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

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)
AND
SHRI M. BALAGANESH (ACCOUNTANT MEMBER)

I.T.A. Nos.2280 & 2281/Mum/2019
(Assessment year 2010-11)

Shri Sanjeev Chandrakant Deo A-501, Brahma Nivas, MHADA Colony, Mulund (East), Mumbai-400 081 PAN : ABWPD5388D	vs	Income-tax Officxer-29(3)(3), Mumbai
APPELLANT		**RESPONDENT**

Assessee by	Shri Mandhar Vaidya, AR
Revenue by	Shri Pankaj Kumar, DR

Date of hearing	06-10-2021
Date of pronouncement	25-10-2021

O R D E R

Per Saktijit Dey (JM)

Captioned appeals by the assessee arise out of two separate orders, both dated 21-01-2019, of learned Commissioner of Income Tax (Appeals)-40, Mumbai. One of the appeals arises out of quantum proceeding, whereas, the other one is against penalty imposed under section 271(1)(c) of the Income Tax Act, 1961. However, both the appeals are for the assessment year 2010-11.

ITA No.2281/Mum/2019

2. In ground 1, the assessee has challenged the validity of reopening of assessment under section 147 of the Act as well as the assessment order passed under the said provision.

3. Briefly the facts are, the assessee is an individual. As stated by the assessing officer, in course of the assessment proceedings in case of Mrs. Swati S Deo, the wife of the assessee, it was found that she had invested a sum of Rs.37 lakhs in an immovable property, whereas, she had not filed any return of income. As alleged by the assessing officer, in the re-assessment proceedings assessee's wife stated that investments were made by her husband Shri Sanjeev Chandrakant Deo, the assessee before us. As observed by the assessing officer, on verifying records he found that the assessee had not filed his return of income for the impugned assessment year. Further, as per information available on record, he found that besides investing in house property, the assessee had incurred credit card expenditure of Rs.7,75,827/- and has also received interest income of Rs.17,862/-. Being of the view that income aggregating to Rs.44,83,689/- has escaped assessment, the assessing officer reopened the assessment u/s 147 of the Act by issuing notice under section 148 of the Act. Ultimately, the assessing officer completed the assessment under section 143(3) r.w.s. 147 of the Act vide order dated 27-03-2015 making the following additions:-

1.	Unexplained cash credit u/s 68 of the Act	Rs.10,06,503/-
2.	Investment from undisclosed source u/s 69B	Rs.37,00,000/-
3.	Interest on FDR	Rs. 10,211/-
4.	Interest on bank deposit	Rs. 9,037/-
	Total	Rs.47,25,751/-

4. Against the assessment order so passed, assessee preferred appeal before learned Commissioner (Appeals), inter alia, challenging the validity of the assessment order. However, learned Commissioner (Appeals) did not find merit in the grounds raised by the assessee either on the issue of validity of service of notice under section 148 of the Act or the reopening of assessment under section 147 of the Act. However, learned Commissioner (Appeals) granted partial relief to the assessee by deleting the addition of Rs.37 lakhs.

5. The learned counsel for the assessee submitted, the order of assessment is bad in law as there is no valid service of notice issued under section 148 of the Act on the assessee. Proceeding further, he submitted, after reopening the assessment under section 147 of the Act, the assessing officer has served the notice under section 148 of the Act by way of affixture. Drawing our attention to section 282 of the Act, learned counsel submitted, without strictly following the rigors of section 282 of the Act read with Order V, Rules 17 and 20 of Code of Civil Procedure (in short, "CPC") and without making any attempt to serve the notice through post, the assessing officer has straight away proceeded to serve the notice by way of affixture, that too, in absence of any independent witness. He submitted, when the notices issued under section 142(1) and several other communications including the assessment order were served through post, there is no justifiable reason in serving the notice by way of affixture. Thus, he submitted, in absence of proper service of notice under section 148 of the Act, the assessment order is invalid. He submitted, non service of notice under section 148 of the Act, being a jurisdictional error, it cannot be cured under section

292BB of the Act. In support of such contention, he relied upon the following decisions:-

1. *Sajjan Kumar Aggarwal ITA/307/Mum/2019 dated 31-01-2020*
2. *Dnyaneshwar Trading & Investments Pvt Ltd 6807 & 7536/Mum/2016 dt 14th March, 2019*
3. *Sweet Memories Property Pvt Ltd ITA 4533-4855/Mum/2017 dated* 23rd April, 2019
4. *Sanjay Badani (2014) 35 ITR (Trib) 536 (Mum)*
5. *CIT vs Silver Line 383 ITR 455 (Del) – Section 292BB would have no application & cannot cure jurisdictional defect.*

6. Without prejudice to the aforesaid submission, learned counsel submitted, though, the AO had alleged that the assessee had not filed any return of income for the impugned assessment year, however, the assessee, in fact, had filed his return of income for the impugned assessment year in terms of section 139 of the Act and the return of income so filed was also processed under section 143(1) of the Act. Thus, he submitted, the very basis for reopening the assessment is erroneous. Therefore, the assessment order passed in pursuance to such wrong initiation of proceeding would be invalid. In support of such contention, he relied upon the following decisions:-

1. *Sagar Enterprises vs ACIT (2002) 257 ITR 335 (Guj)*
2. *Mumtaz Haji Mohmad Memon vs ITO (2018) 408 ITR 268 (Guj)*
3. *Baba Kartar Singh Dukki Educational Trust vs ITO (2016) 158 ITD 965 (Chandigarh Trib.)*

7. Strongly relying upon the observations of the assessing officer and learned Commissioner (Appeals) the learned departmental representative submitted, the issues regarding valid service of notice issued under section 148 of the Act and validity of reopening of assessment were not raised either before the assessing

officer or before learned Commissioner (Appeals). He submitted, in any case of the matter, learned Commissioner (Appeals) has addressed all the issues raised by the assessee. He submitted, the fact that the notice issued under section 148 of the Act was served by affixture is established. Therefore, the assessee cannot have any grievance.

8. As regards the validity of reopening of assessment under section 147 of the Act, he submitted, the assessing officer has received specific information relating to escapement of income; hence, has validly reopened the assessment. Finally, he submitted, in case, the assessee has any grievance against service of notice, the proceedings may be restored back to the assessing officer for de novo assessment.

9. We have considered rival submissions in the light of decisions relied upon and perused materials on record. At the outset, we deem it appropriate to examine assessee's submissions regarding validity of service of notice issued under section 148 of the Act. There cannot be any doubt that issuance of notice under section 148 of the Act is a mandatory statutory requirement for initiation of proceeding under section 147 of the Act. Therefore, in absence of valid service of notice under section 148 of the Act, proceeding under section 147 of the Act would be vitiated. Undisputedly, in the facts of the present case, the notice issued under section 148 of the Act on 12-03-2014 was served on the assessee by way of affixture. This is evident from the report dated 18-03-2014 submitted by the Inspector, Ward 23(3), Mumbai to the assessing officer, a copy of which is placed at page 21 of the paper book. The contents of the said report are as under:-

"Date; 18.03.2014

The Income Tax Officer 23(3) (3) Mumbai.

Sub: Service of notice u/s 148 of the Income - Tax Act, 1961. In the case of Sanjeev Chandrakant Deo, A.Y. 2010-11, PAN : ABWPD5388D.

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Respected Sir,

As per directions, I visited the address mentioned in the notice u/s 148 in the case of Shri. Sanjeev chandrakant Deo at A/501, Brahama Niwas , Plot no - 04,RDP -1, Mahada Colony, Mulund East, Mumbai - 4000800 for the service of the said notice for A.Y. 2010-11. However, the assessee was not present in the said address.

Hence, the notice u/s 148 was served by way of affixture on the door of the said flat as it is the last known address of the assessee in the presence of Shri.Himanshu Sayana, Inspector Jt. CIT 23(3), Mumbai. Submitted.

Priya Vinerkar
Sd/-
Inspector-23(3)(3), Mumbai.

Sd/-
Himanshu Sjiayana Inspector Jt. CIT- 23(3), Mumbai"

10. Thus, a reading of the report reproduced above would make it clear that as per the directions of the assessing officer, the concerned authority went to the address of the assessee and since the assessee was not present at the said address, he served the notice by way of affixture on the door of the said premise. At this stage, it is necessary to refer to section 282 of the Act which lays down the mode and manner of service of notice, which is as under:-

"[Service **of notice generally.**
"282. (1) The service of a notice or summon or requisition or order or any other communication under this Act (heiinafter 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;
(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 Explanation to section 66A of the Information Technology Act, 2000 (2) of 2000)."

11. Thus, as can be seen from the aforesaid provision, any notice / summons / requisition or order or any other communication under the Act has to be made by way of post or by such courier services as may be approved by the Board. Of course, they can also be served in the manner as provided under the CPC for the purpose of service of summons or the other mode as provided in the said provision. Thus, the primary mode for service of notice, summons, orders, etc. is by way of post or through any approved courier services.

12. Having examined the provisions of section 282 of the Act, it is necessary to look into the manner and mode of service of summons as provided under CPC. Order V of the CPC lays down the procedure for service of summons. Whereas, rules 17 & 20 of Order V, CPC lays down the procedure for substituted service of notice / summons under certain circumstances, in case, such notices / summons cannot be served by way of post / courier service. Rule 17 of Order V, CPC provides for substituted service of notice / summons in two situations. Firstly, where the defendant or his agent or member of family to whom the summons is tendered, refuses to sign the acknowledgement and secondly, where the serving

officer after using all due and reasonable diligence cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of him being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf. In such circumstances, the serving officer can affix a copy of the notice / summons on the outer door or some other conspicuous part of the house where the addressee / person stays and shall return the original to the Court with a report stating that he has affixed the copy of the notice / summons, the circumstances under which he did so and the name and address of the person, if any, by whom the house was identified and in whose presence the copy was affixed. Rule 20 of Order V, CPC also provides for substituted service in a situation when Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service and that for any other reason, the summons cannot be served in the ordinary way, then such summons / notice can be served by way of affixture in the last known address.

13. Thus, a conjoint reading of section 282 of the Act and Order V Rules 17 and 20 of CPC would make it clear that the mode of service by affixation can be resorted to only if none of the other modes are practicable and cannot be resorted to at the first instance. If attempt to serve notice / summons by registered post was found to be ineffective, the serving officer is justified in ordering service by affixation. However, the conditions of Rules 17 and 20 of Order V, CPC have to be satisfied. The expression, “after using of due and reasonable diligence” as used in rule 17 of Oder V, CPC makes it incumbent upon the serving officer to serve by way of affixture, only if, after service of notice /

summons either on the defendant or agent, refuses to sign the acknowledgement or serving officer cannot find the defendant or his agent who is empowered to accept summons / notice. Similarly, as per Rule 20 of Order V of CPC, service by way of affixture can be resorted to, if the defendant avoids service of notice / summons.

14. In the facts of the present case, the notice under section 148 of the Act was issued on 12-03-2014 and it was served on the assessee by way of affixture only after six days, i.e. on 18-03-2014, as per the report of the serving officer. Thus, neither the assessment order nor any other material on record including the report of service of notice under section 148 by way of affixture reveal that before resorting to serve notice by way of affixture, any attempt was made to serve the notice through post or any courier service as laid down under section 282 of the Act. Without exhausting the regular / ordinary course of service of notice as provided under section 282 of the Act, the assessing officer has straight away proceeded to serve the notice by way of substituted service as provided under Rule 17 and 20 of Order V of CPC. However, there is nothing on record to suggest that before resorting to substituted service of notice issued under section 148 of the Act, the pre-conditions of Rules 17 and 20 of Order V CPC were satisfied. Nowhere in the assessment order the assessing officer has mentioned even a single sentence to indicate that either the assessee or anyone authorized on his behalf has refused to sign the acknowledgement or the assessing officer even after reasonable attempt has failed to find the assessee at the given address or the assessee has consciously avoided service of notice issued under section 148 of the Act. Thus, in our view, the notice issued under section 148 of the Act was not validly served on the assessee. Therefore, the fundamental requirement for

initiation of proceedings under section 147 of the Act stands unsatisfied / unfulfilled. This being a jurisdictional error, the consequence which follows would result in invalidation of the assessment order. Therefore, we hold that the assessment order passed under section 143(3) r.w.s. 147 of the Act without valid service of notice under section 148 of the Act is void ab initio.

15. Having held so, we will examine the other aspect of the issue.

16. The reasons recorded by the assessing officer for reopening the assessment, a copy of which is at page 1 of the paper book reads as under:-

"Date:- 10/03/2014

A.Y. 2010-11

ShrL Sanjecv C. **Deo**

REASON FOR REOPENING

The undersigned is in 'possession of information wherein it is informed that the assessee has purchased an immovable property for Rs. 37,00,000/- incurred credit card expenses of Rs. 7,75827/- *&* has received interest on bank deposits to the extent of Rs. 1 7,862/- during the previous year ending 31/03/2010 relevant to the A-Y 2010-11. Since the assessee has not filed any Return of Income for the relevant *A.Y. 2010-11,* I have reason to believe that income to the extent of Rs.44,83,689/- has escaped assessment within the meaning of section 147 of the Income Tax Act, 196 1,for the A.Y. 201 0- 11 .

Sd/-
(Manoj Tripathj)
Income Tax Oficer, 23(3)(3), Mumbai

Note : Issue notice u/s 148 of the IT Act, immediately."

17. A careful reading of the reasons recorded clearly reveals that being of the view that the assessee has not filed any return of income for the impugned assessment year resulting in escapement of income, the assessing officer has

reopened the assessment under section 147 of the Act. However, the facts on record reveal that the assessee, in fact, had filed his return of income for the impugned assessment year on 18-05-2010 declaring total income of Rs.2,05,448/. It is also evident, the return of income so filed by the assessee was processed under section 143(1) of the Act on 15-04-2011 granting refund of Rs.7,190/-. Thus, it is very much clear, the reason to believe for reopening of assessment has no nexus with the material on record. In other words, on erroneous appreciation of facts the assessing officer has formed a belief that the income has escaped assessment. The fact that the assessee had filed the return of income for the impugned assessment year has not been disputed either by learned Commissioner (Appeals) or by the revenue before us.

18. In case of Sagar Enterprises vs ACIT (supra), the Hon'ble Gujarat High Court, while dealing with an identical issue of reopening of assessment on erroneous assumption of non filing of return of income has held the reopening of assessment as invalid, since, the fact of non filing of return had heavily weighed with the assessing officer for forming belief regarding escapement of income. The same view has been reiterated by the Hon'ble Gujarat High Court in case of Mumtaz Haji Mohmad Memon vs ITO (supra). No contrary decision has been brought to our notice by the revenue. Thus, respectfully following the aforesaid judicial precedents, we hold that due to erroneous assumption of facts while forming belief for reopening of assessment, the proceeding has been vitiated. Consequently, the assessment order passed under section 143(3) r.w.s. 147 of the Act has been rendered invalid.

19. Thus, for the aforestated reasons, we have no hesitation in quashing the impugned assessment order. As a corollary, the impugned order of learned Commissioner (Appeals) is set aside. Ground 1 is allowed.

20. The other grounds having become academic, are not adjudicated upon.

21. In the result, appeal is allowed as indicated above.

ITA 2280/Mum/2019

22. This appeal is challenging the penalty imposed under section 271(1)(c) of the Act based on the addition sustained by learned Commissioner (Appeals) in the quantum proceeding. Since, while deciding assessee's appeal in ITA No.2281/Mum/2019 in the earlier part of the order we have quashed the assessment order, the addition based on which penalty under section 271(1)(c) of the Act have lost their existence. As a natural corollary, the penalty imposed under section 271(1)(c) of the Act will not survive. Accordingly, we delete the penalty imposed under section 271(1)(c) of the Act.

23. In the result, both the appeals are allowed.

Order pronounced on 25/10/2021.

Sd/- sd/-

(M. BALAGANESH)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dt : 25/10/2021
Pavanan

Copy to :

1. Appellant
2. Respondent
3. The CIT concerned
4. The CIT(A)
5. The DR, ITAT, Mumbai
6. Guard File

/True copy/ By Order

Asstt. Registrar, ITAT, Mumbai