IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad SMC Bench, Hyderabad
(Through Video Conferencing)
Before Smt. P. Madhavi Devi, Judicial Member

ITA No.1757/Hyd/2019		
Assessment Year: 2011-12		
Smt.Surat Lalitha Devi Hyderabad PAN:BALPL0921R	Vs.	Income Tax Officer Ward 9(1) Hyderabad
(Appellant)		(Respondent)
Assessee by:	Sri K.A. Sai Prasad	
Revenue by:	Sri Sitarama Rao, DR	
Date of hearing:	07/01/2021	
Date of pronouncement:	08/01/2021	

ORDER

This is assessee's appeal for the A.Y 2011-12 against the order of the CIT (A)-7, Hyderabad, dated 7.10.2019.

2. Brief facts of the case are that the assessee, an individual along with six other family members, had sold an immovable property through registered sale deed document No.1051/2010 dated 19.04.2010 for an amount of Rs.80.00 lakhs as against the market value fixed by the Stamp Duty Authority at Rs.1,02,05,740/-. Since the value of the property is more than the sale consideration, the AO verified the registered sale deed and found that the difference of stamp duty was paid by the assessee's group i.e. Vendors. Therefore, he was of the opinion that as per the provisions of section 50C, the market value of the property is to be adopted as consideration for the purpose of computing at the capital gains. Since the assessee did not file his return of income for the year under consideration and has not offered the

capital gains to tax, the AO issued a notice u/s 148 of the Act on 23.3.2018 which was served on the assessee's wife on 27.03.2013. Subsequently, assessee's wife appeared before the AO and submitted a letter stating that the assessee has expired on 9.8.2018 and that she does not have any information regarding the said notice. She also submitted that she has no knowledge about any property in the name of her husband and that they do not have any asset either in her name or in the name of her daughter. The AO, however, did not accept the assessee's contention and by applying the provisions of section 50C, he adopted the market value of Rs.1,02,05,740/- as sale consideration and computed the long term capital gain and brought the assessee's share to tax.

3. Aggrieved, the assessee preferred an appeal before the CIT (A) stating that the notice u/s 148 should have been served on the assessee and not on the assessee's wife and also that the notices have not been issued to the assessee. He also questioned the addition made by the AO. The CIT (A) however, held that the notice has been properly served on the assessee's wife and that the legal heirs have been brought on record as per the information given by the assessee. Against this order of the CIT (A), the assessee is in appeal by raising the following grounds of appeal:

> *"1. The order of the learned CIT (A) is erroneous both on facts and in law.*
>
> *2. The order of the learned CIT (A) is not justified in sustaining the addition of Rs.19,82,494 under the head capital gains.*
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> *3. The order of the learned CIT (A), in the facts and circumstances of the case, is not justified in holding that the service of notice u/s 148 is proper.*
>
> *4. The order of the learned CIT (A) is not justified in not appreciating the claims that:*

(i) the AO's show cause notice dt. 29.11.2018 was invalid since it was addressed to Sri Surat Manohar, who died on 9.8.2018 itself and the fact of his death was intimated by his wife to the AO immediately on receipt of the same by her;

(ii) no action was taken by the AO to bring on record the legal heirs on record and make the assessment on legal heirs; and

(iii) therefore, the consequent assessment order is bad in law.

5. The learned AO is not justified in not taking into consideration the fact that the assessment order passed in the name of the Smt. Surat Lalitha Devi, without serving any notice addressed to her, as a legal representative, and therefore, the consequent assessment order is bad in law.

6. The learned CIT (A) is not justified in holding that the provisions of sub-section (4) and (6) of section 159 are to be considered only during the course of recovery proceedings.

7. The appellant craves leave to add, amend, delete or substitute any ground or grounds during the course of appellant proceedings".

4. The learned Counsel for the assessee submitted that the requirement of the law is to serve the notice u/s 148 on the assessee himself and not on the assessee's wife. In support of this contention, he placed reliance upon the decision of the Single Bench of the ITAT at Agra in the case of Shripal Singh Gulati vs. ITO reported in (2008) 9 DTR (A.T)564 (ITAT Agra), dated 30th April, 2008 wherein it has been held that notice served on the assessee's wife without first fulfilling the conditions for such service or any other person other than the assessee is not proper notice. The learned Counsel further relied upon the judgment of Hon'ble Madhya Pradesh High Court in the case of CIT vs. Dalumal Shyamumal reported in (2005) 276 ITR 62 (MP) wherein it was held that in cases where the assessee dies pending any

assessment proceedings, it is the duty of the AO to ensure compliance with section 159(2) of the I.T. Act before any orders are passed and therefore, such assessment has to be nullified. As regards the merits of the case also, the learned Counsel reiterated the assessee's submissions made before the authorities below.

5. The learned DR, on the other hand, supported the orders of the authorities below.

6. Having regard to the rival contentions and the material on record, I find that the AO in the assessment order for the relevant A.Y has recorded that the notice u/s 148 has been served on the assessee's wife. The assessment was completed on the L.R of the assessee Shri Surat Manohar vide orders dated 10.12.18 as the assessee's husband had expired on 9.8.2018 and the same was brought to the notice of the AO. We find that similar facts existed in the case of Shripal Singh Gulati vs. ITO (cited Supra) and for ready reference, the relevant paragraphs are reproduced hereunder:

> *"11. The third prong of legal contention of the appellant is with regard to service of notice on his wife instead on himself. This is a fact that the notice was served on assessee's wife. The AO recorded reason on 28th March, 2002 and sent notice to the assessee under s. 148 on 28th March, 2002 which was served on the same day. The explanation of the Department is that the service on assessee's wife was made because the time for making assessment was getting barred.*
>
> *12. After hearing rival submissions the clear-cut facts which emerge are that due to short time left for making assessment the AO was in a hurry to serve the notice. The learned CIT(A) has mentioned in his order that the notice was served on the last day of the limitation. But actually it was served on 28th March, 2002 and couple of days were left behind. Sec. 149 of the Act envisages time period within which assessment has to be completed. The words used in the section refer to the limitation for 'issuance' of notice and not for 'service' of*

notice. It was so held by the Hon'ble Supreme Court in the case of R.K. Upadhyaya vs. Shanabhai P. Patel (1987) 62 CTR (SC) 17: (1987) 166 ITR 163(SC). It has been argued that the information from the Dy. Director of IT (Inv.), Gurgoan was received by the AO on 28th March, 2002 and on the same day reason for taking action under s. 148 was recorded. The proposal for sanction was submitted to the higher authorities on the same date and after receipt of the sanction notice under s. 148 was also served on Smt. Swaranjeet Kaur on the same date Le" on 28th March, 2002. The plea taken by the learned Authorised Representative is that under s. 282 a notice or requisition under this Act may be served on the person therein named either by post or as if it were summons issued by a Court under the CPC, 1908. Insofar as legal position with regard to service of notice is concerned, there is no dispute and I agree with the learned Authorised Representative in this regard. Rule 15 of order 5 of the CPC ordains that where service can be on an adult member of defendant's family where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of notice on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him. Therefore, under this rule too conditions have to be in existence to make a service on adult member of the family who is residing with the assessee. Bat before that following conditions have to be fulfilled:
(1) that the assessee must be absent from his residence;

(2) there should be no likelihood of his being found at his residence within a reasonable time; and

(3) that he has no agent empowered to accept service on his behalf.

13. In this case, all the three requirements of r.15 of order 5 of CPC were not even looked into because the AO was in a hurry and to finalise everything on a single day i.e., 28th March, 2002 as mentioned in the above para. A notice was simply sent to the house of the assessee and was served on assessee's wife without enquiring as to whether the assessee was present or not or was he likely to be available or had he any agent empowered. In this regard, all these facts are missing to satisfy all the three above-mentioned conditions which are sine qua non for service of notice on an adult member of the family living with the assessee. No doubt that family of the assessee was living with him and adult one to (sic), all the three conditions should coexist. The service of notice

is to be made on the assessee and not on any adult member of the family of the assessee as per the directions of CPC. It is true that the assessee appeared before the AO on 8th Oct., 2002 after service of notice under s. 148 on his wife. Now it has to be seen as to whether the mere appearance of the assessee after improper service of notice would absolve the requirement of law or not. The Hon'ble Allahabad High Court in Full Bench mentioned in the case of Laxmi Narain Anand Prakash vs. CST 46 STC 71(AII)(FB) has held that "notice under s, 21 of the UP Sales-tax Act, 1948, was served on A, who had no concern with the assessee's firm. The assessee, however, appeared on the date of hearing in the proceedings. The question was whether the service of notice on A became immaterial because of the assessee's appearance and the proceeding under s, 21 could not, therefore, be said to be invalid. Held, that the notice under s. 21 having been improperly served, the initiation of proceedings was without jurisdiction and it could not be validated by participation of the assessee in the proceedings". It has been contended that s, 21 of the UP Sales-tax Act is equal to s. 148 of the IT Act. I have examined the ratio of the above decision and the provisions of s. 21 of the Sales-tax Act. Sec. 148 of the IT Act (sic) in my opinion, the ratio of the above decision of Hon'ble Allahabad High Court Full Bench is also applicable to the case in hand and thus the proceedings initiated u/s. 148 are without service of proper notice and as such are illegal. The entire proceedings thus become void ab initio and are liable to be quashed. As a result, I quash the proceedings being without jurisdiction and as a result of invalid service of notice. Therefore, the assessee succeeds on this limb of argument. Notice was served directly on assessee's wife without there being any effort which may be evident from any noting on the notice that any reasonable effort/attempt was made as required by law, before service of the notice to the assessee's wife. There is no evidence on record nor the wife of the assessee is legally authorised by the assessee to receive the notice. The learned CIT(A) has tried to justify the action of the AO by ignoring that the date on which it was served was the last day of limitation. So it is manifestly clear that the notice was improperly served on assessee's wife due to lack of time".

7. Thus, it can be seen that the facts in this case are similar to the facts in the case of Shripal Singh Gulati vs. ITO (Supra) and in the case before me, it is also not the case of the Revenue that the assessee had participated in the assessment

proceedings subsequent to the notice u/s 148 of the Act. Therefore, respectfully following the decision of the Coordinate Bench at Agra, I hold that the assessment order u/s 147, without serving a proper and valid notice u/s 148 of the Act to the assessee is bad in law. Since the assessment order itself is held as not valid, I do not see any reason to adjudicate the other grounds/arguments of the assessee at this stage as it would only result in an academic exercise. Therefore, the appeal of the assessee is partly allowed.

8. In the result, appeal of the assessee is partly allowed.

Order pronounced in the Open Court on 8th January, 2021.

Sd/-

(P. MADHAVI DEVI)
JUDICIAL MEMBER

Hyderabad, dated 8th January, 2021.

Vinodan/sps

Copy to:

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3 CIT (A)-7 Hyderabad
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5 The DR, ITAT Hyderabad
6 Guard File

By Order