

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "A", MUMBAI

Before Shri Mahavir Singh(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

ITA No2041/Mum/2017  
(Assessment year : 2012-13)

Anidhi Impex Pvt Ltd C/o A Porwal & Associates 201, Rajshila, 597, JSS Road Near Marine Lines, Mumbai- 400 002 PAN : AAECA7748J	vs	ITO-4(1)(3), Mumbai
<b>APPELLANT</b>		<b>RESPONDEDNT</b>

Appellant by	Ms. Pooja Jain
Respondent by	Ms Harkamal Sohi

Date of hearing	10-04-2019
Date of pronouncement	31-05-2019

**ORDER**

Per G Manjunatha, AM :

This appeal filed by the assessee is directed against order of the CIT(A)-9, Mumbai dated 23-12-2016 and it pertains to AY 2012-13. The assessee has raised the following grounds of appeal:-

**“Ground No. 1: Validity of Assessment Proceedings**

1.1 On the facts and in the circumstances of the case and in law, the Id. CIT (A) erred in not holding the assessment proceedings under section 143(3) of the Income Tax Act, 1961 ('the Act') conducted by the learned Assessing officer ('A.O') as bad in law as the notice issued under section 143(2) of the Act was not served upon the

appellant and the fact was brought to the notice of AO vide letter dt.24/03/2015 well before completion of assessment as envisaged in section 282 of the Act.

1.2 Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Id. CIT (A) erred in not upholding the appellant's objection that assessment proceedings conducted by the assessing officer as bad in equity and as he did not initiate the proceeding well in time and took at the end of time barring period, leaving insufficient time for compliance by appellant and thus deprived the appellant proper opportunity of being heard and concluded the assessment in a tearing hurry, without giving a fair hearing and without following the principles of natural justice.

1.3 The Ld. CIT (A) failed to appreciate that:

- a. merely giving opportunity by the A.O to give information was not by itself good enough to justify the inference of a fair hearing, which is a basic principle of natural justice;
- b. reasonable opportunity should have been given to the Appellant to put forward its case by the AO.
- c. a fair opportunity is one where the assessee is faced with the tentative conclusion of assessing officer for rebuttal; and
- d. it is settled law that assessing officer must proceed without bias and give sufficient opportunity to assessee to place its case before the Department, he must conduct himself in accordance with the principles of justice, equity and good conscience.

1.4 The appellant prays that, it be held that the entire assessment be quashed, being bad in law as well as equity.

**Ground No. 2: Addition of unsecured loans of Rs. 1,20,71,301/- as unexplained cash credit under Section 68 of the Act:**

2.1 On the facts and in the circumstances of the case and in law, the Id. CIT (A) erred in confirming the decision of AO in making addition of Rs. 1,20,71,301, being unsecured loans received from a director and a limited company, to the income of the Appellant by invoking section 68 of the Act on the alleged ground that the same represent unexplained cash credit.

2.2 The Ld. CIT (A) failed to appreciate and ought to have held that:

- a. the loans were received by the Appellant from the parties during the regular course of business;
- b. the loans were received through proper banking channels and the AO could have verified the same by making independent cross inquiries etc, despite specific request by the appellant;
- c. the appellant has furnished complete address & PAN of loan creditors and even confirmation and Balance sheet and ITR of loan creditors;
- d. the Appellant could have been given reasonable opportunity to put forward its case;
- e. the condition of section 68 of the Act are not satisfied, the question of invoking the same does not arise; and
- f. the various decisions relied on by him are distinguishable from the facts and the circumstances of the Appellant's case.

2.3 The Ld. CIT (A) seriously erred in not admitting and appreciating the evidences submitted by the appellant's authorized representative during the course of hearing despite specific request of appellant as reproduced by himself in para 4, page 14 of his order

2.4 The Id. CIT (A) has seriously erred by concluding in para 6.3, page 17 of his order that the appellant has not substantiated loan from director and the company with balance sheet and other documents, despite himself admitting the fact in para 3 on page 13 and 14 of the order confirming that the appellant submitted various documentary evidences in support of loans as stated in the order.

2.5 The Appellant prays that it be held that the loans received by it were genuine and as such the addition made by the AO by invoking section 68 of the Act be deleted.

**Ground No. 3: Disallowance of loss on foreign exchange fluctuation loss of Rs. 2,37,86,650:**

3.1 On the facts and in the circumstances of the case and in law, the CIT (A) erred in confirming the disallowance of loss of Rs.2,37,86,650/- incurred by the Appellant due to foreign exchange fluctuation on the alleged ground that the appellant failed to furnish supporting documents.

3.2 He failed to appreciate and ought to have held that:

- a. the Appellant is in the business of import of goods;
- b. rates of foreign exchange currencies did fluctuate widely during the relevant previous year;
- c. corresponding import purchase have been allowed as normal business expenditure in same year and also in earlier assessment years;
- d. foreign exchange fluctuation gain have been offered to tax and accepted as income in earlier assessment years;
- e. based on rule of consistency the loss on foreign exchange fluctuation be treated as normal business loss;
- f. the loss was computed and debited to Profit & loss Account in accordance with the Accounting Standard-11 issued by the ICAI;
- g. the Appellant was not given reasonable opportunity to put forward its case; h. it is settled law that assessment cannot be made based on presumption, conjectures and/ or surmises; and

3.3 The Appellant prays that it be held that loss on account of foreign exchange fluctuation be allowed as deduction u/s 37(1).

**Ground No. 4: Initiation of Penalty**

4.1 On the facts and circumstances of the case, the Id. CIT (A) erred in not ordering to delete findings in the order as to initiation of penalty proceedings u/s 271 (1) (c) of the act without giving any reasons as to why such action is required.”

2. The brief facts of the case are that the assessee company is engaged in the business of trading in non ferrous metals, gold, silver diamonds and also dealing in purchase and sale of shares and securities, including futures and options, filed its return of income for AY 2012-13 on 30-09-2012, declaring total income at Nil. The case was selected for scrutiny through CASS. The AO claims to have issued notice u/s 143(2) dated 08-08-2013 and also duly served on the assessee on 27-08-2013. Thereafter notice u/s 142(1) dated 23-04-2014 was issued at the registered address of the assessee, but said notice has been returned by the postal authorities with the remark ‘not known’. Again, further notices u/s 142(1) of the Act were issued; however, no notice could be served

on the assessee. A further notice u/s 142(1) of the Act dated 15-01-2015 was served on director, Shri Mahendra B Jain and Shri Jaswant J Shah at their address as recorded in the return of income. In response to notice, the assessee, vide letter dated 06-02-2015 through its authorised representative, filed various details, as called for as listed by the AO in his assessment order at paras 2.1 to 2.11. The assessee has also filed a letter on 24-03-2015 and objected for proposed assessment proceedings u/s 143(3) on the ground that no notice u/s 143(2) has been served on the assessee within the time prescribed under the Act, consequently, assessment proceedings are invalid, bad in law. The AO, after considering submissions of the assessee, rejected objection raised by the assessee in respect of non service of notice u/s 143(2) and observed that the notice required to be served u/s 143(2) of the Act, has been duly served on the assessee on 27-08-2013 and such notice has been served on or before the due date prescribed under the Act. The AO further observed that the assessee has raised this objection at the fag end of the assessment, when the time limit available for completion of assessment was approaching the last date just to avoid the scrutiny proceedings and also escaped from wrong claim made in respect of various expenses in its financial statements. Therefore, objection raised by the assessee through its authorised

representative does not have any merit and accordingly, rejected objection raised by the assessee for non service of notice.

3. Insofar as unsecured loan received during the year, the AO has made addition towards unsecured loan received from Satellite Developers Ltd and Shri Mahendra B Jain on the ground that the assessee has failed to furnish required details to justify creditworthiness of the person and genuineness of transaction. Similarly, the AO has made addition towards foreign exchange fluctuation loss of Rs.2,37,86,650 on the ground that although sufficient opportunities have been provided to the assessee to produce relevant details no evidence, including copies of sale and purchase invoice, bank certificate and other related documents relevant to import and export made during the previous year has not been filed to justify its claim for loss in foreign exchange fluctuation. Although, the assessee claims that records were destroyed by termite, but could not furnish any evidence to justify its claim. Therefore, it could not be accepted that no records were available due to termite and accordingly, rejected arguments of the assessee and made addition towards loss on foreign exchange fluctuation.

4. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before the CIT(A), assessee has challenged validity of assessment proceedings consequent to non service of notice required to be served u/s

143(2) of the Act. The assessee has also challenged addition made by the AO towards unsecured loans of Rs.1,20,71,301 as unexplained cash credit u/s 68 of the Act. Insofar as disallowance of loss in foreign exchange fluctuation, the assessee has filed various details and submitted that it is in the business of import of goods and to hedge possible loss in fluctuation of foreign currency, entered into forward contracts in order to mitigate loss. Therefore, loss incurred on foreign exchange fluctuation is intrinsically linked to business activity of the assessee and hence, the same is rightly claimed as business loss.

5. The Ld.CIT(A), after considering submissions of the assessee, rejected legal ground taken by the assessee challenging validity of assessment proceedings on the ground that when the assessee has participated in assessment proceedings, there is no reason for the assessee to agitate the issue of non service of notice u/s 143(2), because the facts brought out by the AO during assessment proceedings clearly establishes that the assessee was given enough opportunity to substantiate its case on merit, therefore, the AO was right in rejecting objection filed by the assessee for non service of notice. The Ld.CIT(A) further observed that the facts brought out by the AO in his assessment order clearly proves that notice required to be served u/s 143(2) has been duly served on the assessee. Accordingly, rejected legal ground taken by the assessee. Insofar as issues involved on merits, i.e.

addition towards unsecured loan u/s 68, the Ld.CIT(A), after considering relevant submissions of the assessee and also by relying upon various judicial precedents, held that the assessee has not substantiated loan received from director with the balance-sheet and other direct evidences such as availability of own funds in the bank passbook on the date of advancing loan. The assessee has not substantiated loan from Satellite Developers Ltd alongwith relevant evidences like balance sheet, availability of own funds, therefore, he opined that there is no reason to interfere with the findings recorded by the AO to make addition towards unsecured loan u/s 68 of the Act. Similarly, the Ld.CIT(A) has confirmed addition made by the AO towards foreign exchange loss on the ground that the assessee has not filed any evidence to prove loss claimed on foreign exchange fluctuation with necessary details. Although, the assessee has filed certain additional evidences, but such evidence has been filed without filing any formal application for admission of additional evidence, therefore, there is no reason to admit additional evidence filed by the assessee and accordingly, rejected evidence filed by the assessee and confirmed addition made by the AO. Aggrieved by the order of Ld.CIT(A), assessee is in appeal before us.

6. The first issue that came up for our consideration from ground 1 is validity of assessment proceedings consequent to non service of notice u/s

143(2) within the prescribed time provided under the Act. The Ld.AR submitted that before taking up case for scrutiny assessment proceedings, it is a prerequisite condition to issue notice u/s 143(3) within the time allowed under the Act. Unless notice required to be served u/s 143(2) is served, the AO cannot proceed with assessment proceedings. In this case, although the AO claims to have served notice u/s 143(2) dated 08-08-2013 to the assessee on 27-08-2013, but the copy of notice issued u/s 143(2) was not given to the assessee despite the assessee has made various attempts including filing application under the RTI Act, 2005. In absence of any statutory notice required to be issued u/s 143(2), the assessment order passed by the AO suffers from legal sanctity; hence, the assessment order passed by the AO should be quashed in the interest of justice. The Ld.AR further submitted that the Ld.CIT(A) failed to appreciate the fact in right perspective in the light of objection filed by the assessee for non service of notice before the AO vide its letter dated 24-03-2015 which is part of record of assessment order where the AO has discussed objection filed by the assessee and also reasons for not accepting the objection filed for non service of notice. The Ld.AR further submitted that the assessee requested the Ld.CIT(A) to direct the AO to provide copies of proof of service of notice; however, even today no such proof was furnished the assessee. When the bench has directed the Ld.DR to

produce assessment records, finally, the Ld.DR has produced copy of notice issued u/s 143(2), where it was mentioned that notice was served to one Mr.Anant Dongarkar, part time employee of the assessee, who was in employment with the assessee till March 31, 2011. Otherwise, no proper proof of service of notice including records from postal authorities was shown to us that valid service of notice was effected before taking up the case for assessment. The Ld.AR further submitted that the assessee has filed affidavit from Shri Anant Dongarkar, where he has categorically admitted that the AO has called him to his office during August, 2013 and handed over the notice despite refusing to accept the notice on the ground that he was no longer the employee of the assessee. He, further stated that even after collecting the notice from the AO, he could not send the said notice to the company, due to change of address of the assessee. The Ld.AR further submitted that the directors of the company have also filed affidavits and reconfirmed the facts stated by the Accountant and also non service of notice u/s 143(2). Consequently, the whole proceedings become invalid and liable to be quashed. In this regard, she relied upon various judicial precedents. The case laws relied upon by the assessee are as under:-

I.	<b>C1T v. Kanpur Plastipack Ltd. (2018) (256 Taxman 394)</b>	SC
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2.	<b>CIT v. Kanpur Plastipack Ltd. (2017) (390 ITR381)</b>	All. HC
3.	<b>CITv.ChetanGupta (2016) (382 ITR 613)</b>	DelHC
4.	<b>CIT v. Dr. Ajay Prakash (2014) (42 taxmann.com 387)</b>	All. HC
5.	<b>CIT v. Rajesh Kumar Sharma (2007) (165 Taxman 488)</b>	Del. HC
6.	<b>Addl. CIT v. Prem Kumar Rastogi (1980) (124 ITR 381)</b>	All. HC
7.	<b>Jayanthi Talkies Distributors v. CIT ( 1 979) (120 ITR 576)</b>	Mad. HC
8.	<b>Heaven Distillery (P.) Ltd. v. ITO (2017) (185TTJ 197)</b>	Mum. ITAT

9.DCIT v. M/s. M. K. Enterprise (ITA Nos. !81and426/Kol/2013)

**10. Anil Kumar Goel v. ITO (2008) (116 TTJ 239)**

11.Hind Book **House v. ITO (2005) (92ITD 415)**

12. ITO v. Suraj Prakash (1984) (7 ITD 839)

13. CIT v. Baxiram Roadmal (1934) (2 ITR 438) Nagpur Judicial Commissioner's Court

7. The Ld.DR, on the other hand, submitted that there is no merit in the arguments of the Ld.AR for the assessee that there is no valid service of notice

u/s 143(2), because the AO has served notice u/s 143(2) dated 08-08-2013 to the assessee on 27-02-2013 through Mr. Anand Dongarkar, who claims that he was an accountant of the assessee. The recipient of notice has signed on the notice at the office of the AO. Therefore, having received the notice through accountant, there is no reason for the assessee to object service of notice, that too, after complying with various notices issued by the AO u/s 142(1), that too, at the fag end of the assessment proceedings.

8. We have heard both the parties, perused materials available on record and gone through orders of revenue authorities. There is no dispute with regard to the fact that notice required to be issued u/s 143(2) dated 08-08-2013 was served on one Shri Anant Dongarkar on 27-08-2013. In fact, the person, who received notice has signed on the top of the notice with date. The dispute is with regard to the valid service of notice. The provisions of section 282(1) of the Act, provides that a notice or requisition under the Act, may be served on the person therein named either by post or as if it were a summons issued by a Court under the Code of Civil Procedure, 1908. Order 5 Rule 12 of the CPC provides that wherever it is practicable, service shall be made on the dependent in person, unless he is an agent empowered to accept service in which case service on such agent shall be sufficient. Rules 13, 14 & 15 forms part of the same scheme. A general reading of these rules makes it clear that if

a summons is accepted by a person, who is authorised to do so, then only can it be said that the dependent has received the summons or that the service is good service of notice. In the above legal background, if we examine the facts of the present case, we find that in the instant case, the notice required to be served u/s 143(2) has been served on one Shri Anant Dongarkar. The assessee claims that Shri Anant Dongarkar was a part time accountant, who was employed till 31-03-2011. Thereafter he left the service of the assessee. Therefore, he is not authorised to receive notice or any other communications from the AO in connection with any income-tax proceedings. Therefore, even if such notice is served on the persons, who is not authorised to receive notice from the assessee, it cannot be said that there is a valid service of notice. We further note that the assessee has filed various details to argue that Shri Anant Dongarkar is no longer employed with the assessee at the time of service of notice. In fact, the assessee has filed ledger account copy of salary paid to him as per which he was employed upto 31-03-2011. This fact has been confirmed by Mr. Anant Dongarkar in his affidavit dated 09-04-2019 where he has categorically stated that he left the service of the assessee from 01-04-2011 and also the AO has called him to his office during August, 2013 and forcibly handed over notice u/s 143(2) for AY 2012-13 despite he having refused to accept the notice on the ground that he was no longer employee of the

assessee and also he could not send the notice to the company. Further, this fact has been reiterated by the directors of the assessee company where they have, in their affidavits filed on 09-04-2019 stated that Mr. Anant Dongarkar left the service of the assessee on 31-03-2011 and that he was not authorised to collect any notice on behalf of the company or attend before any authorities. It is further noted that the assessee has filed his objections for non service of notice u/s 143(2) before the AO, vide letter dated 24-03-2015 and the AO has rejected objections filed by the assessee on the ground that the assessee has filed objection for non service of notice to avoid scrutiny proceedings and also to justify wrong claim of certain expenses and loans in the financial statements, that too, at the fag end of the time available for scrutiny assessment. All these are part of assessment order. The Ld.DR neither filed any evidence to controvert the above facts nor denied of assessee having filed objection before the AO for non service of notice. Further, the Ld.CIT(A) has also dismissed legal ground taken by the assessee challenging validity of assessment proceedings consequent to non service of notice u/s 143(2) only on the ground that the assessee has participated in assessment proceedings and also filed various details in respect of issues involved in assessment. Therefore, there is no grievance caused to the assessee by non service of notice required to be served u/s 143(2) of the Act, without

appreciating the fact that, when objection was filed before AO, the provisions of section 292BB has no application. Therefore, we are of the considered view that there is merit in the argument of the assessee that the notice required to be served u/s 143(2) of the Act, which had not been served on the assessee within the time prescribed under the Act. Once the notice required to be served u/s 143(2) was not served on the assessee through proper channel, even though such notice has been served through a person, who is not authorised to receive notice, it is a case that the notice required to be served was not served on the assessee. Consequently, the whole assessment proceedings become vicious.

9. Coming to the case laws relied upon by the assessee. The assessee has relied upon the decision of Hon'ble Allahabad High Court in the case of CIT vs Kanpur Plastic Packs Ltd (2017) 390 ITR 381 (All). We find that the Hon'ble High Court had an occasion to consider invalid service of notice in the light of provisions of section 148 and held that service of notice to an accountant of the assessee company, who did not have power of attorney to conduct assessment proceedings for that year, was not valid in view of the fact that power of attorney did not include in it any authority to accept any fresh notice. The revenue has filed SLP against order of the Hon'ble High Court and such SLP has been dismissed by the Hon'ble Supreme Court in its order dated 03-07-

2018 where it was held that re-assessment proceedings initiated on the basis of notice served u/s 148 on accountant of the company were vitiated as accountant was not principal officer of company nor was there any material to show that he had been authorised by company to accept any notice. The Hon'ble Delhi High Court in the case of CIT vs Chetan Gupta (2016) 382 ITR 630 (Del) has considered an identical issue and after analysing provisions of section 282(1) read with order 5 Rule 12 of CPC and order 3 Rule 6 of CPC held that notice required to be served u/s 148 has to be mandatorily served upon assessee in accordance with section 282(1) of the Act. The court further held that where prior to completion of assessment, assessee raised an objection that he had not been duly served notice in accordance with section 148, Proviso to section 292BB was attracted and revenue could not take advantage of main portion of section 292BB.

10. In this case, on perusal of facts available on record, it is abundantly clear that notice u/s 143(2) has been served on the person, who is not authorised to receive notice or attend any proceedings before the AO. Therefore, considering facts and circumstances of this case and also respectfully following the case laws discussed hereinabove, we are of the considered view that assessment order passed by the AO, consequent to invalid service of notice /

non service of notice to the assessee is bad in law and liable to be quashed.

Accordingly, we quashed the assessment order passed u/s 143(3) of the Act.

11. The assessee has taken other grounds to challenge addition made by the AO towards unexplained cash credit u/s 68 of the Act, and addition towards loss on foreign exchange fluctuation. Although, the assessee has argued at length on the issues, since we have quashed assessment order passed by the AO on the issue of invalid service of notice u/s 143(2) of the Act, the other ground taken by the assessed on merits of the issue does not require any specific adjudication at this point of time. Hence, the other grounds taken by the assessee are not adjudicated upon specifically.

12. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 31-05-2019.

Sd/-

sd/-

(Mahavir Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 31<sup>st</sup> May, 2019

Pk/-

Copy to :

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

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai