that document but did not. No such finding was recorded by the learned trial Court before ordering *ex parte* proceedings. In the present case, it cannot be presumed or deemed that he was served with the copy of the plaint also along with the summons. In his order dated May 3, 1972, dismissing the application of the petitioner under Order 9, rule 13, Civil Procedure Code, the learned trial Court merely held that "the defendant has utterly failed to show that he was not served and that there is sufficient cause for setting aside the *ex parte* decree." No finding has been recorded that the summons had been duly served on the petitioner. The learned District Judge has also not recorded any such finding in his appellate order. Evidently, the attention of the Courts below was not drawn to the fact that 'mere service' is different from 'due service', as contemplated by Order IX, rule 13, Civil Procedure Code. The requirement of rule 2 of Order V of the Code that a copy of the plaint shall accompany the summons is meant to inform the defendant as to the nature of the suit filed against him so as to enable him to decide whether to defend the same or not. It is for this reason that 'mere service' of the summons is not considered to be 'due service' to empower a Court to take *ex parte* proceedings against the defendant.

(5) I accordingly accept this revision petition and set aside the orders of the learned trial Court and the learned District Judge. The *ex* parte proceedings taken against the petitioner are set aside and the learned trial Court is directed to restore the suit and decide it in accordance with law. In the circumstances of the case, I leave the parties to bear their own costs. The parties through their counsel have been directed to appear before the learned trial Court on April 8, 1974.

B.S.G.

INCOME TAX REFERENCE

Before D. K. Mahajan and C. G. Suri, JJ.

VIJAY KUMAR JAIN,—*Applicant.*

versus

THE COMMISSIONER OF INCOME TAX, PATIALA,—*Respondent.*

I.T. Ref. No. 1 of 1973.

March 20, 1974.

Income Tax Act (XLIII of 1961)—Sections 139, 147 *and* 148—*Valid return of income filed under section* 139(4)—*Income Tax Officer*

considering the return invalid and issuing notice under section 148—*Assessment under section* 147 *made—Assessee filing appeal against the assessment but giving up the challenge to the validity of the notice—Further appeal to the Income Tax Tribunal—Tribunal refusing to consider the validity of such notice—Whether justified.*

Held, that a return of income filed under section 139(4) of the Income Tax Act, 1961 where no notice is received by the assessee under sub-section (3) is a valid return. Notice under section 148 of the Act can only be issued after the Income Tax Officer decides to proceed under section 147. Where no ground is made out for taking action under section 147, the notice under section 148 of the Act and the consequent assessment made thereon are void. The mere fact that in the appeal against the assessment, the assessee gives up the ground challenging the validity of the notice, is of no consequence. What is void is *non est.* By giving up the ground of invalidity of the notice the assessee cannot confer jurisdiction on the Income Tax Officer where he has none. The assessee is not precluded from urging the invalidity of the notice in a further appeal before the Income Tax Tribunal. The Tribunal is bound to hear the assessee and is not justified in refusing to consider the validity of the notice under section 148 of the Act.

Reference made by the Income Tax Appellate Tribunal, Chandigarh Bench u/s 256(1) *of the Income Tax Act,* 1961, *to this Hon'ble Court for decision of the following question of law arising out of the Tribunal's Order dated* 6*th April,* 1972, *passed in I.T.A. No.* 757 *of* 1970-71 *regarding the Assessment Year* 1965-66:—

> *"Whether the Tribunal was justified in refusing to consider the validity of notice under section* 148 *even though the ground challenging the same had not been pressed before the Appellate Assistant Commissioner?".*

R. N. Narula, for S. P. Jain, Advocate, *for the applicant.*

D. N. Awasthy, Advocate, S. S. Mahajan, Advocate, with him, *for the respondent.*

JUDGMENT

MAHAJAN, J.—The Income-Tax Appellate Tribunal has referred the following question of law for the opinion of this Court :—

> "Whether the Tribunal was justified in refusing to consider the validity of notice under section 148 even though the

ground challenging the same had not been pressed before the Appellate Assistant Commissioner ?"

(2) The assessee is an individual. The Assessment year in question is 1965-66. The assessee obviously did not file the return of income within the time allowed by section 139(1) and 139(2) of the Income-Tax Act, 1961. He filed his return of income on 28th March, 1969, and this return would be a valid return in view of section 139(4) and (8). However, the Income-Tax Officer who was oblivious to this provision treated the return dated 28th March, 1969, as invalid as it was according to him outside the period prescribed by section 139(3). No order was passed by him on the said return. He proceeded to issue a notice under section 148 on 9th March, 1970, in response to which the assessee filed a return on the same day declaring the loss of Rs. 4,128 as per original return. It may be mentioned that in the original return dated 28th March, 1969, the same amount of loss had been declared. The Income-Tax Officer completed the assessment on 24th March, 1970, and assessed him on a total income of Rs. 32,431 on the basis of the return filed on 9th March, 1970. The assessee, being dissatisfied, preferred an appeal to the Appellate Assistant Commissioner of Income-Tax. In the grounds of appeal to the Appellate Assistant Commissioner, the following five grounds were raised :—

"(1) The learned Income-Tax Officer has erred in assessing interest received from the firms twice. Account version may please be accepted;

(2) The learned Income-Tax Officer has erred in issuing the notice under section 148 of the Act;

(3) The learned Income-Tax Officer has erred in levying penal interest;

(4) The assessment order is against law and facts of the case; and

(5) The status of the assessee is H.U.F. and not individual as held by the Income-Tax Officer."

The Appellate Assistant Commissioner dealt with ground No. 1 and with regard to grounds 2 to 5 observed as follows:—

"These contentions have not specifically been pressed before me. Hence rejected."

Again dissatisfied, the assessee preferred an appeal to the Income-Tax Appellate Tribunal, Chandigarh Bench. The Tribunal dealt with the first ground which had been dealt with by the Appellate Assistant Commissioner, but refused to deal with grounds 2 to 5 for the reason that they were specifically given up by the assessee before the Appellate Assistant Commissioner. The assessee then moved an application under section 254(2) for rectification of its order dated 6th April, 1972, rejecting its appeal with regard to grounds 2 to 5. This application was rejected by the Tribunal on 6th September, 1972. The assessee then moved an application before the Income-Tax Tribunal under section 256(1) requiring it to state the question of law already referred to for our opinion. This application was allowed by the Tribunal and that is how the matter has been placed before us.

(3) The contention of the learned counsel for the assessee is that the notice under section 148 was invalid. The argument proceeds thus. The assessee had not filed his return as required by section 139, sub-sections (1) and (2), within the time specified therein. No notice under sub-section 139(3) was served on the assessee. The assessee took advantage of sub-section (4) of section 139 which is in the following terms :—

> "139(4) (a) Any person who has not furnished a return within the time allowed to him under sub-section (1) or sub-section (2) may, before the assessment is made, furnish the return for any previous year at any time before the end of the period specified in clause (b), and the provisions of clause (iii) of the proviso to sub-section (1) shall apply in every such case.
>
> (b) The period referred to in clause (a) shall be—
>
> (i) where the return relates to a previous year relevant to any assessment year commencing on or before the 1st day of April, 1967, four years from the end of such assessment year;
>
> (ii) where the return relates to a previous year relevant to the assessment year commencing on the 1st day of April, 1968, three years from the end of the assessment year ;

(iii) where the return relates to a previous year relevant to any other assessment year, two years from the end of such assessment year,"

and filed the return dated 28th March, 1969. This return could not be treated as invalid. However, the Income-tax Officer treated the said return as invalid and proceeded to issue a notice under section 148. Notice under section 148 can only be issued after the Income-tax Officer decides to proceed under section 147. Section 147 is in the following terms :—

"147. If—

(a) the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that 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 or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year).

(4) There is no material on the record to show that any decision was made by the Income-tax Officer to issue a notice under section 148 on the basis that the assessee had failed to disclose fully and truly all material facts necessary for his assessment for that year and that the income chargeable to tax had escaped assessment for that year. The notice was issued on the basis that there was omission or failure on the part of the assessee to make a return under

section 139 for any assessment year. It is maintained that in view of the clear provisions of section 139(4) there was a valid return before the Income-tax Officer. That return could not be treated as invalid and no ground was made out for taking action under section 148 read with section 147. Once it is held that the return dated 28th March, 1969 was a valid return, the mere fact that the assessee gave up grounds 2 to 5 before the Appellate Assistant Commissioner would be of no consequence. In this connection, reliance is placed on the decision of the Supreme Court in *Commissioner of Income-Tax, Madras M. K. K. Muthukaruppan Chettiar* (1). The following passages from that judgment are relied upon by the learned counsel for the assessee :—

> "It is not necessary to decide whether the observations made by the Appellate Assistant Commissioner in his order declining to assess the income of the Hindu undivided family operated to lift the bar of limitation as regards the assessment of income of the separated members by the application of the principle of the judgments of this Court in *Income-tax Officer* v. *Murlidhar Bhagwandas* (2) and *N. Kt. Sivalingam Chettiar* v. *Commissioner of Income Tax* (3). In our opinion, the orders passed by the Income-tax authorities and confirmed by the Tribunal suffer from a fundamental defect. As we have already stated, Karuppan Chettiar submitted returns of his income in his individual capacity for the years 1950-51, 1951-52 and 1952-53 in response to the notice issued under section 22(2) of the Act. By his order dated June 18, 1953, the Income-tax Officer closed the assessments as 'no assessments' and added that since there was no separate income, the pending proceedings would be closed as N.A. and for income-tax year 1953-54 the file would be removed and clubbed with the family file F. 1005-A. Thereafter the assessee filed two sets of returns for the aforesaid three years, once on February 23, 1955, and again on March 30, 1956. These returns were submitted by the assessee in response to (sic.) the notice issued on March 2, 1957. It is manifest that in these circumstances notice under section 34 of

(1) (1970) 78 I.T.R. 69.
(2) (1964) 52 I.T.R. 335.
(3) (1967) 66 I.T.R. 586.

the Act cannot be issued to Muthukaruppan Chettiar and his minor sons unless the returns which had already been filed by that family were disposed of.

It was held by this Court in *Commissioner of Income-tax* v. *Ranchhoddas Karsondas* (4) that the return in answer to the general notice under section 22(1) of the Act can, under section 22(3), be filed at any time before assessment and for this there is no limit of time. When in respect of any year a return has been voluntarily submitted before assessment, the Income-tax Officer cannot ignore the return and the notice of reassessment and consequent assessment under section 34 ignoring the return are invalid. In the present case, we are of opinion that the order of the Income-tax Officer dated June 18, 1953, is not an order to terminate the proceedings and the result, therefore, is that the original returns submitted by the assessee under section 22(2) and (3) have not been properly and legally proceeded with. In the case before us the order of the Income-tax Officer dated June 18, 1953, should be interpreted in the light of circumstances in which that order passed. So interpreted it appears to us that the Income-tax Officer did not intend to conclude the proceedings before him. It follows, therefore, that there is no disposal of the voluntary returns made by the respondent for the assessment years 1950-51, 1951-52 and 1952-53. It is manifest that the assessment proceedings under section 34(1) of the Act for the aforesaid three years are invalid."

The matter has been put beyond any doubt by the Supreme Court in *Commissioner of Income-tax, Gujrat II* v. *Kurban Hussain Ibrahimji Mithiborwala* (5), where it is observed—

"It is well-settled that the Income-tax Officer's jurisdiction to reopen an assessment under section 34 (it is equivalent to section 147) depends upon the issuance of a valid notice (now section 148). If the notice issued by him is invalid for any reason the entire proceedings taken by him would become void for want of jurisdiction."

(4) (1959) 36 I.T.R. 569.
(5) (1971) 82 I.T.R. 821.

It is axiomatic that what is void is *non est*. In this situation, the assessee was not precluded from urging the grounds 2 to 5. By giving them up the assessee could not confer jurisdiction on the Income-tax Officer where he had none. Therefore, the Tribunal was bound to hear the assessee and could not reject the appeal on the ground that grounds 2 to 5 were not agitated before the Appellate Assistant Commissioner and thus could not be permitted to be agitated before it.

(5) Mr. Awasthy fairly and frankly conceded that in view of the decision of the Supreme Court in *Kurban Hussain's case*, the question referred has to be answered in the negative, that is, in favour of the assessee and against the department. We return the said answer to the Tribunal. There will be no order as to costs.

SURI, J.—I agree.

N. K. S.

APPELLATE CIVIL

Before R. S. Narula and B. R. Tuli, JJ.

RAGHBIR SINGH,—*Appellant.*

versus

THE UNION OF INDIA,—*Respondent.*

R.F.A. No. 291 of 1961.

March 25, 1974.

Land Acquisition Act (I of 1894)—*Sections* 9, 23(1) *and* 25—*Acquisition of land under un-expired period of lease at the time of acquisition—Construction of brick-kiln thereon by the lessee along with a water channel for making bricks—Lessee—Whether entitled to compensation for such water channel—Obtaining of a site by the lessee for another brick-kiln soon after the taking possession of the acquired land by the Government—Whether deprives the lessee of compensation for 'loss of earning'—Compensation for the un-expired period of lease—Whether allowable.*

Held, that where land, which is under un-expired period of lease and on which the lessee has constructed brick-kiln along with a channel for carrying water from a well to the brick-fields for