

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

**BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.5960/M/2018
Assessment Year: 2002-03**

Shri Abhishek Acharya, A/13, Krishna Kunj, 552, Khar Pali Road TPS- 3, 8 th Road, Khar West, Mumbai – 400 052 PAN: ACYPA 2833R	Vs.	ITO, Ward 16(1)(1), [Erstwhile Jurisdiction of ACIT, Circle 11(1)], Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Jitendra Sanghavi, A.R.
Shri Amit Khatiwala, A.R.

Revenue by : Shri R. Bhoopathi, D.R.

Date of Hearing : 16.09.2019

Date of Pronouncement : 31.10.2019

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 21.08.2018 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2002-03.

2. The only issue raised in ground No.2 & 3 is against the non service of notice under section 143(2) of the Act on the assessee and challenging the jurisdiction of the AO to frame assessment under section 143(3) of the Act. The assessee has challenged the order of Ld. CIT(A) for not quashing the assessment order passed under section 143(3) on the ground that there has been no service of notice under section 143(2) of the Act.

3. The facts in brief are that the notice under section 143(2) of the Act was issued and sent on the address 710, Everest, J.P. Road, Andheri (West), Mumbai on 29.10.2003. However, the said notice was returned unserved. The assessee, in the return of income filed, has stated the address as E-202, Serenity of New Link Road, Oshiwara, Andheri (West), Mumbai 400 053 and thus the notice has been sent on the wrong address. Thereafter, no attempt was made by the AO to send the notice on the correct address and finally the assessment under section 143(3) of the Act was framed vide order dated 31.03.2005.

4. In the appellate proceedings, the Ld. CIT(A) did not adjudicate this ground of appeal and dismissed the appeal of the assessee in limine on account of non condonation of delay in filing the appeal. The learned CIT(A) has dismissed the appeal of the appellate by concluding that due to purely callous and negligent attitude of the appellant there is inexplicable and inordinate delay of more than 12 and a half years in filing the appeal and therefore it is not a fit case to condone the delay.

5. At the outset, the Ld. A.R. submitted before the Bench that the assessment has been framed by the AO without serving the mandatory notice under section 143(2) of the Act on the assessee despite the fact that the return as filed was with the correct address whereas the notice was sent on a wrong address. The Ld. A.R. stated that in response to RTI information sought by the assessee, the AO has responded that the notice under section 143(2) was sent on the address at 710, Everest, J.P. Road, Versova, Andheri (West), Mumbai whereas the correct was

E-202,, Serenity , Off New Lind Road, Oshiwara , Andheri (West), Mumbai. The Id AO has taken this address from form 16A, a TDS certificate issued to the assessee by third party. Thus the Ld. A.R. submitted that this is undisputed that notice has not been served on the assessee. During the course of proceedings before the Tribunal, the AR drew our attention to the RTI reply received by the appellant from the Assessing Officer which is extracted is as under: -

Sr.No	Information required	Reply
8(ii)	Was the assessment order u/s. 143(3) dated 31.3.2005 dispatched at the address mentioned at Sr.No.7? If yes, whether the same is delivered or returned unserved? If served, provide copy of the acknowledgment of service.	Yes, the assessment order was despatched at the address mentioned at Sr.No.7 and it was returned unserved.

The Id AR submitted that it is very clear from the Assessing Officer's response to the query raised about the address at which the assessment order was dispatched wherein he has acknowledged that the assessment order was dispatched to the address which was not the appellant's address and also that address was not mentioned on the physical return of income filed by the appellant for the relevant assessment year. In fact, it was accepted by the Assessing Officer that the assessment order was dispatched to the address mentioned in Form 16A issued by M/s. Mudra Communications Ltd. dated 10.7.2001.

The Assessing Officer has further confirmed that the assessment order was returned unserved. It can also be seen from the paper book filed by the assessee before the Tribunal that the appellant has filed 9 letters before the Assessing Officer from the period 17.4.2006 to 22.10.2018 with respect to outstanding demand raised for the current assessment year expressly pointing out that the appellant has not received any assessment order for the relevant year. The ld AR objected to the observation of the ld CIT(A) in para 5 of his order that the appellant has mentioned date of service of order / notice of demand in Form No.35 as 11.10.2017 which was incorrect. The ld counsel also controverted the observations of the ld CIT(A) that the appellant has obtained true copy of the notice of demand and true copy of assessment order etc. which was signed by the Assessing Officer on 29.9.2017 and that the appellant has tried to present a picture as if the appeal has been filed within due time by mentioning the date of service of order / notice of demand as 11.10.2017 and the date of filing of the appeal being 9.11.2017 and therefore in time. The ld AR also referred to the CIT(A) harsh remarks that the appellant has only tried to hoodwink the appellate procedure without any valid reasons. The ld AR submitted that the true copy of the assessment order was certified on 29.9.2017 and was dispatched on 9.10.2017 and served to the appellant on 12.10.2017 as is clear from the RTI reply given by the AO which is extracted as under:

Sr.No	Information required	Reply
9	On which date the true copy of the assessment order certified by ITO	09.10.2017. Served on you on 12.10.2017. (Copy of postal

	Ward 16(1)(1) on 29.9.2017 was despatched? On which date the same was served on me? Kindly provide proof of the delivery.	acknowledgement enclosed)
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The ld. AR contended that it is very clear that all the relevant details were available in the file of Assessing Officer with respect to the matter on hand and the CIT(A), instead of calling for the records from Assessing Officer to verify the facts of the case and the claim of the appellant, has chosen to make undue harsh comments on the attitude of the appellant and also to allege that the appellant has tried to hoodwink the appellate procedure without any valid reasons. Such observations and comments by the CIT(A) in his order were totally unwarranted and uncalled for. The ld AR argued that it quite apparent from the assessment records as brought to forth by the RTI queries raised by the appellant that the original assessment order u/s.143(3) dated 31.3.2005 was not served on the appellant and the same was dispatched to a wrong address. Further, the true copy of the assessment order certified by the ITO, Ward 16(1)(1) on 29.9.2017 was dispatched on 9.10.2017 and received by the appellant first time on 12.10.2017. The appellant filed an appeal against the said order before the CIT(A) on 9.11.2017 which is within the time limit prescribed for filing the appeal. The CIT(A) has therefore wrongly dismissed the appeal of the appellant by holding the same as filed inexplicably and inordinately delayed. Coming to the core issue in the appeal, the ld AR stated that the appellant has challenged the legality of the assessment on the ground that the notice issued u/s. 143(2) of the Act was not

served on the appellant as it dispatched at wrong address. The Assessing Officer in his reply to RTI query has confirmed the non-service of notice. Finally the ld AR prayed before the bench that the assessment order being nullity may kindly be quashed as the non service of notice goes to the roots of the assessment and is not a curable defect at all. In defence of his arguments, the Ld. A.R. relied on a series of decisions namely;

1.	ACIT v Geno Pharmaceuticals Ltd. (Bombay High Court)	32 Taxmann.com 162
2.	CIT v Abacus Distribution Systems (India) (P.) Ltd. (Bombay High Court)	78 Taxmann.com 321
3.	Harjeet Surajprakash Girotra v Union of India & Ors.	Writ Petition No.51 3 of 201 9
4.	Shri Prakash Ramji Gavali v ITO {Mumbai Tribunal}	ITANo.1492/Mum/2012
5.	Suresh Kumar Sheetlani v ITO (Allahabad High Court)	96 Taxmann.com 401
6.	Veena Devi Karnani v ITO (Delhi High Court)	102 Taxmann.com 470
7.	ACIT v Hotel Blue Moon (SC)	188Taxman 113
8.	Shri Ramesh Salecha HUF v ITO (Mumbai Tribunal)	ITANo.3312/Mum/2015
9.	CIT Vs Laxman Das Khandelwal	(2019) 108 taxmann.com 183(SC)

6. The Ld. D.R., on the other hand, relied on the order of authorities below by submitting that notice has properly been issued but sent on an address which was different than the address mentioned on the income tax return.

7. After hearing both the parties and perusing the material on record, we observe that the undisputed facts are that the notice under section 143(2) was not served on the assessee as is apparent from the reply of the AO in response to the RTI application dated 05.10.2018, we observe from the perusal of the said application that the notice has not been served on the

assessee. In our opinion, the non service of notice is factual and serious defects in the framing of the assessment and renders the assessment proceedings as well as the consequent assessment order as null and void. The ld CIT(A) instead of finding the truth chose to dismiss the appeal even without verifying the facts from assessment records. In the present case before us the AO admitted to have not served the notice under section 143(2) on the assessee and in such a scenario we are left with no option except to quash the assessment order. The case of the assessee is supported by a series of decisions as stated hereinabove. In the case of CIT vs. Abacus Distribution Systems (India) (P.) Ltd. (supra) the Hon'ble Bombay High Court has held that where the notice under section 143(2) has not been served at the correct address then the assessment proceedings concluded on the basis of invalid notice is void. Similarly, in the case of CIT vs. Laxman Das Khandelwal (2019) 108 taxmann.com 183 (SC) the Hon'ble Apex Court has held that no notice under section 143(2) was ever issued by the Department, therefore, in the light of judgement referred to above the assessment proceedings sans service of notice under section 143(2) of the Act are invalid and accordingly quashed.

8. Before parting we would like to make mention of the recent judgement of the Hon'ble Apex Court PCIT Vs M/S I-Ven Interactive Ltd Civil Appeal No. 8132 of 2019(arising out of SLP (C) No.3530/2019 order dated 18.10.2019,wherein it was held that where mere mentioning the new address in the return of income without specifically intimating the assessing officer qua change of address and without getting the PAN database changed, is not enough and sufficient. the Hon'ble Apex Court

has held that in absence of any specific intimation to the assessing officer qua change of address or change of name of the assessee, the AO is justified in sending the notice under section 143(2) at the available address mentioned in the PAN Database of the assessee, especially when the return has been filed under E-module scheme. The said decision was rendered in the context of matter that selection of the case generated under automated system of the department which picks up address of the assessee from the database of the PAN and the change of address in the PAN database is therefore must. The said decision of the Hon'ble Apex court is not applicable to the present facts, as in the instant case there was no PAN Data base and there was no e-filing at that time and scrutiny used to be fixed manually and not on automated system and thus the notice under section 143(2) used to be issued on the basis of the records before the AO.

9. Since the appeal of the assessee is allowed on this legal issue, other grounds raised by the assessee need not to be adjudicated.

10. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 31.10.2019.

Sd/-
(Vikas Awasthy)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 31.10.2019.

* 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.