IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D' NEW DELHI

BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

I.T.A .No. 1605/DEL/2012
ASSESSMENT YEAR-2008-09

Wg. Cdr. Sucha Singh, **C/o Manoj Kumar Kanth,** **Advocate, B-136,** **Lajpat Nagar-I,** **New Delhi-110024** **(APPELLANT)**	vs	**ITO,** **Ward-35(4),** **New Delhi.** **(RESPONDENT)**

Appellant by	**Shri Umesh Chand Dubey, Sr. DR**
Respondent by	**Shri Raj Kumar Gupta, CA**

ORDER

PER SUDHANSHU SRIVASTAVA, JM

This appeal has been preferred by the assessee against order dated 17/01/2012 passed by the Ld. Commissioner of Income Tax (Appeals)- XXVII, New Delhi and pertains to assessment year 2008-2009.

2. The brief facts of the case are that the return of income was filed declaring an income of Rs. 3,58,130/-. The assessment was completed under section 144 of the Income Tax Act, 1961

(hereinafter called "the Act") at an income of Rs. 59,65,340/-. The AO has noted in the assessment order that notice under section 143 (2) of the Act was issued and served upon the assessee within the stipulated period. He has also mentioned that various notices were issued from time to time along with the questionnaire but all of them remained un-complied with. The AO further mentions that finally a notice under section 143 (2) of the Act was issued along with the detailed letter dated 25th of November 2010 which was served by affixture on the last known address of the assessee on 29/11/2010 providing the assessee a final opportunity to file the details by 06/12/2010. Since no reply was forthcoming from the assessee and the case was getting time-barred on 31/12/2010, the assessment was completed under section 144 of the Act.

2.1 The assessee carried the matter in appeal to the Ld. Commissioner of Income Tax (Appeals) and agitated that the assessee had not received a single notice from the Department in respect of the assessment proceedings. The additions were also challenged on merits. The Ld. CIT (Appeals) dismissed the assessee's ground agitating the service of notice and partly

allowed the assessee's appeal on merits. Now the assessee has approached the ITAT and has raised the following grounds of appeal –

> *"1. That the Ld. CIT(A) has erred in dismissing the grounds of appeal raised before him with regard to non-service of notice and of proper opportunity in as much the Assessee was never given any opportunity to reply to the remand report of the Assessing Officer.*
>
> *2. That the Ld. CIT (A) has once again erred in confirming the addition of Rs. 13,44,500/- on account of unexplained deposits without appreciating the % source of cash deposit filed before him.*
>
> *3. That the Ld. CIT has further erred in making the addition of Rs.8,67,900/- on account of unexplained investment in the purchase of Mohali property in as much as the issue before the CIT (A) was with regard to the long term capital arisen on account of sale of property at Delhi. Nor the CIT (A) had ever asked for details of source of investment in Mohali property."*

3. The Ld. AR submitted that the return of income was filed on 12/11/2008 and as such the notice under section 143 (2) of the act was to be served on or before 30 of September 2009 whereas the 1st notice was issued on 14/09/2009 and served by affixture on 24/09/2009 at "123 Hargobind Enclave, Delhi – 110092. The Ld. AR submitted that this property had already been sold on 04/02/2008 and the capital gain had been declared in the return for assessment year 2008-2009 and as such the

said property was not in the ownership of the assessee on 24/09/2009 when the affixture was made. It was further submitted that the income tax return for assessment year 2009-10 was filed on 04/09/2009 in which the address was given as "H – 234, Naraina Vihar, Naraina New Delhi." The Ld. AR submitted that the service of the notice was not made at the last known address by the Department and that the service of the notice at the address which did not belong to the assessee cannot be taken as a service of notice. It was further submitted that since the return for assessment year 2008-2009 did mention the sale of property at 123, Hargobind Enclave, New Delhi, it was well within the knowledge of the AO that the said property was not owned by the assessee on 24th of September 2009, that is, when the notice under section 143 (2) was affixed on the said premises. It was further submitted that when the officials would have visited the premises at 123, Hari Gobind enclave, New Delhi for a affixture of notice, it would have been apparent that the assessee did not reside at the said address at the time when the notice was affixed. It was submitted that the affixture of notice at an address not belonging to the assessee cannot be is taken as a valid service of notice. The Ld. AR submitted that even in the

remand report, the AO has admitted that all the notices issued under section 143 (2) remained un-served. It was further submitted that there was no witness at the time of affixture and the same was evident from the affixture report placed at page No. 23 of the paper book.

4. In response, the Ld. Departmental Representative submitted that the onus was on the assessee to provide the correct address and the AO was patently right in issuing the notice and getting it affixed at the address mentioned in the return of income for assessment year 2008-2009. The Ld. Departmental Representative also submitted that the AO has mentioned in pages 1 and 2 of the assessment order that the impugned notices were duly served. The Ld. Departmental Representative relied on the findings of the AO and submitted that the service of notice was a valid one and the dispute was being created by the assessee to avoid confirmation on merits of the case.

5. The rival submissions have been heard and the relevant material on record has been perused. The Ld. CIT (A) has mentioned in Para 6 of the impugned order that the assessee had not offered any comments on the AO's remand report as to why

the address mentioned in the return of income was that of the property which the assessee had already sold. He has further noted that the assessee did not press the grounds relating to issue/service of notice and lack of proper opportunity. The Ld. Authorised Representative, on the other hand, has submitted that the ground was pressed before the Ld. CIT (Appeals).

5.1 On a careful consideration of facts we find that, admittedly, the issue involved is legal issue and it is a settled position of law that a legal issue can be raised before the Tribunal even for the first time even if it was not raised before the authorities below. In our considered opinion, the position does not change in raising the legal issue before the Tribunal even if such legal issue was raised before the CIT (Appeals) but was not pressed. Therefore, we proceed to adjudicate on this issue.

5.2 It is now well settled by various courts, including the jurisdictional High Court and the Apex Court, that for proper assumption of jurisdiction by the assessing officer, a valid service of notice in terms of section 282 (1) of the Act is a mandatory legal requirement. The Hon'ble Delhi High Court in the case of Hotline International 296 ITR 333 has held as under –

"22. As per order V, r.12 of the CPC referred to above, wherever it is practicable, the service has to be effected on defendant in person or on his agent. Admittedly, in the present case, notice under S. 148 of the Act was not tendered to the assessee nor the same was refused at all by the assessee. It is an admitted case of the revenue that when the officials of the IT department went to serve the notice under S.148 for the assessment year 1995 – 96, the security guard informed them that the company was closed for Holi festival holidays. The security guard by no stretch of imagination can be said to be the agent of the assessee and admittedly no notice was tendered either to the assessee or his agent nor the same was refused either by the assessee or his agent.

23. Under order V, r.17 of the CPC, the fixation can be done only when the assessee or his agent refuses to sign the acknowledgement or could not be found. Here, in the present case, no effort was made by the IT department to serve the notice upon the assessee, since the company of the assessee was closed due to Holi festival holidays, and admittedly no effort was made by the serving officer to locate the assessee.

24. Even otherwise, as per order V, r.19A of the CPC, the notice sent by registered post ought to have been sent along with acknowledgement due but admittedly it was not sent along with acknowledgement due.

25. So, from the entire material available on record we have no hesitation in holding that there has been no valid service of notice

under S. 148 of the act upon the assessee as the same was neither tendered to the assessee or his agent, nor the same was refused by either of them."

5.3 Coming to the facts of the case, it is undisputed that the property located at 123, Hargobind Enclave, Delhi was sold by the assessee during assessment year 2008-2009. It is also undisputed that the return of income for assessment year 2009-2010 was filed by the assessee on 04/09/2009 whereas the notice under section 143 (2) was dated 14/09/2009 and was served by affixture on 24/09/2009 and, thus, the last known address before the issue of service of notice was H – 234, Naraina Vihar, Naraina, New Delhi i.e. the address mentioned in the return of income for assessment year 2009-2010. The remand report of the AO also admits that all the notices under section 143 (2) remained un-served. Thus, the service of the very first notice has, undisputedly, been done by way of affixture whereas order V, rule 12 of CPC provides that wherever it is practicable, service has to be effected on the defendant in person or on his agent. Order V, rule 17 of CPC further provides that the affixture can be done only when the assessee or his agent refuses to sign the acknowledgement or cannot be found. Thus, for resorting to

affixture, efforts have to be made to serve the notice upon the assessee and only after reaching a finding that the notice cannot be served upon the assessee, the mode of affixture can be resorted to. Further rule 17 of order V of CPC mandates that an independent local person be the witness of service through affixture and for the purpose of having been associated with the identification of the place. However a perusal of the affixture report shows that there was no independent local person as a witness and there is no evidence that anyone identified the place as belonging to the assessee before such affixture. It is seen that the Income Tax Inspector has signed as the local independent person but such witness cannot be considered to be a local independent person for the purposes of rule 17 of order V of CPC. The Hon'ble Punjab and Haryana High Court in the case of CIT versus Naveen Chander reported in 323 ITR 49 has held that the fixation is required to be done in accordance with the procedure laid down in the Code of Civil Procedure, and where in the report of the inspector/notice server, who claimed to have affixed the notice, there was no evidence of any independent local person having been associated with the identification of the place of business of the assessee, it was a clear violation of the mandate

of rule 17 of order V of Code of Civil Procedure, which laid down the procedure to serve notice by affixture. Since there was no valid service of notice, the assessment proceedings were held as invalid. Therefore, in view of the factual matrix of the case, it is our considered opinion that the Department has failed to prove a valid service of notice on the assessee before embarking upon the assessment proceedings. Since the entire reassessment proceedings were based on assumption of jurisdiction through the issue of notice under section 143 (2) of the Act, which was not validly served on the assessee, we hold that the assessing officer was patently wrong in completing the assessment without effecting the service of notice in accordance with section 282 (1) of the Income Tax Act, 1961 read with order V rule 12 and order V rule 17 of the CPC. Therefore, on the facts and circumstances of the case, we have no option but to quash the entire assessment proceedings. Accordingly, we quash the assessment proceedings and allow the appeal of the assessee on the legal issue. In view of our adjudication in favour of the assessee on the legal issue, the other grounds become academic in nature and are not being adjudicated upon.

6. In the final result the appeal of the assessee stands allowed.

Order pronounced in the open court on 11th April, 2017.

Sd/-	**Sd/-**
(N. K. SAINI)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

DATED: 11th APRIL 2017
'GS'

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT 5. DR

ASSTT. REGISTRAR

ITAT NEW DELHI