

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "J", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER**

**ITA No.1917/M/2011
Assessment Year: 1994-95**

M/s. Farmson Basic Drugs Pvt. Ltd., 27-B, Parmeshwar Villa CHS Ltd., 4 th Toad (TPS – 3), Santacruz (E), Mumbai – 400 051 PAN: AAACF 2426L	Vs.	ITO 10(1)(1), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : none
Revenue by : Shri Abani Kanta Nayak, D.R.

Date of Hearing : 12.02.2016
Date of Pronouncement : 24.02.2016

ORDER

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 16.12.2010 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 1994-95. Earlier the matter was heard on 21.7.2015 and Sh. Milin K. Mehta (AR) appeared on behalf of the assessee. However the matter was re-fixed for hearing for 12.2.2016. On the said date, no one appeared on behalf of the assessee. The Ld. DR however made submissions on behalf of the revenue. The assessee in this appeal has taken the following grounds of appeal:

"1. The learned Commissioner of Income Tax (Appeals) erred in fact and in law in confirming the action of the Assessing Officer in again holding that the notice u/s 143(2) was served on the appellant within the statutory period despite the fact that the appellant had mentioned that no notice u/s 143(2) of the Act was served on it.

It may be mentioned that the AO has held that the notice was served on the appellant within the statutory period without providing sufficient material to the appellant and purely on the basis of assumptions, surmises and conjectures.

2. The learned Commissioner of Income Tax (Appeals) erred in fact and in law in confirming the action of the Assessing Officer in again disallowing loss incurred in the business of transportation of goods and assessing Rs.72,000/- as income of the appellant applying provision of section 44AE of the Act and thus making the addition of Rs. 2,48,392/- on this count.

The learned Commissioner of Income Tax (Appeals) as well as the AO failed to appreciate the fact that the appellant has been maintaining all the books of accounts required to be maintained under the Act and has also got the accounts audited and full details of income earned and expenses incurred have been given to the AO.

3. The learned Commissioner of Income Tax (Appeals) erred in fact and in law in confirming the action of the Assessing Officer in disallowing depreciation of Rs.1,61,510/- on account of leased assets during the year.

4. The learned Commissioner of Income Tax (Appeals) erred in fact and in law in confirming the action of the Assessing Officer in initiating penalty proceedings u/s. 271(1)(c) of the Act.

5. The learned Commissioner of Income Tax (Appeals) erred in fact and in law in confirming the action of the Assessing Officer in charging interest u/s. 234B of the Act.

6. The learned Commissioner of Income Tax (Appeals) erred in fact and in law in confirming the action of the Assessing Officer in charging interest u/s. 234C of the Act.

7. Your Appellant craves a right to add to or amend, alter, substitute, delete or withdraw all or any of the grounds of appeal.”

Ground No.1

2. The assessee vide this ground has challenged the validity of the notice issued under Section 143(2) of the Income-tax Act. It is averred that the assessment made Under Section 143(3) deserves to be quashed as no notice Under Section 143(2) had been served upon the assessee within the statutory period of 12 months from the end of the month in which the return was filed by the assessee.

3. This is a second round of litigation before us. The facts relating to this issue are that the assessee filed return of income on 25.11.1994. The return was selected for scrutiny. Notice u/s.143(2) was issued on 14.11.1995 by the Assessing Officer (hereinafter referred to as the AO) which was dispatched to the assessee by Registered Post Acknowledgement due on 20.11.1995 at the office of the assessee at 'Vadodara' (Gujrat). Thereafter, the AO issued other notice dated 18.09.1996 in response to which the assessee's authorized representative appeared on 7.10.1996 and filed objection letter stating that the notice issued on 18.09.1996 was beyond the period of limitation and therefore, the assessment proceedings were required to be dropped. The AO did not accept the assessee's argument and intimated to the assessee that the earlier notice was issued on 14.11.1995 the photocopy of the receipt of registered post was also supplied to the assessee. The AO observed that the Department of Posts vide its letter dated 12.12.1996 had certified the delivery of letter containing the notice u/s.143(2) dispatched on 20.11.1995 from the Central Building Post Office. The assessee further filed objections stating that the receipt issued by the Department of Posts did not contain the address of the assessee. The AO did not accept the assessee's objections stating that Department of Post accepts the letters sent through RPAD which contain full address, however, acknowledgement/receipt issued by them contains only the name of the person and place. The objections raised by the assessee in respect of service of notice u/s.143(2) were not accepted by the AO.

4. On appeal preferred by assessee, the Ld. CIT(A) also did not accept the assessee's ground that notice u/s.143(2) was not served within the prescribed time.

5. Thereafter, the assessee carried the matter before the ITAT. The ITAT, vide order dated 23rd March 2005 passed in ITA No.6534/M/1999, observed that the AO had rejected the assessee's claim without giving proper opportunity

to examine the papers and letter issued by the postal authorities. Under the circumstances, the ITAT referred the issue to the file of the AO with a direction to supply evidence including the letter issued by Postal authorities to the assessee and thereafter, pass a fresh assessment order.

6. In pursuance of ITAT's direction, the AO re-initiated the assessment proceedings. During the assessment proceedings, the assessee argued before the AO that letter of postal authority did not contain date of delivery and also the name of company and hence, service of notice u/s.143(2) was invalid and therefore, entire proceedings were required to be dropped. The AO did not accept the assessee's contention regarding non delivery of notice u/s.143(2). The AO held that after lapse of 10 years it was almost impossible to find out the date of delivery and letter from the postal authorities. Regarding non-mention of address of the company, the AO held that the letter of postal authorities indicated the RPAD Number of letter which was being posted by RPAD and address mentioned thereon. The AO further held that the postal authorities had admitted the delivery of letter/notice in the normal course which would have been delivered within a week or so. Hence, the notice issued on 14.11.1995 and dispatched by RPAD on 20.11.1995 was a valid service of notice u/s.143(2) of the Act. The AO further held that the assessee failed to discharge its onus to prove that the subject notice was received by the assessee after 30.11.1995. In the facts and circumstances, the AO held that the service of notice u/s.143(2) by RPAD was a valid service and notice was served within the time prescribed u/s. 143(2) of the Act.

7. The above finding of the Assessing Officer was challenged before the learned CIT(Appeals). It was submitted that the notice was not served upon the assessee within the statutory period. The learned CIT(Appeals) however rejected the pleas of the assessee and upheld the findings of the AO on this issue. The assessee has thus come in appeal before us.

8. We have considered the rival pleas raised by the parties. The facts, as emerging out from the above discussion are that the return was filed on 25.11.1994 with limitation period for issuing of notice ending on 30.11.1995. The case of the AO is that the first notice u/s 143 (2) was issued on 14.11.95 and the same was served upon the assessee by sending it through registered post on 20.11.1995 i.e. within the limitation period which was duly served on the assessee as per the letter of postal authorities dated 12.12. 96. The copy of the postal receipt for registered post has also been produced on the file. The AO has relied upon the provisions of section 27 of the General Clauses Act and has held that the notice was deemed to be served upon the assessee in due course.

9. On the other hand the contentions raised by the assessee are that no such presumption can be made regarding service of notice sent through registered post. The assessee had never received the alleged notice dated 14.11.95. The only notice received u/s 143(2) was notice dated 18.9.96 which was time barred. The assessee had admitted the service of noticed dated 18.11.96. Had the earlier notice been received, then the assessee could have admitted the service of the said notice also. That the burden was upon the department to establish that the service was done on the assessee within the specified statutory period of 12 months. The assessee had filed objections that no alleged notice dated 14.11.95 had been received by it. That since the assessee had challenged the service of the notice; it was on the department to specifically prove as to on which date the notice was served and upon whom served.

10. It is to be noted that section 143(2) of the Act requires that where return has been filed by an assessee, if the Assessing Officer considers it necessary or expedient to ensure that the assessee has not understated the income, or has not computed excessive loss, or has not under-paid tax in any manner, he shall serve on the assessee a notice requiring him either to attend his office, or to

produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return. Proviso under the said sub-section requires that no notice shall be served on the assessee after the expiry of 12 months from the end of the month in which the return was filed by the assessee. A careful reading of the above proviso reveals that the limitation prescribed therein is mandatory as the format of provision is in negative terms. The Hon'ble Supreme Court in the case of 'Assistant Commissioner of Income-tax vs. Hotel Blue Moon reported in [2010] 321 ITR 362 has considered the very issue and it has been held that the Assessing Officer has to necessarily follow the provisions of section 142 and sub-sections (2) and (3) of section 143. The Hon'ble Apex Court did not accept the submission of the Revenue that the requirement of the notice under section 143(2) can be dispensed with or that the same is a mere procedural irregularity.

11. It is a fact on the file that the notice dated 14.11.95 was sent on the address given by the assessee of its office at Baroda (Gujrat), which is an out station. There is nothing on record to indicate that the notice was returned by the postal authorities as un-served. The mode of service of notice has been prescribed under section 282 of the Act, which for the sake of convenience is reproduced as under:

"282. Service of notice generally.- (1) The service of a notice or summon or requisition or order or any other communication under this Act (hereafter in this section referred to as "communication") may be made by delivering or transmitting a copy thereof, to the person therein named,—

(a) by post or by such courier services as may be approved by the Board; or

(b) in such manner as provided under the Code of Civil Procedure, 1908 (5 of 1908) for the purposes of service of summons; or

(c) in the form of any electronic record as provided in Chapter IV of the Information Technology Act, 2000 (21 of 2000); or

(d) by any other means of transmission of documents as provided by rules made by the Board in this behalf.

(2) The Board may make rules providing for the addresses (including the address for electronic mail or electronic mail message) to which the communication referred to in sub-section (1) may be delivered or transmitted to the person therein named.

Explanation.—For the purposes of this section, the expressions “electronic mail” and “electronic mail message” shall have the meanings as assigned to them in Explanation to section 66A of the Information Technology Act, 2000 (21 of 2000).”

12. In view of the above provision, the service of notice by post is a valid service in terms of the provisions contained in Section 282(1) of the Act. The Hon’ble Delhi High Court in the case of CIT Vs. Yamu Industries Limited(2008) 306 ITR 309 (Del) has examined the above provisions and has held that the requirement of section 282 of the Act is that notice may be served upon the person named therein, either by post or if it were a summons issued by a Court under the Code of Civil Procedure. The Hon’ble Delhi High Court thereafter further analysed the provisions of Order V, rule 19A of Code of Civil Procedure, which provides for simultaneous issue of summons for service by post in addition to personal service. The said rule 19A to order V CPC, as it stood, before it was omitted vide CPC(Amendment)Act 1999 w.e.f.1.7.2002, is reproduced as under:

"Rule 19A. Simultaneous issue of summons for service by post in addition to personal service- (1) The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in rr. 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgement due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case, the Court considers it unnecessary.

(2) When an acknowledgement purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgement due, the declaration referred to in this sub-rule be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of the issue of summons."

13. The Hon'ble Delhi High Court after analysing the said provisions of rule 19A held that if the notice has not been received back unserved within the period of thirty days of its issuance, under these circumstances, it has to be held that the notice has been duly served upon the assessee.

However, as noted above, the said Rule 19A since has been omitted vide CPC (Amendment) Act 1999 w.e.f.1.7.2002; and subsequently an amendment was brought to Order V rule 9 CPC whereby the Rule 9 was substituted vide CPC(Amendment) Act 2002 w.e.f 1.7.2002 and almost similar provisions to rule 19A were brought into existence w.e.f. the same date i.e.1.7.2002, which read as under:

Order V, Rule 9

" Delivery of summons by Court.-

- (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.
- (2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and where he is such an officer, the summons may be sent to him in such manner as the Court may direct.
- (3) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court:

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

- (4) Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgment due), the provisions of Rule 21 shall not apply.
- (5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, ' - the Court issuing the summons shall declare that the summons had been duly served on the defendant:
- Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.
- (6) The High Court or the District Judge, as the case may be, shall prepare a panel of courier agencies for the purposes of sub-rule (1). "

14. A perusal of the above reproduced Rule 19A since omitted, and subsequently substituted 'Rule 9' reveals that both are identically worded and being applicable in relation to service of summons, where the defendant resides **with in the jurisdiction of the court issuing the summons**. However in the case of the assessee, the notice dated 14.11.95 was sent on the address given by the assessee of its office at Baroda (Gujrat) which is an out station and not with in the jurisdiction of the assessing officer at Mumbai. The said rules are therefore not applicable to the case of the assessee.

15. Now we discuss the relevant provisions of CPC in relation to service of summons where the defendant resides within jurisdiction of another court.

Order V Rule 21.

“Service of summons where defendant resides within jurisdiction of another court.- A summons may be sent by the court by which it is issued, whether within or without the State, either by one of its officers or by post or by such courier service as may be approved by the High Court, by fax message or by electronic mail service or by any other means as may be provided by the rules made by the High Court to any court (not being the High Court) having jurisdiction in the place where the defendant resides.

HIGH COURT AMENDMENTS

Rule 21-A

BOMBAY, DADRA AND NAGAR HAVELI.- The following shall be inserted:

“Rule 21-A. Service of summons by prepaid post wherever the defendant may by residing if plaintiff so desires.— Notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, (the Court may, in addition to or in substitution for, any other mode of service), cause the summons to be addressed to the defendant at the place where he is residing, (Or where he ordinarily carries on business) and Sent to him by registered post, prepaid for acknowledgement, provided that at such place there is a regular daily postal service. An acknowledgement purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be prima facie proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and declare the summons to have been duly served or order such further service as may in its opinion be necessary.” (1-11-1966)

GUJARAT.- As in Bombay save that the rule begins with words “the Court may’ and the words put in brackets are omitted. (17-8-1961).”

16. The Hon’ble Bombay High Court by virtue of its powers conferred under section 122 CPC has thus inserted Rule 21A as reproduced above, which provides that in cases where the summons are sent by registered post, prepaid for acknowledgement to an out stationed defendant and where an acknowledgement duly signed by the defendant is not received back, there will not be a presumption of service but the court shall hold such enquiry as it thinks fit and declare the summons to have been duly served or order such further service as may in its opinion be necessary.

The Hon’ble Bombay High Court in the case “Sunder Spinner And Anr. vs Makan Bhula (1922) ILR 46 Bom 130 has held that service by registered post is at any time a poor substitute for personal service which is directed by the

Court. It is allowed to litigants as a matter of convenience. The court must allow the defendant a retrial ,if, after the decree had been passed against him on evidence that the summons was sent by registered post and returned refused, he appeared and denied that the packet had ever been delivered to him by the postal authorities.

17. Now coming to the facts of the present case, we may point out here that there appears to be some doubt whether the notice was at all sent to the assessee because, as observed above, the receipt showing that an envelope was sent by registered post merely contained the name of the assessee without its address. Consequently, it is quite possible that the notice may have been sent to the assessee at some wrong or even some incomplete address. A perusal of the copy of the alleged notice dated 14.11.95 reveals that there is a cutting/alteration in the address written of the assessee on the said notice. Further a perusal of the letter of the postal authorities dated 12.12.96 reveals that it has been mentioned therein that the RL No. 563 dated 20.11.1995 was delivered to the addressee, however no name or address of the addressee has been mentioned in the said letter. So far so, even the date of delivery of the said letter has not been mentioned. The assessee has taken a specific objection that no such Regd. Letter has ever been received by it. Under these circumstances, the burden was upon the Department to prove that notice was served upon the assessee within the prescribed time. The revenue has failed to prove its case in this regard. We may further note that in the facts and circumstances of the case, no benefit of presumption under section 27 of the General Clauses Act 1897, or section 114 of the Indian evidence Act is available to the revenue as there are serious doubts about the correct address mentioned on the envelope and even the postal authorities have also not mentioned the name of the addressee and date of delivery of the letter. Even there is no available presumption of the time period within which in normal

course a Regd. Post can be taken to have been delivered at an out- station i.e. from Mumbai to Baroda. Moreover as per the provisions of Rule 21A CPC as amended/inserted by the Bombay High Court, the Assessing Officer was supposed to make a reasonable inquiry as to delivery of the post to the assessee which was stationed outside the jurisdiction of the assessing officer. Moreover the mode of service by Regd. Post has been held to be a poor substitute by the Hon'ble Bombay High Court in the case of 'Sunder Spinner And Anr. vs Makan Bhula' (supra).

18. In view of the above, it is clear that there is no evidence or even presumption of service of notice u/s.143(2) by post on the assessee. Since in the instant case, the department has not been able to demonstrate that notice u/s.143(2) was served within the statutory time limit, the assessment made on the basis of such invalid notice could not be treated to be valid assessment and, hence, such assessment order deserves to be treated as null and void and liable to be quashed and annulled. Accordingly, we allow assessee's appeal on legal issue regarding non-service of notice u/s.143(2). The consequential additions thus have no legs to stand and the same accordingly stand deleted. The other grounds raised by the assessee have thus become infructuous and need no adjudication.

19. In the result, the appeal of the assessee is hereby allowed.

Order pronounced in the open court on 24.02.2016.

Sd/-
(G.S. Pannu)
ACCOUNTANT MEMBER

Sd/-
(Sanjay Garg)
JUDICIAL MEMBER

Mumbai, Dated: 24.02.2016.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai

The DR Concerned Bench
//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.