IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D', NEW DELHI
(Through Video Conferencing)

BEFORE, SHRI G.S. PANNU, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.2349/Del/2017
(ASSESSMENT YEAR-2012-13)

M/s. J.K.V.B Properties Pvt. Ltd. 11/2A, Pusa Road New Delhi-110005 PAN:AABCJ 2028H	Vs.	Dy. CIT Circle-13(1), New Delhi
(Appellant)		**(Respondent)**

Appellant By	**Sh. Salil Aggarwal, Adv. & Mr. Shailesh Gupta, CA**
Respondent by	**Sh. C.P.Singh, Sr. DR**
Date of Hearing	**14.08.2020**
Date of Pronouncement	**30.09.2020**

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This appeal is filed by the assessee against the order dated 14.03.2017 passed by the Ld. Commissioner of Income Tax (Appeals)-5, New Delhi {CIT (A)} for the Assessment Year 2012-13.

2.0 The brief facts are that Assessee Company is a Private Limited Company and is in the business of real estate. Return of

Income for the assessment year under consideration was filed by assessee company wherein the taxable income was declared at Rs. 2,96,34, 780/-. Assessment in this case was completed under section 143(3) of the Income Tax Act, 1961 (hereinafter called 'the Act') wherein the income was assessed by the Assessing Officer (AO) at Rs. 3,53,02,460/- after making certain additions and disallowances.

2.1 Aggrieved, the Assessee filed an appeal before the Ld. CIT (A) who dismissed the appeal of the assessee vide order dated 14.03.2017 and against the said order of learned CIT (A), an appeal is now being preferred by the Assessee Company before this Tribunal. The following grounds have been raised by the assessee:

"1. Whether on the facts and in the circumstances of the case the learned lower authorities has grossly erred in law and on facts in passing and in confirming the order u/s 143(3) of the Act by ignoring the fact that the first notice u/s 143(2) of the Act was not served upon the assessee within the time limit prescribed under the Act. i.e. on or before 30th September 2013 as such the assessment proceedings were illegal.

*2. Whether on the facts and in the circumstances of the case the learned assessing officer has grossly erred in law and on facts in enhancing the income from House Property by Rs. 35,94,903/- *by holding that in the computation of total income the rent considered separately for calculating property income was shown at Rs. 4,79,31,859/- however while calculating income from House Property*

the rental Income is considered to be 4,27,96,283 and the assessee was asked to clarify the reason for such difference however no satisfactory reply was given.

The learned CIT (A) has also grossly erred in law and on facts in confirming the addition by ignoring the fact that the assessing officer has neither raised any query to this effect nor any clarification was sought to this effect nor any show cause notice was issued by the assessing officer before enhancing the income.

3. Whether on the facts and in the circumstances of the case the learned assessing officer has grossly erred in law and on facts by ignoring the fact that the expenses amounting to Rs. 55,96,453/- incurred to earn the gross rent were clearly shown in the computation of income as expenses considered separately and were deducted from the gross rent received while computing the income from house property which was the basic reason for the fact that the rent considered separately for calculating property income was shown at Rs. 4,79,31,859/- however while calculating income from House Property the rental Income was considered to be 4,27,96,283.

The learned lower authorities grossly erred in law and on facts in not allowing these expenses as deduction from the gross rent received to determine the Annual Letting Value of the Property.

4. Whether on the facts and in the circumstances of the case the learned CIT (A) erred in not considering the decision of the Hon'ble Delhi Tribunal in the case of DCIT v/s Texaco Overseas Pvt. Ltd. ITA no. 4050/DEL/2009 and in the case of Texaco overseas Pvt. Ltd. v/s ACIT, ITA No. 5007/DEL/2014 wherein it was held that the expenses incurred to earn the gross rent were deductible from the gross rent received to determine the ALV.

5. Whether on the facts and in the circumstances of the case the learned lower authorities has grossly erred in law and on facts in holding that there was no business activity during the year under consideration.

6. Whether on the facts and in the circumstances of the case the learned lower authorities has grossly erred in law and on facts in holding that the interest income amounting to Rs. 20,73,047/- was assessable under the head income from other sources instead of income from business by ignoring the various facts and evidences etc. on record.

The learned CIT (A) further erred in law and on facts by ignoring the fact that the assessing officer has neither raised any query to this effect nor any clarification was sought nor any show cause notice was issued nor any reasons were given by the assessing officer for assessing the interest income under the head income from other sources instead of income from business.

7. Whether on the facts and in the circumstances of the case the learned CIT (A) erred in not considering the decision of the Hon'ble Delhi High Court in the case of Snam Progetti S.P.A. Vs. Additional Commissioner of Income Tax, New Delhi 132 ITR 70 (Del) where in it was held that interest earned from bank deposit was business income and further it was categorically held the interest from bank deposit was also a business income for the purpose of set off and could not be refused even if interest income is taxed under a separate head.

8. Whether on the facts and in the circumstances of the case the learned lower authorities has grossly erred in law and on facts in withdrawing the claim of set off of brought forward business losses amounting to Rs. 20,55,105/- as claimed u/s 72 of the Income Tax Act.

9. Whether on the facts and in the circumstances of the case the assessment was time barred as the assessment order was dispatched on 08/04/2015 and was served upon the assessee on 09/04/2015 that is after the assessment has become time barred on 31/03/2015.

10. Whether on the facts and in the circumstances of the case the assessment order was made after the time limit prescribed u/s 153 of the Act.

11. Whether on the facts and in the circumstances of the case the learned assessing officer has grossly erred in law and on facts in making the above addition in defiance of the instructions issued by the CBDT by without obtaining the approval of principal Commissioner of Income Tax before making the above additions.

12. The appellant craves leave to add, alter, amend or forgo any of the grounds of appeal."

3.0 At the outset, the Ld. Authorised Represenatative (AR) submitted that the assessee was challenging the assumption of jurisdiction to frame the impugned assessment as notice under section 143(2) of the Act was not correctly issued and served on the assessee company within the prescribed time limit as prescribed under the Income Tax Act, along with other grounds of appeal as stated in the memo of appeal so filed with the Tribunal. It was submitted that Ground No. 1 raised by assessee is a legal ground which goes directly to the root of the matter, as such, the same is being taken up first. The Ld. AR argued that that in the instant case, the return of income was filed by the assessee company on 27.09.2012 (placed at page 1 of the paper book) wherein the

address of the assessee was mentioned as 11/2A, Pusa Road, Karol Bagh, New Delhi – 110005. That further, it was also submitted by the Ld. Counsel for the Assessee that vide letter dated 06.06.2008, the assessee company had duly intimated to the Assessing Officer (AO) regarding the said new address of the assessee. The said letter was referred to and is placed at page 44 of the paper book so filed by the assessee. The Ld. Counsel for the Assessee further, argued that right from Assessment Year (AY) 2008-09 onwards, the assessee had been filing its return of income at its new address i.e. 11/2A, Pusa Road, Karol Bagh, New Delhi – 110005. It was further, argued by the learned counsel that even the Revenue in AY 2009-10 had, while processing the return of income under section 143(1) of the Act, issued the same at the new address (placed at page 45 of the paper book). Thus, it was argued by the learned counsel of assessee that the Revenue was aware about the new address of the assessee but still the notice under section 143(2) of the Act was issued on 23.09.2013 at the old address i.e. A – 46, IInd Floor, Vasant Marg, Vasant Vihar, New Delhi (placed at page 78A of the paper book), which was never served on the assessee. It was further

submitted that, however, the AO, in the remand report dated 17.01.2017 furnished before learned CIT (A), had submitted that the said notice was personally served on the assessee company. In this regard, the learned counsel for the assessee further submitted that the assessing officer has not enclosed the report of the process server to support the fact that the notice was served personally through the process server. It was further submitted that also the name mentioned on the said notice is not pertaining to the assessee nor the telephone numbers so mentioned in the said notice belong to the assessee company. It was further argued by the learned counsel of the assessee that even if for a moment we accept the contention of the AO that notice dated 23.09.2013 was served personally at the new address, then why were subsequent notices dated 20.10.2014 and 18.11.2014 again issued at the old address? (Placed at pages 3 and 4 of the paper book) It was the argument of the learned AR that once the Revenue was aware of the new address, as per the allegation of the AO that notice dated 23.09.2013 was personally served at new address, then why were subsequent notices again issued at old address? It was further

submitted by the Ld. AR that even the notice dated 18.11.2014 was served on the counsel of the assessee on 17.02.2015 when he had personally visited the office of the assessing officer and compliance was made thereafter, by the assessee.

3.1 The learned counsel for assessee further drew our attention to pages 1 and 2 of the assessment order wherein, in response to a specific objection filed by the assessee, it was mentioned by the AO that notice under section 143(2) of the Act dated 23.09.2013 was served on assessee through speed post. It was submitted that, thus, the finding so recorded by the AO and the observation of the AO in the remand report were contrary and fortified the argument of assessee that there is no proof with the department regarding service of notice under section 143(2) dated 23.09.2013 on the assessee. In support of the aforesaid arguments, reliance was placed on the following judgments:

1. CIT v. Hotline International (P.) Ltd. (Delhi HC) reported in 296 ITR 333.
2. CIT vs Chetan Gupta (Delhi HC) reported in 382 ITR 613.

3. PCIT vs Atlanta Capital Pvt. Ltd. (Delhi HC)
in ITA No. 665/2015.

4.0 The Ld. Sr. DR placed heavy reliance on the order of the AO and the Ld. CIT (A) and argued that the notice under section 143(2) of the Act had been served on the assessee as per the remand report and, thus, this argument of the assessee needs to be discarded and appeal of the assessee company be heard on merits.

5.0 We have heard the rival contentions and perused the material on record. Admittedly, ground no. 1 is a legal ground which goes directly to the root of the matter and the same is being taken up first. It is challenging the validity of the assessment as notice under section 143(2) of the Act was not served on the assessee company within the stipulated time prescribed under the Income Tax Act, 1961. On going through the paper book filed by the assessee company, it becomes evident that the return of income was filed by the assessee company on 27.09.2012 (placed at page 1 of the paper book) wherein the address of the assessee is mentioned as 11/2A, Pusa Road, Karol Bagh, New Delhi – 110005. Further, it

is uncontroverted that the assessee had, vide letter dated 06.06.2008, intimated the AO, regarding the said new address of the assessee. The said letter was referred to and is placed at page 44 of the paper book. On further going through the paper book, it is seen that from AY 2008-09 onwards, the assessee had been filing its return of income at the new address i.e. 11/2A, Pusa Road, Karol Bagh, New Delhi – 110005 and that even the Revenue, in AY 2009-10, had processed the return of income under section 143(1) of the Act at the new address (placed at page 45 of the paper book). Thus, it is clear that the Revenue was aware about the new address of the assessee prior to the issuance of notice under section 143(2) of the Act in the instant case. Thus, once it is clear that the Revenue was aware about the new address of the assessee, we fail to appreciate as to why then the notice under section 143(2) of the Act was issued on 23.09.2013 at the old address i.e. A – 46, IInd Floor, Vasant Marg, Vasant Vihar, New Delhi (placed at page 78A of the paper book)? This question was put to the learned Sr. DR by the Bench but he was not able to provide any satisfactory reply to our question. Thus, we have no hesitation in holding that the notice

under section 143(2) of the Act issued at the old address of the assessee company is *void ab initio* as it was issued at the old address even though the AO was made aware of the new address of the assessee. In this regard, we place reliance on the judgment of the Hon'ble jurisdictional High Court of Delhi in the case of PCIT vs. Atlanta Capital Pvt. Ltd. in ITA No. 665/2015, wherein, on identical facts, it has been held as follows:

> *"7. On the facts of the present case, it is seen that notice dated 27th March 2008 under Section 148 of the Act was issued to the Assessee by the Assessing Officer ('AO') at the address at B-231, Okhla Industrial Area, Phase-I, New Delhi. Admittedly, the Assessee had shifted from that address with effect from 1st February 2005 to a new address at B-115, Sarvodaya Enclave, New Delhi. For AY 2005-06 and the subsequent AYs, the Assessee disclosed his address as B-115, Sarvodaya Enclave, New Delhi. Even the AO had sent letters to the Assessee at the same address on 8th August 2007. The intimation under Section 143(1) of the Act dated 25th January 2008 for AY 2006-07 was also sent by the AO to the Assessee at the same changed address i.e. B-115, Sarvodaya Enclave, New Delhi. There is nothing to show that the notice under Section 148 of*

the Act was in fact issued by the AO showing the aforementioned changed address.

8. It is the contention of Mr. N.P. Sahni, learned Senior Standing counsel for the Revenue, that the notice satisfied the requirement as to limitation under Section 149 (b) of the Act. However, as noted by the ITAT, the notice itself was not issued at the correct address. The fact that the said notice, sent by speed post, was not returned unserved, would be to no avail since the address given in the notice was not the last known address of the Assessee. 9. Mr. Sahni then submitted that it was incumbent on the Assessee to have got his changed address entered in the PAN Data Base failing which the AO would only go by the address given in the record of the relevant AY which in the case is AY 2001-02.

10. The Court is unable to agree with this submission. No provision in the Act has been shown to the Court which obliges the Assessee to ensure that his changed address is entered in the PAN Data Base failing which he is precluded from insisting on the notice under Section 148 being issued to him at the known address and being served upon him. In the present case, on facts, it is not in dispute that the AO was aware of the change of address of the Assessee and yet the notice under Section 148 of the Act was issued at the older address.

11. Mr. Sahni submitted that the order of the CIT (A) notes the fact that a photocopy of the notice was given to the Assessee

during the re-assessment proceedings and that by itself should constitute sufficient service of notice on the Assessee. In light of the law explained by the Supreme Court in R.K. Upadhyaya v. Shanbhai P. Patel (1987) 3 SCC 96 which has in turn been followed by this Court in Chetan Gupta (supra), the requirement of both the issuance and the service of such upon the Assessee for the purposes of Section 147 and 148 of the Act are mandatory 'jurisdictional requirements'.

The mere fact that an Assessee participated in the re-assessment proceedings despite not having been issued or served with the notice under Section 148 of the Act in accordance with law will not constitute a waiver of the said jurisdictional requirement.

12. On facts, therefore, the Court finds no legal error committed by the ITAT in holding that there was no proper service of notice on the Assessee under Section 148 of the Act."

5.1 We have also gone through the remand report dated 17.01.2017 furnished by the AO before the learned CIT (A), wherein, he had submitted that the said notice was personally served on the assessee company. In this regard, the Bench enquired from the learned Sr. DR, as to whether there is any process server's report to

support the fact that the notice was served personally through the process server, to whichthe learned Sr. DR answered in negative.

5.2 On further going through the said notice, it is seen that there is neither any seal/stamp of the company nor it is signed by any representative of the assessee company nor any time of service is mentioned in the said notice. It is further worthwhile to ponder over the question that, even if for a moment, we accept the contention of the AO that the notice dated 23.09.2013 was served personally at the new address, then why were subsequent notices dated 20.10.2014 and 18.11.2014 again issued at the old address? We also note that there is contradiction in the stand of the assessing officer as at pages 1 and 2 of the assessment order. It is seen that in the assessment order, it is mentioned that the notice under section 143(2) of the Act dated 23.09.2013 was served on the assessee through speed post. However, in the remand report he mentions that the said notice was served personally. Thus, there is a contradiction in the stand of the AO and the learned CIT (A) has merely placed reliance on the remand report without there being any proof to establish the fact that the notice dated 23.09.2013 was

though issued at the old address but was served personally at the new address of the assessee. Thus, the assessment so framed by the AO is bad in law on this count also and in reaching this said finding, reliance is placed on the following case laws:

(i) CIT vs Chetan Gupta (Delhi HC) reported in 382 ITR 613.

"Onus on Revenue to prove service of notice

34. There is sufficient judicial authority for the proposition that the burden of showing that service of noticed has been effected on the Assessee or his duly authorized representative is on the Revenue. These include Fatechand Agarwal v. CWT [1974] 97 ITR 701 (Ori.) and Venkat Naicken Trust v. ITO [1999] 107 Taxman 391/[2000] 242 ITR 141 (Mad). In CIT v. Thayaballi Mulla Jeevaji Kapasi [1967] 66 ITR 147 (SC), the Respondent to whom the notice was directed was not in town. The only information which the process server had was that the Respondent was either in Bombay or Ceylon. Thereafter, the process server affixed the notice on the business premises of the Respondent. The Supreme Court affirmed the essential principle that "if no notice was served within the period, the Income-tax Officer was incompetent to commence proceedings for reassessment under Section 34 of 1922 Act." It was further held that "service of notice under Section 34 (1) (a) within the period of limitation being a condition precedent to the existence of jurisdiction, if the Income-tax Officer was unable to prove that the notice was duly served upon the Respondent within the prescribed period, any return filed by the Respondent after the expiry of the period of eight years will not invest the Income-tax Officer with authority to reassess the income of the Respondent pursuant to such return." On the facts of

that case it was held that the Revenue had sufficiently discharged the onus by producing the affidavit of the process server."

(ii) CIT vs Hotline International Pvt. Ltd. (Delhi HC) reported in 296 ITR 333.

"As per order V, Rule 12 of the Code of Civil Procedure that wherever it is practicable, the service has to be effected on defendant in person or on his agent. Admittedly, in the instant case, notice under section 148 was not tendered to the assessee nor the same was refused at all by the assessee. It was an admitted case of the revenue that when the officials of the Department went to serve the notice under section 148 for the relevant assessment year, the security guard informed them that the company was closed for the Holi festival holidays. The security guard by no stretch of imagination could 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. [Para 22]

Under order V, rule 17 of the Code of Civil Procedure, the affixation can be done only when the assessee or his agent refused to sign the acknowledgement or could not be found. In the instant case, no effort was made by the Income-tax 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. [Para 23]"

5.3 In the background of the aforesaid discussion and respectfully following the precedents as aforesaid, we are of the considered view that the AO has not issued any notice u/s 143(2) of

the Act to the assessee within the time stipulated under the Income Tax Act, 1961 and, therefore, the impugned assessment order is invalid, void *ab initio* and against the provisions of the law and is not sustainable in the eyes of law. The appeal of assessee is allowed with respect to ground no. 1 raised by the assessee company.

5.4 Since the assessment order itself is quashed, the other grounds raised by the assessee become *in fructuous* and the same are dismissed as such.

6.0 In the final result, the appeal of the assessee stands allowed.

Order pronounced on 30/09/2020.

Sd/-	Sd/-
(G.S.PANNU)	**(SUDHANSHU SRIVASTAVA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated:30/09/2020

DRAGON

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI