

**IN THE INCOME TAX APPELLATE TRIBUNAL,
AGRA BENCH, AGRA**

**BEFORE SHRI P.K. BANSAL, ACCOUNTANT MEMBER AND
SHRI H.S. SIDHU, JUDICIAL MEMBER**

**ITA No. 196/Agra/2007
Asstt. Year : 1998-99**

Income-tax Officer,
4(4), Agra.

vs. Sh. Sikandar Lal Jain (Deceased),
Through L/H Shri Gagan Kumar Jain,
B-664, Kamla Nagar, Agra.
(PAN – ABCPJ 6847 R)

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**ITA No. 405/Agra/2007
Asstt. Year : 1998-99**

Income-tax Officer,
4(4), Agra.

vs. Sh. Sikandar Lal Jain (Deceased),
Through L/H Smt. Uma Rani Jain,
B-664, Kamla Nagar, Agra.
(PAN – ABCPJ 6847 R)
(Respondent)

(Appellant)

For Revenue : Shri Sahib P. Satsangee, F.C.A.
For Assessee : Shri Vinod Kumar, Jr. D.R.

ORDER

Per P.K. Bansal, A.M. :

There being difference of opinion between both the Members constituting the Bench, the matter was referred by Hon'ble President u/s. 255(4) of the Income-tax Act to the Third Member for adjudication on two questions. The learned Judicial Member had confirmed the order of CIT(A) quashing the reassessment proceedings both on the basis of invalidity of notice having

been issued on the dead person and the service of notice on legal heir of assessee beyond the period of limitation, whereas the learned Accountant Member set aside the order of Id. CIT(A) holding the reassessment proceedings as valid having been initiated after issuing valid notice and its proper service. The Third Member vide his opinion dated 8th December, 2010 concurred with the decision reached by learned Judicial Member on invalidity of notice having been issued on the dead person thereby rendering the re-assessment proceedings as void and agreed with the learned Accountant Member on the validity of service of notice holding that the notice could be validly served beyond the time limit prescribed u/s. 149 of the Income-tax Act.

2. Thus, on the basis of majority of opinion, the appeals of the Revenue are dismissed.

The order pronounced in the open court on 21.01.11.

Sd/-
(H.S. SIDHU)
Judicial Member

Sd/-
(P.K. BANSAL)
Accountant Member

Dated: 21st January, 2011

*aks/-

Copy of the order forwarded to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT, concerned
5. DR, ITAT, Agra
6. Guard file

By order

Assistant Registrar

True copy

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(Respondent)

For Revenue : Shri M.K. Srivastava, Sr. D.R.
For Assessee : Shri Sahib P. Satsangee, F.C.A.

ORDER

Following questions on difference of opinion between the learned Judicial Member and the learned Accountant Member were referred to me by Hon'ble President u/s. 254(4) of the Income-tax Act :

- (i). “Whether the Ld. CIT(Appeals) has erred in law and on facts & the circumstances of the case in declaring the assessment order as void and a nullity or not ?

(ii). *Whether the Ld. CIT (Appeals) has erred in law and on facts & the circumstances of the case in concluding that the notice u/s. 148 has not been served on proper person ?*

2. Although both the Members have mentioned the brief facts in their respective orders relating to these appeals by the Revenue and all these questions arise out of the various grounds taken in the appeals filed by the Revenue, yet for disposing of the questions referred to me, it is necessary for me to refer to the brief facts of the case even at the cost of repetition.

3. The facts of the case are that Shri Sikandar Lal Jain filed his return of income on 29.10.1998 for A.Y. 1998-99. Thereafter, he died on 17.11.2002. Subsequently, the Assessing Officer received information from Addl. DIT (Inv.), Agra that Shri Sikandar Lal Jain had obtained accommodation / bogus entries regarding sale proceeds of shares during the assessment year 1998-99 from M/s. Yadav & Co., New Delhi. The Assessing Officer, therefore, issued a notice u/s. 148(1) of the Income-tax Act in the name of Shri Sikandar Lal Jain on 21.03.2005. The time limit for issuance of notice u/s. 148 as contemplated u/s. 149 of the Act had expired on 31.03.2005 in the present case. Shri Sikandar Lal Jain was admittedly died on 17.11.2002 prior to taking the action u/s 147 by the AO. The proceedings u/s 147 were initiated in the name of the dead person consequently, even the notice u/s 148 was issued in the name of dead person recording reasons to believe also in the name of dead person. The notice was served on Smt. Vandana Jain, the daughter-in-law of the deceased on 30.05.2005 who while receiving the notice stated the fact of death of the assessee in the year 2002. Thereafter, the Assessing Officer issued notice u/s. 142(1) of the Act again in the name of the dead person on 30.09.2005, in response to which Smt. Vandana Jain, the daughter-in-law of the deceased submitted that the notice u/s. 148

dated 21.03.2005 has been illegally served on her, as she is neither the legal heir of the deceased nor duly authorized in that respect. She also informed that the legal heirs of the deceased are Smt. Uma Rani Jain (widow) and her two sons namely Neeraj Kumar Jain and Gagan Kumar Jain. Having the knowledge of the legal heirs of the deceased, the Assessing Officer made communication in the form of office letters on 23.12.2005 in the individual names of three legal heirs accompanied by the photocopies of the original notice dated 21.03.2005 which was already issued in the name of Shri Sikandar Lal Jain, the dead person. The legal heirs acknowledged the receipt of this communication on 23.12.2005 and the acknowledgement was received in the office of the Assessing Officer on 27.01.2006. Finding no response of the notices/communications from the legal heirs of the deceased, the respondents here, the Assessing Officer made assessments u/s. 144 read with section 147 of the Act in the names of three legal heirs, the respondents in the present appeals. Against these assessments, each of the respondents preferred appeal before the CIT(A), who held that the proceedings initiated u/s. 147 of the Act in the case of Smt. Uma Rani Jain, the legal heir, on the basis of invalid notice, are void as the notice issued u/s. 148 of the Act was in the name of dead person. While doing so, the Id. CIT(A) also sought remand report from the Assessing Officer, who in his report dated 04.09.2006 admitted that the notice was actually issued in the name of Shri Sikandar Lal Jain, the dead person. The assessments in the cases of other two legal heirs were also quashed by the Id. CIT(A) holding that the same amount cannot be taxed twice, i.e., once in the hands of Smt. Uma Rani Jain, the widow and second in the hands of other two legal heirs.

4. Before answering the questions referred to me, I have to adjudicate upon the point whether in the background of aforesaid facts, the notice dated 21.03.2005 issued within the

period of limitation but in the name of dead person, Shri Sikandar Lal Jain, and its photocopies served on the legal heirs of the deceased alongwith office letters dated 23.12.2005 of the AO addressed to the legal heirs beyond the period of limitation, should be deemed to be a valid service of notice for acquiring jurisdiction u/s. 147 of the Act or not.

5. The learned DR supported the order of the learned Accountant Member by pointing out that the proceedings u/s. 147 were validly initiated. The notice has been served on the legal heir, Mr. Neeraj Jain on 30.03.2005, which is apparent from page 2 of the assessment order. Our attention was also drawn towards the copy of the notice placed on record. The photocopies of the said notice were also served on all the legal heirs when Smt. Vandana Jain pointed out to the Assessing Officer. The Assessing Officer has given the clear cut finding that the service of the notice by the assessee before the CIT(A) has not been disputed. The issuance of the notice within the limitation period is essential but the service of the notice within the period of limitation is not essential. In this regard reliance was placed on the decision of Hon'ble Supreme Court in the case of R.K. Upadhyaya vs. Shanabhai P. Patel, 166 ITR 163(SC). The issuance of the notice is within the limitation period i.e. prior to 31.3.2005 and, therefore, the jurisdiction is validly vested with the Assessing Officer. He did not deny the fact that the notice was issued in the name of dead person. The learned D.R. vehemently relied on the draft order of the learned Accountant Member for the proposition that under the facts and circumstances of the case, even if the notice is issued in the name of dead person, but served on all the legal heirs, the notice cannot be regarded to be invalid one. Reliance was placed on the following decisions

- (i). Maharaja of Patiala vs. CIT, 11 ITR 202 (Mum.)
- (ii). Jose T. Mooken vs. CIT, 117 ITR 894 (Ker)
- (iii). Smt. Kaushalyabai vs. CIT, 238 ITR 1008 (MP)

It was contended that in all these cases, the notices were issued in the name the dead persons, the legal heir had participated in the proceedings and it was held that the reopening of the assessment was valid. Referring to the decision of Allahabad High Court in the case of CIT vs. Suresh Chandra Jaiswal, 325 ITR 563 (All.) filed in the paper book of the assessee, it was pointed out that the said decision is not applicable because in that decision, the facts were different. No doubt, the notice was addressed to the dead person, but the notice was also not served on the legal heir of the assessee, but on the Munim. Even the name of the deceased was not correctly mentioned in the notice. Therefore, the Hon'ble Allahabad High Court has held that the notice was not valid. Since, there is only MP High Court and Mumbai High Court decisions directly on this point, the tribunal is bound to follow those decisions. Thus it was contended that order of the accountant member is in accordance with law and I am bound to agree with the order of the accountant member.

6. The learned AR, on the other hand, contended that the factum of service of notice dated 21.03.2005 on the legal heir Shri Neeraj Jain on 30.03.2005 is not correct. In fact, notice was not served on any of the legal heirs within the period of limitation, i.e., upto 31.03.2005. Even after 31.03.2005, it is only the photocopies of the notice dated 21.03.2005 were served on the legal heirs. The assessee has expired on 17.11.2002. For this attention was drawn at page 128 of the paper book, which is the return of the deceased for A.Y. 2003-04. The proceedings u/s. 147 were initiated against the name of the assessee, a dead person on 21.03.2005. The same very Assessing Officer has issued refund for the assessment year 2003-04 on 24.08.2004 in the name of the legal heir. The notice was received by the daughter-in-law of the deceased w/o Shri Neeraj Kumar Jain. She immediately mentioned on the notice that her father-in-law had already expired.

For this attention was drawn to the copy of the notice available at page 119 of the paper book. The photocopies of the notice were served on all the legal heirs only on 23.12.2005 not prior to that. The service of notice on Mrs. Vandana Jain is not valid service as she is neither the legal heir of the deceased nor authorized in this regard. My attention was drawn towards pages 41 to 42 of the paper book which contain the remand report of the Assessing Officer. The learned Accountant Member has wrongly observed in para 3 of his proposed order that notice was served on Shri Neeraj Jain on 30.03.2005. The remand report does not speak of this fact at all. The service of the notice is essential for assuming the jurisdiction u/s. 147 of the Income-tax Act. Even otherwise also, the notice was not valid, as it was issued in the name of the dead person and the proceedings have been initiated in the name of the dead person, even though the Assessing Officer has noticed that the assessee has expired because the refund for the assessment year 2003-04 has been given to the legal heir of the deceased. The notice issued in the name of a dead person is invalid. He relied in this regard on the following decisions :

- (i). ACIT vs. Vindhya Telelinks Ltd., 107 TTJ (Jab.) (TM) 149.
- (ii). CIT vs. Amarchand N. Shroff, 48 ITR 59 (SC)
- (iii). Chooarmal Wadhuram vs. CIT, 80 ITR 360 (Guj.)
- (iv). ACIT vs. Late Mangi Lal Through L/H Badri Prasad Bhatia, 83 TTJ (Jd) 590
- (v). ITO vs. Ganga Prasad Jaiswal, 39 ITD (All.) 444
- (vi). CIT vs. Rakesh Kumar, Mukesh Kumar L/H of Late Mohar Singh 313 ITR 305 (P&H)
- (vii). Shaikh Abdul Kadar vs. ITO, 34 ITR 451 (MP)
- (viii). Late Mrs. Jerbanoo N. Wadia vs. ACIT, 39 TTJ (Bom) 138
- (ix). Suraj Mal (HUF) vs. ITO, 110 TTJ (Del.) (TM) 834
- (x). CIT vs. Suresh Chandra Jaiswal, 325 ITR 563 (All.)
- (xi). Braham Prakash vs. ITO, 275 ITR 242 (Del.)
- (xii). Smt. Kesar Devi vs. CIT, 321 ITR 344 (Raj.)

It was pointed out that the decision of Maharaja of Patiala vs. CIT (supra) was not applicable. This decision has been distinguished by the Mumbai Bench of this tribunal in the case of Late

Mrs. Jerbanoo N. Wadia vs. ACIT, 39 TTJ (Bom) 138. The assessment was considered valid in that case in view of the peculiar facts and circumstances of the case. The notice was in the name of Maharaja of Patiala and did not indicate whether it was issued in the name of present Maharaja or for Maharaja who had already expired. The present Maharaja, in fact, was the legal heir of the deceased Maharaja and who also understood that the notice was served in respect of the income of the late Maharaja. Therefore, he did not raise any objection till the matter reached to the Tribunal. In the case of the assessee, the legal heir has not at all participated in the proceedings, but challenged the notice issued in the name of dead person even before the first appellate authority. Referring to the decision in the case of Jose T. Mookan vs. CIT, 117 ITR 894 (Ker), it was pointed out that the question involved in that decision did not relate to the issue of the notice on the dead person by referring to para 3 of the decision. The facts involved in that case are different. Referring to the decision in the case of Smt. Kaushalya Bai vs. CIT (supra), it was pointed out that this decision relates to the M.P. High Court. In that decision, no doubt, the notice was issued in the name of dead person, but the widow of the deceased participated in the proceedings and, therefore, the Hon'ble High Court held that the defect, if any, stands automatically cured. In the case of the assessee, the legal heir did not participate in the proceedings, rather the assessment was completed u/s. 144 of the Income-tax Act. It was pointed out that Hon'ble M.P. High Court in the case of Shaikh Abdul Kadar vs. ITO, 34 ITR 451 (MP) has clearly laid down the proposition of law that the notice issued in the name of dead person is invalid and no assessment can be made on the basis of such notice. This decision of the M.P. High Court has not been referred to by the Hon'ble M.P. High Court in its subsequent decision in the case of Smt. Kaushalyabai vs. CIT (supra). It was vehemently contended that so far the validity of notice is concerned, the notice is invalid and the case of the assessee is duly covered

by the decision of the jurisdictional High Court in the case of CIT vs. Suresh Chandra Jaiswal, 325 ITR 563 (All.). The Allahabad Bench of Tribunal in the case of ITO vs. Ganga Prasad Jaiswal, 39 ITD (All.) 444 has also taken the same view. The Delhi High Court as well as Rajasthan High Court in Braham Prakash vs. ITO, 275 ITR 242 (Del.) and Smt. Kesar Devi vs. CIT, 321 ITR 344 (Raj.) have also taken the same view and are applicable to the facts of the present case.

7. I have carefully considered the rival submissions and have gone through the orders of authorities below as well as the orders of both the Members. For deciding whether the assessment order passed u/s. 144 read with section 147 is a nullity or not, it is necessary to refer to the relevant provisions of section 147, 148 and 149 of the Income-tax Act, which read as under :

Income escaping assessment.

147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any

appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

(a) *where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;*

(b) *where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;*

(c) *where an assessment has been made, but—*

(i) *income chargeable to tax has been under assessed ; or*

(ii) *such income has been assessed at too low a rate ; or*

(iii) *such income has been made the subject of excessive relief under this Act ; or*

(iv) *excessive loss or depreciation allowance or any other allowance under this Act has been computed.]*

Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148

Issue of notice where income has escaped assessment.

148. [(1)] *Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting*

forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 :

Provided that in a case—

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and

(b) subsequently a notice has been served under sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to sub-section (2) of section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, re-assessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice:

Provided further that in a case—

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub-section (2) of section 143, but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.

Explanation.—For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so.

Time limit for notice.

149. (1) No notice under section 148 shall be issued for the relevant assessment year,—

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.

Explanation.—In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section.

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.

(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year.

8. The learned judicial Member confirmed the order of the CIT(A) quashing the reassessment proceedings both on the basis that the notice since issued in the name of a dead person is not a valid notice and that even the notice since was not served on the legal heir upto the last date of limitation, i.e., 30.03.2005. Therefore, the service of notice is also invalid and the notice was not served whereas as the limitation expired on 31.03.2005. The learned Accountant Member, on the other hand, set aside the order of the CIT(A) and took the view that the assumption of the jurisdiction u/s. 147 is on the basis of a valid issue of notice which can be served subsequently, i.e. beyond the time limit as prescribed u/s. 149 of the Income-tax Act. The notice in this case since issued prior to 31.03.2005, service of the notice subsequent to 31.03.2005 will not invalidate the proceedings. Similarly, he was of the view that the notice cannot be held to be invalid merely because it has been issued in the name of dead person. Therefore, I am of the view that in question No.1 there are two issues involved – (i) whether the

service of the notice within the limitation period is essential and (ii) whether the notice issued in the name of the dead person is a valid notice.

9. So far as the first issue is concerned, both the parties agreed that the notice u/s. 148 was issued in this case on 21.03.2005 after recording the reasons. A copy of the reasons is placed in the paper book. The learned AR before me vehemently contended that the notice since was not served on all the legal heirs prior to 31.03.2005, therefore, the proceedings initiated u/s. 147 with the of said notice u/s. 148 are not valid. Sub-section (2) of section 148 requires that the Assessing Officer must first record his reasons before he formally issues the notice under this section. If the word “issuing” in this section is to be read as “serving”, in my opinion, it would lead to an absurdity. This would imply that the Assessing Officer may record his reasons after issuing notice, but before serving it on the assessee. I am of the opinion that the legislature never intended any such strange results. In this regard, reference may be made to section 149(3) itself. There in the first line itself, the word employed is “served” whilst in the ultimate line, the word employed is “issued”. Thus, in the same very sub-section, the legislation itself has used these words as distinct and separate. I think that the legislation would have not used different words in the same very sub-section if it was intended to mean the same thing. Yet, again, the word “issued” has been employed in both the sub-sections (1) and (2) of section 151 which reads as under :

“151. (1). In a case where an assessment under sub-section (3) of section 143 or section 147 has been made for the relevant assessment year, no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Assistant Commissioner or Deputy Commissioner, unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice :

Provided that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer aforesaid, that it is a fit case for the issue of such notice.

(2). In a case other than a case falling under sub-section (1), no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.”

10. If the word “issue” used in both these sub-sections is read as “served” it will also lead to strange situation that even after the Assessing Officer has recorded his reasons and issued the notice, the Joint Commissioner may record its sanction before the service of the notice. It is, thus, manifest that in this very statute and particularly in section 151 and 153, the legislation does not intend and indeed could not have intended that the word “issued” therein should always be read as “served”. Once, it is so, then plainly enough, the ordinary meaning of the word “issued” must be given to that word in section 149 and it is indeed essential to read it only as “issued” and not as “served”. The purpose of bringing the provisions of section 147 to 151, inter alia, against the assessee to bring the assessee who avoided their duty to pay tax or any case against the income which has escaped assessment earlier, within the tax net. Recording of reasons and issuing of notice within the time prescribed is in the hands of the department. The service of the notice is not within the hands of the department. If the service of notice within the time limit is to be read in section 149, it would tantamount to put a premium on the tax evasion by the assessee whose case is to be reopened for the escaped assessment. The legislature, therefore, with its wisdom has made the provisions that the assessing officer must apply his mind and direct the issue of the notice within the time fixed from the last date of the relevant assessment order. The assessee who will be abating the tax will always try to avoid the service of

the notice by hook or crook so that he can take plea subsequently that the proceedings initiated are invalid and the notice could not be served within the prescribed time limit. It was with this object, I am of the opinion that the legislature did not use the word “served” employed in the old section 34 and specifically used the word “issued” alone in section 149 of the Income-tax Act. If the contention of the learned AR is accepted that section 149 requires service of the notice within the time prescribed, it would tantamount to be running against the intended mandate of the legislature and accepting a construction which may defeat and frustrate the very object of bringing section 147 into the statute for curbing the tax evasion. I have gone through the decision of Hon’ble Supreme Court in the case of R.K. Upadhyaya vs. Shanabhai P. Patel, 166 ITR 163 (SC) in which it was held that –

“The scheme of the 1961 Act so far as notice for reassessment is concerned is quite different. What used to be contained in section 34 of the 1922 Act has been spread out into three sections, being sections 147, 148 and 149, in the 1961 Act. A clear distinction has been made out between “issue of notice” and “service of notice” under the 1961 Act. Section 149 prescribes the period of limitation. It categorically prescribes that no notice under section 148 shall be issued after the prescribed limitation has lapsed. Section 148(1) provides for service of notice as a condition precedent to making the order of assessment. Once a notice is issued within the period of limitation, jurisdiction becomes vested in the Income-tax Officer to proceed to reassess. The mandate of section 148(1) is that reassessment shall not be made until there has been service. The requirement of issue of notice is satisfied when a notice is actually issued. In this case, admittedly the notice was issued within the prescribed period of limitation as March 31, 1970, was the last day of that period. Service under the new Act is not a condition precedent to conferment of jurisdiction on the Income-tax Officer to deal with the matter but it is a condition precedent to the making of the order of assessment. The High Court, in our opinion, lost sight of the distinction and under a wrong basis felt bound by the judgment in Banarsi Debi v. ITO [1964] 53 ITR 100. As the Income-tax Officer had issued notice within limitation, the appeal is allowed and the order of the High Court is vacated. The Income-tax Officer shall now proceed to complete the assessment after complying with the requirements of law.”

11. From the aforesaid decision, it is apparent that once the notice is issued within the prescribed limitation period, the proceedings initiated are valid and assessment cannot be made

until a notice is actually served. It is not the case of the learned AR that the notice was not actually served to all legal heir of the deceased. In fact, the Assessing Officer has clearly observed that the notice was served to one of the legal heirs, i.e., the son of the assessee, Shri Neeraj Jain on 30.03.2005. This finding has not been challenged by the assessee before the CIT(A). Now at this stage, the learned AR cannot be permitted to take the plea that the finding given by the Assessing Officer that the notice was served on the son of the assessee Shri Neeraj Jain on 30.03.2005 is incorrect. Even otherwise also, the copy of the notice was duly served on 23.12.2005 on all the legal heirs of the deceased. I do agree with the learned AR that the notice must be served on all the legal heirs and the assessment framed without the service of notice on all the legal heirs of the assessee is invalid, but this is not the case of the assessee here. To that extent, I agree with the learned Accountant Member that the notice u/s. 148 must be issued within the limitation period and section does not require that it must be served within the limitation period.

12. Now coming to the second issue whether the notice issued in the name of a dead person is a valid notice or not. Can the proceedings be initiated against a dead person ? The facts of the case clearly speak that the notice u/s. 148 was issued in the name of the assessee who has already expired on 17.11.2002. Shri Sikandar Lal Jain, the assessee, has submitted the return upto the assessment year 2002-03. His return for assessment year 2003-04 was filed on 26.03.2004 by his wife Smt. Uma Rani Jain as his legal heir. The said return was processed by the Assessing Officer on 02.07.2004 and refund was granted in the name of Smt. Uma Rani Jain as legal heir of the assessee. Thus, the fact regarding the death of the assessee was very much in the record of the Assessing Officer. Under these facts, the Assessing Officer initiated the proceedings in the

name of Shri Sikandar Lal Jain by recording the reasons as well as issuing of the notice u/s. 148 dated 21.03.2005. For a valid initiation of the proceedings u/s. 147, in my opinion, issuance of a valid notice within the limitation period as well as recording of the reasons is essential. The service of the notice on the assessee is also necessary. A reading of section 147, 148 and 149 makes it clear that the notice has to be issued to the assessee. Issuance of the notice to the assessee, as I have already held, is essential for valid proceedings. The assessee is defined u/s. 2 sub-sec.(7) which lays down as under :

- (7) “assessee” means a person by whom any tax or any other sum of money is payable under this Act, and includes—
 - (a) every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or assessment of fringe benefits or of the income of any other person in respect of which he is assessable, or of the loss sustained by him or by such other person, or of the amount of refund due to him or to such other person ;
 - (b) every person who is deemed to be an assessee under any provision of this Act ;
 - (c) every person who is deemed to be an assessee in default under any provision of this Act ;

From the reading of this section, it is apparent that ‘assessee’ means a person by whom any tax or any sum of money is payable under this Act and also includes even every person who is deemed to be an assessee under any provision of the Income-tax Act. The person is defined u/s. 2 sub-sec. (31) which includes an individual. Individual means a single human being distinct from a group of human beings. Now, the question arises whether the person who has already expired, can be regarded to be a human being so as to fall within the definition of ‘individual’. Notice in this case is not issued in the name of the legal representatives of the assessee but issued in the name of an individual who has already expired on 17.11.2002. Therefore, it cannot be said that there was an individual in existence in the name of Shri Sikandar Lal Jain in whose name notice is issued as on the date when the proceedings u/s 147 was initiated or the notice u/s 148 was

issued. Under the 1922 Act, the word “individual” did not necessarily refer to a natural human being but also included a juristic person like a Hindu idol, but under the 1961 Act definition, there is a separate appropriate specification “every artificial juridical person.....”. Similar view has been taken by the Hon’ble Andhra Pradesh High Court in the case of Deccan Wine & General Stores vs. CIT, 106 ITR 111 (AP), in which it was categorically held that an individual under the Income-tax Act, 1961 means only a human being. The issuance of a valid notice is a foundation for the validity of the re-assessment. There is a clear cut distinction between the precedent and procedure. The defect in the procedure will not normally amount to lack of jurisdiction. The notice prescribed u/s. 148 for the purpose of initiation of re-assessment proceedings is not a mere procedural requirement, but is a condition precedent to the validity of re-assessment. If no notice is issued or if the notice issued is shown to be invalid, the proceedings initiated by the Assessing Officer would be invalid and void. The assessment framed on the basis of such invalid proceedings will be invalid. A notice issued to a dead person, in my opinion, cannot be regarded to be a notice issued to an individual as he cannot be a person to be an assessee. In consequence thereof, it cannot be regarded to have been issued to an assessee. No doubt, under section 2 sub-sec. (7) of the Income-tax Act, his legal representatives being different human beings from Shri Sikandar Lal Jain, are deemed to be the assessee in view of the provisions of sec. 159 of the Income-tax Act. Section 159(1) stressed that where a person dies, his legal representatives 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. Similarly, section 159(2) also empowers the Assessing Officer to take the proceedings against the legal representatives which he should have taken against the deceased if he had survived. Section 159(2) nowhere authorizes the Assessing Officer to take the proceedings against the

individual who has already expired, that is why the legal representative u/s. 2(7) are regarded to be assessee. It emanates that the assessee in the case of a deceased person will be the person who are regarded to be the legal heirs of the deceased as they can be regarded to be the human being . The notice u/s. 148 has to be issued on the assessee, i.e., individual (human being). A person who has already expired cannot be regarded to be a human being as on the date when the notice was issued in this case. Only legal heir can be regarded to be the individual. In view of the clear mandates of the provisions of section 2 (7) and sub-section (1), (2) & (3) of section 159, I am of the opinion that the notice issued in the name of a dead person is not a valid notice. In the absence of issuance of a valid notice, the proceedings initiated u/s. 147 cannot be said to be valid one. Since both the parties have argued this issue extensively relying on a number of case laws claimed to be in their favour, I am bound to discuss all these case laws before giving any final verdict and accordingly these cases are discussed in the following paragraphs as under :

(A). The decisions relied on by the assessee :

(i). Shaikh Abdul Kadar vs. ITO, 34 ITR 451 (MP) :

13. In this case it was held:

“Under s. 24B(2) of the IT Act, a notice under s. 34 in respect of the income of a deceased assessee has to be issued to his executor, administrator or legal representatives. In the present case the notice and all communications were addressed to S who, admittedly, was dead at that time, and had been so dead for a long time. The ITO knew from the records of his own office that S was not living, and he also knew who his legal representatives were, because the legal representatives had been assessed in subsequent years, taking into account the assets of the deceased S. In these circumstances, it was incumbent on the ITO to cause the notice to be issued to the legal representatives of S. With the knowledge that the original assessee was dead, and that he was succeeded by his sons and daughter, there was no point in sending a notice as well as all the communications in the name of the dead person. The notice under s. 34 is the foundation of jurisdiction, and that notice has to be correct. When a notice is issued to a dead person, the taxing authority cannot catch any living person into whose hands the notice goes and attribute notice to him. In the present case all notices and communications are addressed to S, which shows that they are all

sent to a dead person. It may be that the legal representatives of S continue to utilize the name of their father for their own business, but the distinction is quite apparent that they are an "AOP"; and it is not the case of the Department that the notice, which was addressed to S was sent to this "AOP". The wording of the notice as well as the letters which have been written by the Department on subsequent occasions clearly show that, in so far as the Department was concerned, it was dealing with S who, they knew, was dead. The notice was defective. As such a notice is a condition precedent for action under s. 34, the assessment cannot be made. The ITO is prohibited from making an assessment on the strength of the notice which he has issued.—E Alfred vs. Addl. ITO (1957) 32 ITR 401 (Mad) : TC51R.1843 relied on.

Conclusion :

Notice for reassessment on the person known to the Department to be dead is invalid."

14. This case, in my opinion, is equally applicable to the facts of the case before me. In the case before me, the notice is addressed to Sikandar Lal Jain, the deceased. The department was fully aware of the fact that Mr. Sikandar Lal Jain has expired on 17.11.2002. The return for the assessment year 2003-04 was filed by Smt. Uma Rani Jain as legal heir on 26.03.2002 and the same was processed on 02.07.2004. The refund of Rs.445/- was granted in the name of Smt. Uma Rani Jain as legal heir by the same very Assessing Officer. Even Smt. Vandana Jain, the daughter-in-law of the deceased, when notice dated 21.03.2005 was served on her, mentioned in the copy of the notice acknowledging the notice itself that the assessee has already expired. The Assessing Officer remained silent and did not take any action so that fresh notice could be issued in the name of the legal heir/s within the permissible time.

(ii). Late Mrs. Jerbanoo N. Wadia vs. ACIT, 39 TTJ (Bom) 138.

15. In this case Mumbai Bench of this Tribunal has held as under :

"It is not disputed by the Department that notice under s.148, dt .!4th March, 1988 was issued to Smt. J.N.W., and received on her behalf on 19th March, 1988. At this point of time, i.e., on 14th March, 1988, the ITO was expected to be aware of the fact that Smt. J.N.W. was no more alive. The intimation of her death was

given to the ITO as early as on 30th Oct., 1987 and the ITO had taken cognizance of the fact that the assessee was dead, as can be seen from the fact, that the ITO had described the assessee as Smt. J.N.W. (deceased). Thus, although the ITO was aware of the death of the assessee as early as in Nov., 1987, he chose to issue the notice under s.148 on 14th March, 1988 on Smt. J.N.W. and not on her legal heir. Thus, there was admittedly a fundamental defect in the notice which was issued on a dead person. It was issued by the ITO on a person who was dead and of whose death the ITO had prior intimation and knowledge.

A notice which is issued in the name of a person who is known to be dead is purposeless and defective and no valid assessment can be made on the strength of such a notice. Before an ITO can proceed under s. 147 with reference to an assessment of an assessee who dies before a notice under that section is served on him, it is his duty to give notice to all the legal heirs of the deceased assessee and attempt to make them parties to the reassessment proceedings. No such effort has been made by the ITO by bringing the legal representatives of the deceased on record or by issuing notices to them. The issue of a valid notice is a condition precedent to the assumption of jurisdiction under s. 148. The point for consideration is whether s. 292B cures a defect of this type. In this connection, it is necessary to point out that s. 159 of the IT Act specifically provides that where a person dies, his legal representatives shall be liable to pay any sum which the deceased should have been liable to pay. The provisions of s. 159(2) (B) and s. 159(3) enable the taxing authority to proceed against the legal representative by issue of appropriate notice if such authority intends to bring to tax any income of the deceased which has escaped assessment or which has to be subjected to assessment. This section would have no meaning if the tax authorities were to proceed to issue notice on assessee who are deceased and of whose death the taxing authority has had advance and adequate intimation. The argument that s. 292B only provides that a return of income or a notice or an assessment shall not be treated as invalid merely by reason of any mistake, defect or omission in the return of income, assessment or notice is not sustainable. This section is intended to cure only procedural errors in the notices or orders of assessment but cannot be relied upon by the Revenue to explain away what is obviously a fundamental and grievous error of the type which has been brought to notice in this case, i.e., the error of issue of notice on a dead person or a person who is known to be dead. Even the fact that in the present case, there was a compliance of this notice by the legal heir does not cure the defect.-Shaikh Abdul Kadar vs. ITO (1958) 34 ITR 451 (MP), E. Alfred vs. First Addl. ITO ;1957) 32 ITR 402 (Mad), P.N. SashiKumar vs. CIT(1988) 69 CTR (Ker) 78 : (1988) 170 ITR 80 (Ker), CIT vs. Surendra Kumar Bhadani (1986) 55 CTR (Pat) 80 (1987) 164 ITR 323 (Pat) and Y. Narayana Chetty & ANR vs. CIT (1959) 35 ITR 388 (SC) applied; Maharajah of Patiala vs. CIT(1943) 11 ITR 202 (Bom) distinguished.”

16. This decision, in my opinion, is applicable to the facts of the case before me. In this case, the Tribunal not only held that the notice issued in the name of the deceased-assessee is invalid,

but also took the view that even if the legal heirs have participated in the proceedings initiated u/s. 147 by issue of notice in the name of the dead person, the assessment so framed cannot be a valid assessment. Section 292B cannot cure the defect. Issuance of a valid notice is the foundation for reassessment proceedings. In the case before me also, the undisputed fact is that the notice had been issued to a dead person and copy of the same notice was served on the legal heirs subsequently, the fact remains no notice issued to the legal heirs of the dead person. A dead person cannot be an assessee and therefore, in absence of the notice issued to the legal heirs, there cannot be the assumption of a valid jurisdiction u/s. 148 of the Income-tax Act. Service of the notice to the legal heirs will not give the valid jurisdiction until and unless the notice is issued to the legal heirs.

(iii). CIT vs. Suresh Chandra Jaiswal, 325 ITR 563 (All.) 325 ITR 563 :

17. In this case it was held -

“that the notice under section 148 of the Income-tax Act, 1961, was addressed to an assessee who was already dead on the date of issue of notice. The notice was issued on March 28, 1985, while the assessee had died on March 20, 1985. The notice was not served upon the legal representatives of the assessee but on the munim. Even the name of the deceased assessee was not correctly mentioned in the notice. The notice was invalid.”

18. In this case, the question before the Allahabad High Court was “whether on the facts and circumstances of the case, the Tribunal was right in holding that the defects in the notice u/s. 148 were not cured by section 292B of the Income-tax Act, 1961”. The Hon’ble jurisdictional High Court in this case followed the order of Allahabad High Court in the case of CIT vs. Shital Prasad Kharag Prasad, 280 ITR 541, in which it was held that the notice contemplated u/s. 148 of the Income-tax Act, 1961 is a jurisdictional notice and is not curable u/s. 292B, if it was not served in accordance with the provisions of the Act. As has been held by me earlier, the Act

requires that the notice is to be addressed to the assessee. A person who is no more in existence cannot be the assessee. It is only the legal heir who can be the assessee. Therefore, the notice must be addressed to the legal heirs. Although the facts of this case were little different, but in this case, the notice was not served upon the legal representative. Even the name of the deceased assessee was not correctly mentioned, but still the Hon'ble High Court has held the notice to be invalid, as it was addressed to an assessee who had already expired on the date of issue of the notice. The decision of the Jurisdictional High court, in my opinion, has clearly laid down the proposition of law that the notice addressed to an assessee who was no more on the date of the issue of notice, is invalid. In the case before me also, the notice is addressed to Shri Sikandar Lal Jain, who has already died prior to the date of issue of the notice.

(iv). CIT vs. Shital Prasad Kharag Prasad 280 ITR 541 (All.):

19. In this case, the Hon'ble Allahabad High Court has held as under :

“The Assessing Authority gets jurisdiction to reopen a concluded assessment only after serving a valid notice on the assessee. A notice contemplated under section 148 of the Income-tax Act, 1961, is a jurisdictional notice and is not curable under section 292B of the Act, if it was not served in accordance with the provisions of the Act.”

20. In this case, the jurisdictional High Court has laid down the proposition of law that the notice contemplated u/s. 148 is a jurisdictional notice and any defect therein cannot be cured u/s. 292B of the Income-tax Act, if it was not served in accordance with the provisions of the Act. The facts of this case are different to the facts of the case before me. In this case, there was a joint Hindu family consisting of two brothers and sons of the pre-deceased brother. One of the brothers died leaving no male descendant. The business of the family came to a close and a separation took place between the two branches; one consisting of G and his sons and the other consisting of JBG and sons. A dispute arose among the family members which led to the filing of

a suit. The arbitrator gave an award which was confirmed by the Supreme Court on July 18, 1973. The effect of this award was that the family was disrupted on the above date. The Assessing Officer came to the conclusion that there had been escapement of capital gains from tax in the assessment year 1964-65 and accordingly, initiated proceedings u/s. 147 issuing a notice u/s. 148. The notice was addressed to S and served on A who had been looking to the affairs of the family from time to time and had a written authority in his favour from JBG. JBG had died on August 13, 1974. The Income-tax Officer completed reassessment but the Tribunal set aside the order on the ground that the notice u/s. 148 was not valid. This decision, in my opinion, is applicable to the extent of the proposition of law laid down by Hon'ble High Court that the notice contemplated u/s. 148 is a jurisdictional notice and cannot be cured u/s. 292B of the Income-tax Act. To this extent, this decision, in my opinion, will support the case before me.

(v). Braham Prakash vs. ITO, 275 ITR 242 (Del.)

21. In this case, the Hon'ble Delhi High Court has laid down following proposition of law :-

“Notice under s. 148 in pursuance of which assessment was framed having been issued in the name of deceased assessee and no notice having been served on the legal representatives, the assessment, notice of demand and notice of penalty under s. 221(1) quashed.”

22. The facts in this case were that a notice u/s. 221 was issued to Shri Brahma Prakash, the legal heir of Sheesh Ram for the assessment year 1996-97. This notice was issued in consequence of the order dated 25.02.2002 pursuant to a notice issued under section 148 of the Income-tax Act. When the matter reached to High Court on a petition filed by the legal heir, the Hon'ble High Court noted that the notice u/s. 148 was issued in the name of Sheesh Ram when he was no more, i.e., notice was issued to a dead person. On this the Hon'ble High Court took a view that as the notice could not have been served upon the deceased, therefore, the subsequent

proceedings are bad in law, as there is breach of principles of natural justice as well as mandatory provisions contained in section 148. Although in this case, I noted that the court has also noted that the notice u/s. 148 was not even served on the legal representative, the Hon'ble High Court quashed all the proceedings, notices, order, pursuant to the notice u/s. 148. In my opinion, this decision, even though differs on the facts as in the case before me, the Assessing Officer served the copies of the notice to all the legal heirs but the fact remains that the notice was addressed to a deceased who cannot be a person u/s 2(31) in the status of an individual. Therefore, to that extent, this decision supports the case of the assessee.

(vi). Smt. Kesar Devi vs. CIT, 321 ITR 344 (Raj.):

23. In this case, the Hon'ble Rajasthan High Court has held as under :

Head Notes - Assessment— Validity— Notice issued to dead person— A case cannot be decided in the absence of the affected party— Therefore, notice to the dead person and consequent assessment were illegal.

24. I noted that the facts in this case are little different, as in this case, the assessment order as well as notice of demand were also made in the name of the dead person. Even the notices were not served on all the legal heirs within the limitation period as stipulated u/s. 149. Under these facts, the Rajasthan High Court has held the assessment to be invalid. I noted that this case is not strictly applicable to the case of the assessee. It appears that the decision of Hon'ble Supreme Court in the case of R.K. Upadhyaya vs. Shana Bhai P. Patel, 166 ITR 163 (SC) has not been referred to before the Rajasthan High Court and therefore, the Hon'ble Court took the view that the notice u/s. 148 has to be served to the legal representative within the period specified u/s. 149 of the Income-tax Act. I have already adjudicated this issue in the preceding paragraph while dealing with the issue whether the service of notice within the time as prescribed u/s. 149 of the

IT on all the legal heirs Act is essential. The decision of the Supreme Court is binding on me in preference to the decision of the High Court. This decision, in my opinion, therefore, will not assist the assessee.

(vii). ACIT vs. Vindhya Telelinks Ltd., 107 TTJ (Jab.) (TM) 149.

25. In this case, Jabalpur Bench of this Tribunal has held as under :

Head Notes :

Reassessment—Notice under s. 148—Service of notice—Averment of the assessee that notice under s. 148 was not served upon it—Except mentioning 'RPAD' at the top of the copy of the notice, no other evidence is brought on record by the Revenue about service of notice upon the assessee—Revenue is unable to produce either the acknowledgement of service of notice upon the assessee or the receipt issued by the postal authorities to prove the dispatch of notice by registered post AD— Departmental Representative also expressed his inability to produce the dispatch register wherein the sending of the notice to the assessee is recorded— Further, the address of the assessee company mentioned in the copy of the notice is incomplete— Therefore, it cannot be said that the notice was correctly addressed—Moreover, there is no evidence that the envelope was properly stamped—Service of notice under s. 148 being a pre-condition for assuming jurisdiction for reassessment, service of the copy of the notice during the reassessment proceedings cannot be said to be valid service of notice—Therefore, impugned notice under s. 148 was not properly served upon the assessee

26. This decision in my opinion is not applicable to the facts of the case of assessee. The service of the notice is not under dispute. The question before me is - whether the notice addressed to a dead person entrusts valid jurisdiction on the Assessing Authority u/s. 147/148 of the Income-tax Act or not. In the case of the assessee this is an admitted fact that the notices to all the legal heirs were duly served by sending the photocopies of the notice dated 21.03.2005 through Assessing Officer's office letter dated 23.12.2005. This fact has not been disputed by the assessee. Even the notice on Shri Neeraj Kumar Jain, son of the deceased was served on him on 30.03.2005 itself.

(viii). CIT vs. Amarchand N. Shroff, 48 ITR 59 (SC) :

27. In this case, the Hon'ble Supreme Court has laid down following proposition of law :

“Section 24B does not authorize levy of tax on receipts by the legal representative of a deceased person in the years of assessment succeeding the year of account being the previous year in which such person died.”

28. This case, in my opinion is not applicable to the facts of the case before me. This case relates to the interpretation of section 24B under 1922 Act. In this case, Hon'ble Supreme Court held that section 24B of 1922 Act does not authorize levy on the receipt by the legal representative in succeeding years. In that case, the dispute does not relate to the validity of re-assessment proceedings initiated against the deceased person by issuing the notice addressed to the deceased person.

(ix). Choocharmal Wadhuram vs. CIT, 80 ITR 360 (Guj.):

29. In this case, Hon'ble Gujrat High Court has held as under :

Head Notes :

“Liability in special cases – Legal representative – where the deceased had admittedly more than one legal representatives and notice for reassessment was served only on one of them, proceedings were invalid in the absence of material to show that such legal representative represented the entire estate of the deceased with the consent, express or implied, of the other legal representatives.”

30. This case, in my opinion, will also not assist the assessee because in the case of the assessee, as I have already held in the preceding paragraphs, this is an undisputed fact that the copy of notice issued to a dead person were served on all the legal heirs.

(x). ACIT vs. Late Mangi Lal Through L/H Badri Prasad Bhatia, 83 TTJ (Jd) 590 :

31. In this case, Jodhpur Bench of this Tribunal has held as under :

“If this irregularity is cured as on today, the AO is not competent to issue notice under s. 148 to other legal heirs because of the provisions of s. 149 and as such, by no means estate can be represented on the basis of notice issued under s. 148 on 21st Fe., 1990 to BP who is also stated to have expired long back. In these circumstances and facts of this case, the assumption of jurisdiction by the learned AO under s. 147/148 of the Act is bad in law. The defect of not sending notices to all the legal representatives is not curable under this Act. The issue of notice under ss. 142(1) and 142(2) is entirely on the different footing. The processing of the returns under s. 143(3) simpliciter and the one processed under s. 148 after assuming jurisdiction to initiate reassessment proceedings are totally different. The assumption of jurisdiction is a very important step under the Act, which is based on certain happenings; whereas the proceedings under s. 142(1)/142(2) are quite procedural and ordinary. The proceedings under s. 147/148 affect the rights of the assessee. There is no infirmity in the findings of the CIT(A) – CIT vs. Jai Prakash Singh (1996) 132 CTR (SC) 262 : (1996) 219 ITR 737 (SC) distinguished.”

32. This case, even though has been vehemently relied on by the learned AR, in my opinion, is not relevant to the facts in the case before me. In this case, the notice u/s. 148 was not served on all the legal heirs of the deceased assessee. Therefore, under these facts, Jodhpur Bench of this Tribunal has categorically held that the re-assessment proceedings were null and void, as the notice u/s. 148 was not served on all the legal heirs of the deceased assessee. In the case before me, this is an admitted fact that the copy of the notice issued to dead person were served on all the legal heirs. Therefore, this decision, in my opinion, is not applicable to the case before me.

(xi). ITO vs. Ganga Prasad Jaiswal 39 ITD (All.) 444 :

33. In this case, Allahabad Bench of this Tribunal has held as under :

“9. We have heard the parties at length and we are of the opinion that the order passed by the learned CIT(A) was perfectly correct and justified. The Hon'ble Allahabad High Court in the case of Madanlal Agrawal and in the case of Smt. Phoolmati Devi had very clearly held that the notice should be properly and legally issued and if the very issue of the notice is not in accordance with law or the notice itself is bad in the eyes of law, then no assessment framed thereafter can be said to be a proper assessment. The Hon'ble Allahabad High Court in the case of Ishwar Singh & Sons (supra) has also held that issue of valid notice under s. 148 is a condition precedent for the validity of an assessment under s. 147 of the IT Act, 1961. It further goes to suggest that it is a jurisdictional issue and

unless such a notice is issued, the ITO does not get jurisdiction to make an assessment. In fact, even the Hon'ble Supreme Court in the case of Y. Narayana Chetty (supra) has held that the notice prescribed by s. 34 of the IT Act for the purpose of initiating reassessment proceeding is not a mere procedural requirement, the service of the prescribed notice on the assessee is a condition precedent to the validity of any reassessment made under s. 34, (now s. 147/148 is analogous to s. 34 of the old Act). If the notice issued is shown to be invalid, then the proceedings taken by the ITO in pursuance of invalid notice will be illegal and void.

10. *The Hon'ble Supreme Court has reiterated the same in a subsequent decision in Thayaballi Mulla Jeevaji Kapasi's (supra) case and held that service of notice prescribed by s. 34 of the Indian IT Act for the purpose of commencing proceedings for reassessment is not a mere procedural requirement, it is a condition precedent to the initiation of proceedings for the assessment under s. 34. If the notice issued is shown to be invalid, then the proceedings taken by the ITO in pursuance of an invalid notice will be illegal and void.*

11. *The Hon'ble Madras High Court in the case of Jayanthi Talkies Distributors vs. CIT 1978 CTR (Mad) 303 : (1979) 120 ITR 576 (Mad) has also held the same view and held that the ITO will have no jurisdiction to make an assessment under s. 147 unless the notice under s. 148 is validly issued to and served on the assessee.*

12. *With these decisions in the background, if we analyse the facts of the present case, we have no option but to hold that the notice issued in this case was invalid. Admittedly, the notice was issued in the name of Ganga Prasad Jaiswal on 28th March, 1985 and Shri Ganga Ram Jaiswal had admittedly died on 20th March, 1985. Secondly, the notice was served on Kesho Ram Munim, who had no authority to receive the notice. In this way, the very issue of notice in the name of a dead person was an invalid notice and, secondly, the very service of the said notice on Munim was invalid. Thirdly, the Munim had written on the very notice itself that Shri Ganga Ram had expired 8 days back and his legal heir was his widow Smt. Tara Devi. The notice was served by the Inspector and thus the knowledge of the said information now cannot be denied by the Department as it had been received and communicated to the Inspector who had gone to effect the service on 29th March, 1985 itself, while there was still three days left to amend the mistake and issue a fresh notice on the legal heir within the limitation prescribed under the law. Despite this information, no action was taken by the Department and now the Revenue tries to take shelter under s. 292B. Sec. 292B does not protect the assessments which are void ab initio. It is only an enabling provision just to condone the mistake, defect or omission in the return of income, assessment or notice or summons or other proceeding if they are in substance and effect in conformity with the law. The very wordings of the section suggests that it has been introduced just to remove the technical difficulties that arose due to human error but it does not help the Revenue in situations as that of the present*

case. Here the issue of the notice is a condition precedent and its proper service is equally important to bestow jurisdiction on the ITO to re-frame the assessment under s. 147 of the IT Act, 1961. In absence of the proper and valid notice and in absence of proper service, the entire proceedings for reassessment and the assessment order framed thereafter, in our opinion, becomes void and invalid in the eyes of law. The various decisions of the Hon'ble Supreme Court and of Hon'ble Allahabad High Court, cited above and relied upon by the learned counsel for the assessee, in our opinion, apply with full force to the present case. Hence, taking all those decisions into consideration, we are of the opinion that the order passed by the learned CIT(A) was perfectly correct and does not call for any interference. The issues are decided accordingly.

13. As a result, the appeal is dismissed.”

34. This case, in my opinion, is applicable to the facts of the case before me. In this case, I noted that the question before the Allahabad Bench of this Tribunal was “whether the notice issued in the name of the deceased assessee was valid or not”. “Whether this irregularity can be cured u/s. 292B”. The Tribunal decided in favour of the assessee and confirmed the order of the CIT(A) holding that the proceedings taken by the Assessing Officer were illegal and void. While holding so, Allahabad Bench of this Tribunal has mainly relied on the decision of the Allahabad High Court (Jurisdictional High Court) in the case of CIT vs. Ishwar Singh & Sons, 131 ITR 480 (All.). The issue involved in the case before me is also similar to the issue involved in this case. This is settled law that decision of a co-ordinate Bench is binding on the Tribunal if there is no contrary decision by the Jurisdictional High Court or by Hon'ble Supreme Court. Hon'ble Allahabad High Court in the case of Ishwar Singh & Sons (supra) has held that the issue of a valid notice u/s. 148 is a condition precedent for the validity of assessment u/s. 147 of the Income-tax Act, 1961. If no notice is issued or if the notice issued is invalid or is not served in accordance with law, the assessment would be void. It was further held in that case that it is a jurisdictional issue and unless such a notice is issued, the Income-tax Officer does not get jurisdiction to make an assessment on a particular assessee. In this case the notice was issued to

AS, an individual and the return was filed by his brother, SS (Karta of his HUF). It was held in this case that the two were absolutely distinct entities in law, and a valid assessment could not be made on the assessee-HUF as no notice had been issued to it under section 148 of the Income-tax Act.

(xii). CIT vs. Rakesh Kumar, Mukesh Kumar L/H of Late Mohar Singh, 313 ITR 305(P&H) :

35. In this case, Punjab & Haryana High Court has held as under :

Head notes :

“Search and seizure – Block assessment – Validity vis-à-vis search warrant in the name of a dead person – Search warrant being issued in the name of a dead person and Panchnama also prepared in the name of dead person, the search and the authorization were invalid and void ab initio and therefore block assessment under s. 158BC r/w s. 144 in pursuance thereof is also invalid – Search warrant in the name of a dead person being against the law of natural justice, no valid assessment could be based upon it.”

36. This decision in my opinion, although not applicable to the facts of the case before me, but it supports the proposition of law that no notice or proceedings can be initiated in the name of a dead person.

(B). Decisions relied upon by the Revenue :

(i). Jose T. Mooken vs. CIT, 117 ITR 897 (Ker).

37. In this case, the Hon’ble Kerala High Court held as under :

“As regards the next question, that the notice under s. 148 was illegal, as it has been issued to a dead person, the Tribunal that a full reading of the notice would show that although it started with the name of the deceased, the notice was intended for the legal representatives only. The Tribunal, therefore, had properly rejected the application for reference on this point.”

38. I noted from para 3 of this decision that the facts of this case are different from the facts of the case before me. In this case, a notice u/s. 148 was served on Shri Thomakutty on

20.03.1969, the sanction for reopening the assessment having been obtained from the CIT on 19.03.1969. During the pendency of re-assessment proceedings, Shri Thomakutti died on 27.02.1970, leaving behind him as his legal representatives, his wife and his four sons, namely, Jose T. Mookan, M. T. Ignatius, M.T. David and Kurian T. Mookan. After the death of the assessee, Shri Thomakutti, the assessment proceedings were continued against Shri Jose T. Mookan who is the petitioner in O. P. No. 5119 of 1974. He was treated as the legal representative of the assessee. From these facts, it is apparent that Sri Thomakutti died after the reopening of the assessment and service of the notice u/s. 148. Under these facts, in my opinion, this decision will not be applicable in the case of the assessee and will not assist the Revenue.

(ii). Smt. Kaushalyabai vs. CIT, 238 ITR 1008 (MP)

39. In this case, the Hon'ble M.P. High Court held -

“(i). that since the widow of the deceased had already participated in the proceedings, notwithstanding the fact that notice was issued in the name of the dead person, the defect in the notice stood automatically cured.

“(ii). That the assessee had gifted cash to his wife which had been invested in a firm. The Tribunal was correct in holding that the income from the firm received by the wife was includible in the total income of the assessee.”

40. In this case I noted that the notice was in the name of a dead person, but legal heir participated in the proceedings for re-assessment. On these facts, the Hon'ble High Court took the view that the issue of the notice on a dead person u/s. 292B of the Act should be treated to be a procedural irregularity because the widow of the deceased participated in the proceedings. Due to her participation, the defect, if any, stands automatically cured. The question whether a dead person can be an assessee was not before the High Court and Hon'ble High Court has not decided that question. This decision is applicable to the extent that the notice is issued in the name of dead person. But in the case before me, the legal representative has not participated in

the re-assessment proceedings, rather the assessment order was passed u/s. 144 of the Income-tax Act. I also noted that although this decision was given by the Division Bench of Madhya Pradesh High Court, but Hon'ble High Court did not refer to the decision of the M.P. High Court in the case of Shaikh Abdul Kadar vs. ITO, 34 ITR 451 (MP). That decision was also given by the Division Bench of M.P. High Court and has been discussed by me earlier, on which the learned AR has relied. Now the two decisions of M.P. High Court are taking contrary view. I have already in the preceding paragraph discussed that issue that a dead person not being individual cannot be an assessee. Only the legal heirs on his behalf can be the 'assessee'

(iii). Maharaja of Patiala vs. CIT, 11 ITR 202 (Bom.)

41. In this case, it was held as under :

"The late Maharaja of Patiala had income from property and business in British India. He died on March 23, 1938. On November 23, 1938, the Income tax Officer, Bombay, sent two notices under sections 22(2) and 38 of the Indian Income-tax Act, 1922, addressed to the Maharaja of Patiala requiring him to make a return of his income from all sources for the assessment years 1937-38 and 1938-39. They were served upon the successor Maharaja. Returns were filed, signed by the Foreign Minister of Patiala. The Income-tax Officer passed assessment orders describing the assessee as "His Highness ... late Maharaja of Patiala". The succeeding Maharaja appealed against the assessment orders contending that inasmuch as the notices were sent in the name of the Maharaja of Patiala and not to him as the legal representative of the Maharaja of Patiala, the assessments made were illegal. The contention was that the notices were really addressed to the late Maharia, who was not alive when the said notices were issued and that they were wrongly served upon him. The' argument was rejected by the authorities under the Act as well as by the High Court on a reference. . The Division Bench comprising Beaumont C.J. and Kania J. held that inasmuch as the present Maharaja (who raised the contention of nullity) was the legal representative of the late Maharaja of Patiala and because the return of the late Maharaja's income was made by the Foreign Minister on his behalf and because he knew perfectly well that what was being assessed was the income of his predecessor, the assessment made, though not complying strictly with section 24B (corresponding to section 159 of the present Act), is yet valid. The following observations of Beaumont C.J., are relevant for our purpose (at page 228):

"In this case, the person to be assessed was the late Maharaja, who had died before he was served with any notice under section 22, and, therefore, the provisions of section 24B(2) apply, and the Income-tax Officer was entitled to serve on the executor, administrator or other legal representative of the deceased Maharaja a notice under section 22(2) or under section 34 as the case might be, and then proceed to assess the total income of the deceased Maharaja as if such executor, administrator or other legal representative were the assessee. As observed by the president of the Tribunal in his judgment, the income-tax officer made no attempt to observe the provisions of that sub-section. He served the notice on the present Maharaja, without showing in what capacity. But the Tribunal have found, as a fact, that the present Maharaja is the legal representative of the deceased Maharaja, and although it would obviously have been better so to describe him in the notice, I am not prepared to say that the notice was bad, if it was served on the legal representative, merely because it omitted to state that it was served in that capacity. It should have been stated that it was served on the legal representative of the late Maharaja, and that the return required was of the late Maharaja's income. It was not so stated, and the present Maharaja himself may have had taxable income for the years in question; but I think there is a good deal of force in the contention of the Tribunal that any irregularities in this respect were waived by the Maharaja because returns of the late Maharaja's income were made by the Foreign Minister on behalf of the Maharaja, and then subsequently corrections were made in the assessment at the instance of the Maharaja. There is no doubt that the present Maharaja knew perfectly well that what was being assessed was the income of his predecessor."

To the same effect are the observations of Kania J., in his separate but concurring opinion. The decision, one of the earliest on the subject, shows that an assessment made without strictly complying with section 24B (section 159 in the present Act) is not void or illegal and that any infractions in that behalf can be waived by the assessee."

42. I noted that the learned Accountant Member has mainly relied on this decision while holding that the notice issued in the name of the dead person is a valid notice. I noted from para 13 of this judgment that the facts of this case are entirely different. In this case, the person to be assessed was late Maharaja, who had died before he was served with any notice under section 22, and, therefore, the provisions of section 24B(2) apply, and the Assessing Officer was entitled to serve on the executor, administrator or other legal representative of the deceased Maharaja a notice under section 22(2) or under section 34 as the case might be, and then proceed to assess the total income of the deceased Maharaja as if such executor, administrator or other legal

representative were the assessee. This decision has been distinguished by the Mumbai Bench of this Tribunal in the case of Late Mrs. Jerbanoo N. Wadia vs. ACIT, 39 TTJ (Bom) 138. This notice in this case was in the name of Maharaja of Patiala not in the name of any individual. It did not indicate whether it was issued in the name of present Maharaja of Patiala or in the name of Maharaja who had already expired. The Present Maharaja was the legal heir of the deceased Maharaja and, therefore, the notice was held to be valid one. Even the present Maharaja did not raise any objection till the matter reached to the Tribunal and he has duly participated in the proceedings before the Revenue Authorities. In the case before me, the legal heirs did not participate in the proceedings before the Revenue Authorities at all and the assessment has been completed u/s. 144.

43. Now, I would like to deal with the contention of the Ld. D.R. whether the said judgment of the Bombay High Court is binding on me on this issue or not. I find that the Bombay High Court in the case of Thana Electricity Supply Ltd. 206 ITR 727 has laid down categorically with regard to the precedent that the decision of one High Court is neither binding precedent for another High Court nor for Courts or Tribunals outside its territorial jurisdiction. In the said judgment, Hon'ble High Court after discussing the various judgments of Hon'ble Supreme Court hold the following proposition of law on the binding force of a judgement at page 738 of the judgment :

"(a) The law declared by the Supreme Court being binding on all courts in India, the decisions of the Supreme Court are binding on all courts, except, however, the Supreme Court itself which is free to review the same and depart from its earlier opinion if the situation so warrants. What is binding is, of course, the ratio of the decision and not every expression found therein.

(b) The decisions of the High Court are binding on the subordinate courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction. It does not extend beyond its territorial jurisdiction.

(c) The position in regard to the binding nature of the decisions of a High Court on different Benches of the same court may be summed up as follows:

(i) A single judge of a High Court is bound by the decision of another single judge or a Division Bench of the same High Court. It would be judicial impropriety to ignore that decision. Judicial comity demands that a binding decision to which his attention had been drawn should neither be ignored nor overlooked. If he does not find himself in agreement with the same, the proper procedure is "to refer the binding decision and direct, the papers to be placed before the Chief Justice to enable him to constitute a larger Bench to examine the question (see *Food Corporation of India v. Yadav Engineer and Contractor*, AIR 1982 SC 1302).

(ii). A Division Bench of a High Court should follow the decision of another Division Bench of equal strength or a Full Bench of the same High Court. If one Division Bench differs from another Division Bench of the same High Court, it should refer the case to a larger Bench.

(iii). Where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decisions is to be preferred if reached after full consideration of the earlier decisions.

(d) The decision of one High Court is neither binding precedent for another High Court nor for courts or Tribunals outside its own territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other State or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect.

By no amount of stretching of the doctrine of stare decisis, can judgments of one High Court be given the status of a binding precedent so far as other High Courts or Courts or Tribunals within their territorial jurisdiction are concerned. Any such attempt will go counter to the very doctrine of stare decisis and also the various decisions of the Supreme Court which have interpreted the scope and ambit thereof. The fact that there is only one decision of any one High Court on a particular point or that a number of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be the conclusion, the decisions cannot have the force of binding precedent on other High Courts or on any subordinate courts or Tribunals within their jurisdiction. That status is reserved only for the decisions of the Supreme Court which are binding on all courts in the country by virtue of article 141 of the Constitution."

44. Thus, the Mumbai High Court in the aforesaid judgment has clearly laid down that the decision of the non-jurisdictional High Court is not binding. In order to understand and appreciate the binding force of a decision, it is always necessary to see what were the facts of the case and what was the point which had to be decided. A precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is called ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large. 'The only use of authorities or decided cases' is the establishment of some principle, which the judge can follow out in deciding the case before him'. The only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided. The only judicial principles which are authoritative are those which are thus relevant in their subject matter and limited in their scope. All others, at the best are of merely persuasive efficacy. They are not true ratio decidendi, and are distinguished from them, under the name of dicta or obiter dicta i.e. things said by the way. The prerogative of judges is not to make law by formulating and declaring it-this pertains to the legislature-but to make law by applying it. Judicial declaration, unaccompanied by judicial application, is not of binding authority. All persons within a state are bound to follow the decisions of the high court for that state, until they are subsequently overruled either by a larger bench of that court or by a decision of the Supreme Court or by an enactment passed by the legislature. It is, however, a statutory rule that a judge is not to be assumed to have intended to overrule or disapprove of an authority which has not been cited to him and which he does not even mention. Moreover, it is not open to the legislature to overrule or set aside a decision of the court. It is open to the legislature, within certain limits, to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been,

but it is not open to the legislature to say that a judgment of a court properly constituted and rendered in exercise of its powers in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the court. The legislature could not say that declaration of law was erroneous, invalid or ineffective either as a precedent or between the parties. If there is only High Court decision, it prevails over an order of the Tribunal on the basis of the view that the High Court is above the Tribunal in judicial hierarchy. The decision of the jurisdictional High Court is binding. Even though the decision of the M.P. High Court in the case of Smt. Kaushalyabai vs. CIT, 238 ITR 1008 (MP) is applicable in the case of the assessee to some extent, but this decision, in my opinion, will not assist the Revenue, as I have already pointed out that the Madhya Pradesh High Court has taken a different view in its earlier decision in the case of Shaikh Abdul Kadar vs. ITO, 34 ITR 451 (MP). This judgment, as relied by the learned DR, even though directly relate to the issue of the notice on the dead person, but cannot be binding precedent on the Tribunal as this judgment has been rendered without noticing the previous judgment and is considered to have been rendered per incurium. The Hon'ble Madhya Pradesh High Court in the case of Jabalpur Bus Operators Association vs. State of MP, AIR 2003 MP 81, decided the question, which view is to be followed by the High Court as a binding precedent when there are conflicting views between the decisions rendered by the co-equal benches of the Apex Court. The court noted the approach of various high Courts on the issue and lack of the decision on the issue by the Supreme Court. The two trends that were noticed by the Hon'ble High Court were (a) following the latter case and (b) following the case which in the judgment of the high court was correct. Ultimately the court held that in case of conflict between decisions of the apex court, benches comprising of equal number of judges, the decision of earlier bench is binding unless explained by the latter bench of equal strength in

which case the later decision is binding. On the basis of law so pronounced by Hon'ble Madhya Pradesh High Court, in my view, the decision of M.P. High Court in the case of Smt. Kaushalyabai vs. CIT, 238 ITR 1008 (MP) cannot be applied in the case of the assessee in view of the earlier decision in the case of Shaikh Abdul Kadar vs. ITO, 34 ITR 451 (MP). My aforesaid view is also supported by the decision of the Hon'ble President, Income Tax Appellate tribunal Shri R.V. Easwar as Third Member in the case of Kanel Oil & Export Inds. Ltd. Vs. JCIT (Asst.), SR-2, Ahmedabad (2009) 121 ITD 596 (Ahd.) (TM), wherein it has been held as under :-

“In the instant case, question that came up for consideration was as to whether the order of the Special Bench upholding the levy of interest in the light of sub-section (4) of section 115JA should be followed or the judgment of the Bombay High Court in Snowcem India Ltd.'s case (supra), also rendered in the context of section 115JA, had to be applied. Both the decisions were under section 115JA. One was of a Special Bench of the Tribunal, Ahmedabad and the other was of a High Court, though not a jurisdictional High Court. A simple answer would be that the judgment of a High Court, though not of a jurisdictional High Court, prevails over an order of the Special Bench even though it is from the jurisdictional Bench (of the Tribunal) on the basis of the view that the High Court is above the Tribunal in the judicial Hierarchy. But this simply view is subject to some exceptions. It can work efficiently when there is only one judgment of a High Court on the issue and no contrary view has been expressed by any other High Court. But when there are several decisions of non-jurisdictional High Courts expressing contrary views, it has been recognized that the Tribunal is free to choose to adopt that view which appeals to it.

The other exception is where the judgment of the non-jurisdictional High Court, though the only judgment on the point has been rendered without having been informed about certain statutory provisions that are directly relevant. A judgment rendered without noticing a previous binding precedent or a relevant statutory rule is considered to have been rendered 'per incuriam'. It is even said that such a judgment need not be given effect to by a lower court. In the instant case, the attention of the Bombay High Court in Snowcem India Ltd.'s case (supra) was not drawn to sub-section (4) of section 115JA, as had been pointed out by the Accountant Member in his dissent. The High Court, therefore, had no occasion to examine the question whether the decisions of the Karnataka High Court and the Supreme Court in Kwaliti Biscuits (supra), rendered in the context of section 115J which did not have a sub-section similar to sub-section (4) of

section 115JA, would still be applicable as binding precedent in a case which arose under section 115JA.”

45. In view of my aforesaid discussion and the fact that the notice issued in the name of the dead person is invalid, I decide the questions referred to me as under :

- (i). The assessment order passed, in view of the issue of notice on the dead person, is void and the CIT(Appeals), in my opinion, was correct in law and in facts holding the assessment order as void.
- (ii). The CIT(A), in my opinion, was not correct in law in concluding that the notice u/s. 148 has not been served on proper person, as section 149 only requires the issuance of the notice within the limitation period and notice can be served on the proper persons subsequently.

46. Now, the matter shall go to the regular Bench.

Sd/-
(P.K. BANSAL)
Accountant Member

Dated: 8th December, 2010
*aks/-