'. Reversing the judgment of the Hon'ble Gujarat High Court, it held that : `The High Court, in our opinion lost sight of the distinction and under a wrong basis felt bound by the judgment in Banarsi Debi vs. ITO (supra). As the ITO has issued notice within limitation the appeal is allowed and the order of the High Court is vacated'. From the above enunciation of law by the highest court of the country, there remains no doubt whatsoever that `issue of notice' cannot be substituted with `service of notice'.

21.4. It is pertinent to take stock of the judgment of Hon'ble Delhi High Court in CIT Vs. Lunar Diamonds Ltd. (2006) 281 ITR 1 (Del.) in which the assessment was held to be rightly quashed when no notice u/s.143(2) was served upon the assessee. In that case also, the judgment of Hon'ble Supreme Court in Banarasi Devi Vs. ITO and others (supra) was pressed into service, which constituted the foundation in the case of V.R.A. Cotton Mills Pvt. Ltd. (supra) for holding that date of service of notice is to be considered as the date of issue of notice. The Hon'ble Delhi High Court in Lunar Diamonds Ltd. (supra) held that the judgment in the case of Banarasi Devi Vs. ITO and others (supra) cannot be applied as it was rendered in the backdrop of section 4 of the Amendment which is not now relevant.

21.5. The Hon'ble Gujarat High Court in Pr. CIT Vs. Nexus Software Ltd. (2017) 248 taxmann 243 (Guj.) also dealt with a similar situation, in which the Revenue once again relied on the judgment of the Hon'ble Punjab & Haryana High Court in V.R.A. Cotton Mills (supra). The Hon'ble High Court observed that : 'However, we are not in agreement with the view taken by the Punjab & Haryana High Court that the expressions "serve" and "issue" would have the same

meaning. The word "served" used in Section 143(2) of the Act is very significant and very clear.'

21.6. The ld. DR also relied on the judgment of Hon'ble Supreme Court in the case of Madan & Co. vs. Wazir Jaivir Chand 1989 AIR 630 (SC) to bolster her argument that a registered letter addressed to the person at his residential address shall be deemed to be served. We do not find any relevance of the judgment in Madan & Co. (supra) to the facts of the instant case. That was a case involving interpretation of section 11 of the Jammu & Kashmir Houses and Shops Rent Control Act, 1966 in which the respondent issued a notice to the petitioner calling upon him to pay the arrears of rent and also terminate tenancy. The notice could not be served through postmaster who tried to serve the same on the addressee but eventually returned with the endorsement "left without address, returned to sender". The question arose before the Hon'ble Supreme Court as to whether it should be considered as a proper service. Considering the section 11(1) of the Jammu & Kashmir Houses and Shops Rent Control Act, the Hon'ble Supreme Court observed that if the addressee refuses or declines to accept the notice, then it can be considered as a proper service. When a postman calls at the address mentioned and fails to contact the addressee and the same is returned to the sender because the tenant is away from the premises for considerable time, then such delay should be attributed to the tenant's own conduct and should be considered as "served". We do not find any applicability of the ratio laid down in the case to the facts as are obtaining before us. That was a decision under a different statute and in a different context in which notice was required to be given by the owner to the tenant for eviction of the premises. Non-acceptance of such a notice was held to be a valid ground for assuming service of notice as in the otherwise scenario the entire object of the statute would have frustrated and the tenant could have easily escaped the clutches of the stringent provisions of eviction by simply avoiding the service of notice, which is not the case within the purview of the Income-tax Act.

21.7. In addition to the series of the judgments discussed above holding that service of notice, which is different from issue of notice, is a pre-condition for assuming jurisdiction to frame the assessment, the Hon'ble jurisdictional High Court in the several decisions including Pr.CIT Vs. Shri Jawahar Hiranand Bhatia in Income Tax Appeal No.1268/2015 has held that service of notice u/s. 143(2) within the prescribed time is sine qua non for completion of assessment u/s. 143(3) of the Act. In our considered opinion, issuance of notice is different from service of notice and the two words cannot be used interchangeably.

iii. Whether the notice can be considered as served by post?

22.1. The ld. DR then contended that sending of notice through registered post satisfies the requirement of service and there is no further need to examine, if it was actually served on not. For this proposition, she relied on certain provision, which we will be shortly referring to.

22.2. Section 282 of the Act has caption `Service of notice generally'. Sub-section (1) provides that : `The service of a notice or summon or requisition or order or any other communication under this Act (hereafter in this section referred to as "communication") may be made by delivering or transmitting a copy thereof, to the person therein named,—(a) by post or by such courier services as may be approved by the Board; or…'. The term service by post has not been specifically defined in the Act. Thus, we will have to go by the meaning of this expression given in the General Clauses Act, on which the ld. DR has laid a great deal of emphasis.

22.3. Section 27 of the General Clauses Act, 1897, deals with the meaning of `service by post'. It states that: `Where any (Central Act) or Regulation made after the commencement of this Act authorizes of requires any document to be served by post, where the expression "serve" or either of the expressions "give" or "send" or any other expression in used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post'. It is manifest from the mandate of section 282 of the Act read with section 27 of the General Clauses Act that these provisions deal with the service of notice and more particularly the service of notice by post. Section 27 provides that service by post shall be deemed to be effected by properly addressing, pre-paying and posting by registered post. It means that when a letter containing the document is properly addressed, pre-paid and posted by a registered post, it will be considered as a valid service. It is not the end of the provision. There is a specific mention of the words `unless the contrary is proved'. It means that the presumption of valid service on properly addressing, pre-paying and positing by registered post is not irrebuttable. It can be rebutted if the contrary is proved. Extantly, we are dealing with a situation in which the contrary has been proved inasmuch as the Department has itself accepted that the notice sent by the registered post was returned by the postal authorities. Under such circumstances, there can be no presumption of valid service of notice in terms of the above provisions.

22.4. The ld. DR has harped on rule 127 to fortify her contention of valid service of the notice. Sub-section (2) of section 282 provides that the Board may make rules providing for the addresses (including the address for electronic mail or electronic mail message) to which the communication referred to in sub-section (1) may be delivered or transmitted to the person therein named. Pursuant to this provision, rule 127 has been inserted by the IT (Eighteenth Amendment) Rules, 2015 w.e.f. 02-12-2015. It deals with the `addresses' at which a notice or summons etc. may be delivered. Sub-rule (2)(a) has some subclauses dealing with different addresses at which such notices etc. may be delivered or transmitted. Whereas sub-clause (i) refers to address available in the PAN database of the addressee, sub-clause (ii) refers to the address available in the income-tax return to which communication relates; sub-clause (iii) refers to the address available in the last income-tax return furnished by the addressee; and sub-clause (iv) refers to address of registered office of a company as available on the website of Ministry of Corporate Affairs. This shows that a notice etc. can be delivered to an assessee at any of the addresses given in rule 127(2)(a) which, inter alia, include address available in the PAN and also the address available in the income-tax return. It means that if a notice etc. is delivered at the address given in PAN, even if such address is at variance with the address given in the income-tax return, it shall be considered as a valid delivery of notice. What emerges from rule 127 is that it simply provides different addresses of the assessee at which a notice etc. can be delivered or in other words served. This rule does not dispense with the otherwise legal requirement of serving the notice. Its effect is limited to the extent that if a notice etc. is delivered or served at the address given in the PAN, which may be different from the address given in the return of income, the assessee cannot assail the valid service of such a notice. But the fact of the matter is that the notice etc. must be delivered at the one of addresses given in the rule. Simply issuing a notice at the address given in PAN etc., which is not delivered to the assessee, may satisfy the requirement of the initial issue of notice at the correct address but not that of service of such notice until such notice is actually delivered or served. It can be seen from the discussion made above that no notice u/s 143(2) was delivered or served upon the assessee. Thus rule 127 does not assist the case of the Revenue in any manner. Before parting with this issue, we want to make it clear that the question as to whether or not the rule 127 will have retrospective effect is left open as adjudication on this issue is not warranted in the facts of the instant case since the notice was not delivered or served upon the assessee at any address.

iv. Whether the notice u/s 143(2) was deemed to have been issued/served ?

23.1. The ld. DR invoked the provisions of section 292BB to contend that since the assessment proceedings were attended by the assessee he cannot now claim that the notice was not issued or served on him.

23.2. We can better appreciate the contention on having a glimpse at section 292BB, which runs as under :

"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.".

23.3. This section was inserted by the Finance Act, 2008 w.e.f.01-04-2008 and thus covers the assessment year/proceedings under consideration. It provides that where an assessee appears in any proceedings and co-operates in an inquiry relating to the assessment etc., it shall be deemed that any notice issued under any provisions of this Act, which is required to be served, has been duly served upon him as per law. When it is so, the assessee shall be prohibited from taking any objection in any proceedings that the notice was not properly served upon him. The proviso to this section states that if an assessee raises an objection before the completion of assessment that the notice was not properly served, then the provision deeming a proper service on attending the assessment proceedings etc., shall not apply. Further, what is relevant to note is that this section dispenses with the requirement of `service' of notice in the given circumstances and not the `issue' of notice. If a particular provision requires issue of notice within a stipulated period and no notice is actually issued, even though the requirement of service of notice will stand satisfied with the assessee attending the assessment proceedings, but the Revenue will still have to independently prove

that the notice was issued. If issuance of a notice is not established, the adverse consequences will follow.

23.4. Since the proviso to section 143(2) talk of service of notice and not issue of notice, let us examine if the notice u/s 143(2) was served on the assessee in terms of section 292BB on his attending the assessment proceedings.

23.5. The assessee has placed on record a copy of his letter dated 28-11-2011 addressed to the DCIT, Circle-3, PMT Building, Pune objecting to the service of notice dated 08-09-2010 purportedly issued u/s. 143(2) and served upon him. The assessee categorically stated that "I would like to state that the said notice 08-09-2010 has not been received by me". It has also been mentioned in para 4 of the assessee's aforesaid letter that "hence, this notice is not a valid notice and bad in law. I request you to please quash the assessment proceedings". This letter of the assessee bears the stamp of the office of ACIT, Circle-3, Pune with the date of 28-11-2011. On examination of the assessment folder produced before us by the ld. DR, it is found that the original of this letter bearing the date of receipt by the office of ACIT, Circle-3 as 28-11-2011, is available there. The assessment order in this case was passed on 30-12-2011. Thus, it is proved that the assessee did raise objection of the non-service of notice before the AO before the completion of assessment and such an objection has not been disposed of by the AO either in the assessment order or otherwise. It is evident from the assessment folder that notice u/s.143(2) dated 08-09-2010 was issued but never served upon the assessee and, in fact, returned by the postal authorities. It is further clear that no other notice u/s. 143(2) was issued by the AO before the cut-off date of 30-09-2010. Accordingly, proviso to section 292BB gets magnetized and the deemed service of notice u/s.143(2), by virtue of the main part of the section 292BB, is erased.

24. Now turning to the facts of the instant case, it is found as an admitted position that no notice u/s. 143(2) was actually served upon the assessee on or before 30-09-2010. The only notice which was issued on 08-09-2010 was returned by the postal authorities and thereafter no effort was made to serve another notice before the deadline. Since the requirement of `service' of notice u/s. 143(2) and not its `issue', is a jurisdictional condition, which is unfortunately lacking in the instant case, the sequitur is that the AO lacked jurisdiction to make the assessment. Ex consequenti, the assessment order passed in absence of a valid jurisdiction has to be and is hereby quashed.

25. In view of our decision on quashing the assessment for want of service of notice u/s. 143(2), there is no need to delve into the grounds raised by the assessee on merits.

26. In the result, the appeal is partly allowed".

Therefore, on this ground itself, the assessment has to be set aside.

5.1. Further, even on merits, we find that the assessee has taken the land of the land owners for development and thereafter, got the entire land registered in its name on 15-11-2006 and re-registered the plots in favour of the land owners vide sale deed dt.16-11-2006. Therefore, it is clear that there is transfer of land in favour of assessee by way of development agreement and not vice-versa. The land owners' share is with them only and it is only the plots that have been re-registered in their favour, so that they have a clear title along with the boundaries of the plots. Further, in a development agreement, there is a transfer of land in exchange for the development of the entire property. Thus, the assessee has incurred expenditure for development of the said land, in consideration of which, it has received a portion of the land. This transaction of transfer of land in favour of assessee has to be taxed in the hands of the land owners as there is transfer of land. As far as the assessee is concerned, he is liable to capital gain, when it sells its share of land. The assessee had filed the sale deed dt.15-11-2006 before the CIT(A) to demonstrate that the it had purchased land on 15-11-2006 in acres and had immediately sold the plots on 16-11-2006 i.e., the very next day. This

shows that assessee has developed the land and sold the same to the land owners. Therefore, the assessee's contention that - *there is no transaction of any transfer by the assessee to the land owners*, is to be accepted. Further, both the AO and the CIT(A) have failed to consider the transaction as a whole and failed to allow the cost of acquisition of the land to the assessee while computing the income from the transaction of sale. As rightly pointed out by the Ld.Counsel for the assessee, if the transaction was to be considered as transfer, then the AO and the CIT(A) ought to have taken the transaction of sale dt.15-11-2006 also into consideration and the cost of acquisition should have been allowed and if it was so done, there would be loss and not income from the said transaction. Therefore, the premise of the AO that there is income which has escaped assessment, is incorrect. The reasons recorded for reopening also are clearly erroneous as the AO has recorded that assessee has not filed the return of income. In view of these facts, we are of the opinion that the re-assessment is not sustainable. Therefore, on both the grounds, assessee's appeal is liable to be allowed.

6. In the result, the appeal of assessee is allowed.

Order pronounced in the open court on 30th August, 2019

Sd/-	Sd/-
(S. RIFAUR RAHMAN)	**(P. MADHAVI DEVI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated 30th August, 2019

TNMM

Copy to :

1. B.M.Land Developers & Builders, C/o.M.Sitaramaiah, Plot No.106/A, Addagutta Society, Kukatpally, Hyderabad.

2. The Income Tax Officer, Ward-11(4), Hyderabad.

3. CIT(Appeals)-5, Hyderabad.

4. Pr.CIT-5, Hyderabad.

5. D.R. ITAT, Hyderabad.

6. Guard File.