IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "G": NEW DELHI]

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA. No. 342/Del/2013
(Assessment Year: 2008-09)

Shri Sukh Pal Choudhary, 1417/3, Rajiv Nagar, Gali No. 7, Gurgaon, Haryana – 122 002. **PAN: AOFPS7431E**	Vs.	ACIT, Circle : 23 (1), New Delhi.
(Appellant)		(Respondent)

Assessee by :	Shri T. R. Talwar, Advocate;
Department by:	Shri H. K. Chaudhary [CIT] – D.R.;
Date of Hearing :	06/10/2021
Date of pronouncement :	07/12/2021

O R D E R

PER AMIT SHUKLA, J. M.

1. This appeal by the assessee is filed against the order dated 31.10.2012 passed by the Commissioner of Income Tax (Appeals)–XXIII, New Delhi, for assessment year 2008-09.

2. The grounds raised by the assessee are as under:-

"1(a) That the learned C.I.T. (A) has erred in law and on facts in upholding the validity of the assessment order passed u/s 144 of the I.T. Act without appreciating that the assessment framed was devoid of jurisdiction inasmuch as statutory notice u/s 143(2) of the I.T. Act allegedly sent on 22-08-2009 at a address not given in the

return filed, was not served either on the appellant or any authorized person. In view of this, further proceedings and consequent assessment order passed on the basis of such notice are bad in law and liable to be quashed.

(b) That the learned C.I.T. has failed to appreciate that in view of the affidavit filed denying the receipt of statutory notice u/s 143(2) of the I.T. Act dispatched on 22-08-2009, it was for the revenue to prove service and rejection of the claim holding the same to be mere bald assertion, on the facts and circumstances of the case, is wholly unwarranted, arbitrary and liable to be set aside. The learned CIT (A) has further failed to appreciate that subsequent notices issued u/s 142(1) of the I.T. Act are not the substitute for section 143(2) of the I.T. Act and can not validate the assessment and the impugned assessment order was liable to be quashed.

2. That holding of the agricultural land by the appellant not having been doubted and agricultural income from such agricultural land having been declared in other assessment years and accepted by the Department, there was no justification with the authorities below to treat the agricultural income declared at Rs. 3,82,300/- as unexplained income.

3. That the authorities below have failed to appreciate that gross receipts disclosed at Rs. 34,82,191/- represented part of the gross receipts of RS. 2,31,04,460/- received from M/s Paradise Villa for contractual work executed by the appellant inasmuch as T.D.S. deducted by the payer on the payment was duly declared and claimed. There is no data or material on record particularly A.I.R. to prove that the assessee had engaged in the purchase and sale of land and the approach of the authorities below in treating gross receipts of Rs. 34,82,191/- as not forming part of contractual receipt of Rs. 2,31,04,460/- thereby denying setting off the net business income declared at Rs. 16,38,596/- against the business income fo RS. 28,88,057/- as estimated by the Assessing Officer is wholly unwarranted, arbitrary, unreasonable and liable to be set aside.

4(a) That there was no justification with the learned C.I.T. (A) in sustaining addition of total cash deposit of RS. 1,30,90,000/- and deposit of Rs. 22,00,000/- and Rs. 35,00,000/- by cheque / transfer in the bank account of the appellant without appreciating that out of refund of advance money of RS. 1,70,20,000/- received by the appellant, an amount of Rs. 22,00,000/- and another amount of Rs. 35,00,000/- were received by cheque which

represented sources of deposits added as unexplained investment / deposit in the bank account. Evidence of transactions led and explanation tendered regarding the sources of money advanced in the earlier years have been brushed aside in order to provide a ground for making the addition and the impugned addition being against the facts and contrary to authoritative judicial pronouncements is liable to be deleted.

(b) That the learned C.I.T (A) was not justified in computing the profit of Rs. 10,00,000/- on the sale of agricultural land at Jodhpur on wholly erroneous and unsustainable grounds and addition sustained to the extent of Rs. 10,00,000/- in respect of sale price ofRs. 1,45,00,000/ received on mere surmises and conjecture deserves to be deleted.

5. That the purchase of a plot of land at Khasra No. 4/36, Village Bhichadaii, Taluka. Jodhpur by M/s OMG Builders Private Ltd. through a registered sale deed not having been doubted, there was no justification with the authorities below to consider purchase price paid by the said company in the hands of the appellant and make addition thereof as unexplained investment u/s 69 of the I.T. Act merely on the ground that the sale price given in the regd. sale deed does not match with the sale consideration as available in the AIR sheet. Such anapproach of the authorities below is wholly unwarranted, arbitrary and the impugned addition of Rs.1,11,60,072/- is liable to be deleted.

6. That the order of the CIT (A) is bad in law and against the facts of the case. "

3. The facts in brief are that assessee is an Individual and he had filed his return of income at Rs.17,06,596/- on 22.07.2008. It was duly processed under section 143(1) of the Income Tax Act, 1961 (the Act) on 25.09.2009 on the same income. Thereafter assessee's case was selected for scrutiny and notice under Section 143(2) of the Act dated 19/21.08.2009 was issued. The main issue challenged here in this case is, whether the notice issued by the Assistant Commissioner of Income Tax, Circle: 1, New Delhi under Section 143(2) dated 19/21-8-2009 was served upon the assessee or not. From the record

placed before us, it is seen the notice was dispatched to the assessee on 22-8-2009 at the address **"1417/3,Gali No. 7, Rajiv Nagar, Gurgaon**". However, the said address was not mentioned in the return of income filed by the assessee on 22-7-2008 for the assessment year 2008-09. The address as per the return of income was, **E-914, Chitranjan Park, New Delhi.** It has been the contention of the assessee that notice was not served upon the assessee within the statutory period, and the same has been denied by the assessee by filing an affidavit.

4. As stated above, the main controversy which has been raised before is that the notice under Section 143(2) of the Act was dispatched on the following address: ***Shri Sukh Pal Chaudhary, 1417/3, Gali No. 7, Rajiv Nagar, Gurgaon, Haryana***, which is not the address where the assessee stays or has its any source of income or office. In fact the address given in the return of income filed by the assessee on 22.07.2008 for assessment year 2008-09 is ***E-914, Chitranjan Park, New Delhi***. It is even evident from the assessment order also as the address mentioned is that of Gurgaon and not of New Delhi. Thus, it has been contended that there was no valid service of notice within the statutory period and accordingly entire assessment order is bad in law. Ld. Counsel for the assessee submitted that the notice under Section 143 (2) was required to be sent to E-914 Chitranjan Park, New Delhi and not at the address 1417/3 Gali No. 7 Rajiv Nagar Gurgoan. The correct address for the purpose of service of valid notice, which has been emphasized by various courts, is the address which is given in the return of income filed by the assessee, or from where he is carrying on his business. In support he relied upon the judgment of the **Hon'ble Delhi High Court in the case of CIT V. Madhsy Films Pvt. Ltd. (2008) 301 ITR 69 (Delhi)** wherein the

Hon'ble Court held that the notice need to be sent at the address as per the return. Ld. Counsel further relied upon the Delhi High Court in CIT v. Hotline International P. Ltd. (2008) 296 ITR 333 (Delhi) that where a reassessment notice was sent by registered post without acknowledgement due, it does not amount to proper service. On the claimed by the department that the notice was sent at the address mentioned in PAN database of the assessee and that the assessee has indicated this address in Form No. 35 which was filed much later i.e. on 14-1-2011, Ld. Counsel submitted that, both are irrelevant under the then existing provisions of section 282 of the IT Act at the relevant time when the notice u/s 143(2) was issued on 21-8-2009.

4.1 Ld. Counsel pointed out from the documents filed in the paper book that the return of the assessee for the past several years since the assessment year 2005-06 have been filled at the address E-914,Chittranjan Park, New Delhi. A photocopy of the last 3 years acknowledgement of the Income Tax Return was enclosed. In the Paper book the PAN had also been taken on this very address, which was subsequently changed to Gurgoan address in Nov. 2014. He submitted the mechanism of service of notice at the address available in the PAN database of the assessee was only made applicable with the introduction of Rule 127 by the Income Tax (18th Amendment) Rules, 2015 w.e.f. 2nd Dec. 2015.

4.2 The plea of the department that since the notice has not been received back, it is presumed to have been served is a rebuttable presumption particularly when an affidavit has been filed at the outset denying the service of notice. The onus shifts to the department to prove that the notice u/s 143(2) has been served on the assessee, or

by the postal remarks that the assessee has refused to take the notice or has left the premises without any address.

4.3 Ld. Counsel thus submitted that, *firstly*, the notice has not been correctly addressed as per the return of income and also not sent by Registered post acknowledgement due as per the Code of Civil Procedure 1908; *Secondly*, its service has been denied by the assessee by filing an affidavit; and *thirdly*, the department has failed to prove the service in this regard. In view of the above facts and legal position, notice under Section 143(2) of the I.T. Act has not been served on the assessee within the prescribed time as per the proviso to section 143(2) of the Act, thus making the assessment invalid in law. He also placed Reliance on the decision of the Hon'ble Delhi High court in the case of **CIT V. Lunar Diamonds Ltd. (2006) 281 ITR 1 (Delhi)**

5. On the other hand, the ld. DR submitted that the following facts should be considered:-

> In the above case, it is humbly submitted that the following facts may kindly be considered:
>
> 1. Notice u/s 143(2) of. I.T. Act was duly issued on 19.08.2009 and sent by registered post on 22.08.2009. The notice was not received back unserved. A copy of the notice issued and slip of speed post is enclosed.
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> 2. The notice was sent at the address mentioned in PAN database of the assessee on the date of issue of notice. The assessee has filed Form No. 35 showing the same address which proves that the address at which the notice was sent to was correct.
>
> 3. As pointed out by Ld. CIT (A) on Page 24 no possible explanation has been provided by the assessee as to why notices admittedly issued at the correct addresses were never received by him.

It is also requested that following decisions may kindly be considered with regard to service of notice u/s 143(2) of I.T. Act:

1. CIT Vs Madhsy Films (P.) Ltd. [2008] 175 Taxman 347 (Delhi)/2008 301 ITR 69 (Delhi)/2008] 216 CTR 145 (Delhi) (Copy Enclosed)where Hon'ble Delhi High Court held that where notice issued to assessee under section 143(2) had been dispatched by speed post at its address as per its return and same had not been received back, it could be presumed that it had reached assessee, particularly when no affidavit had been filed by assessee to effect that notice was not received by it.

2. **CIT Vs Yamu Industries Ltd [20081 167 Taxman 67 (Delhi)/[20081 306 ITR 309 (Delhi)/(2008) 214 CTR 445 (Delhi) (Copy Enclosed)**

where Hon'ble Delhi High Court held that where notice under section 143(2) sent by registered post at correct address of assessee had not been received back 'unserved' within period of thirty days of its issuance, there was a presumption under law that said notice had been duly served upon assessee within period of limitation. "

6. We have heard the rival submissions and also perused the relevant material placed on record qua the issue of service of notice under Section 143(2) of the Act. From the perusal of the Income tax return filed for the assessment year 2008-09 and even the earlier returns for assessment years 2005-06 to 2007-08, copies of which have been placed before us, it is seen that the address mentioned by the assessee all through-out has been **E-914,Chittranjan Park, New Delhi**. From the perusal of the notice under Section 143(2) of the Act placed in the paper book filed by the Department, it is seen that the notice has been addressed and sent to the following address:-

"SHRI SUKH PAL CHAUDHARY
1417/3,
Gali No. 7,
Rajiv Nagar,
Gurgaon,
HARYANA."

6.1 This notice admittedly has not been complied with which has been mentioned by the Assistant Commissioner of Income Tax, Circle : 1, New Delhi, himself in para 2, which for the sake of ready reference is reproduced hereunder:-

" Notice under Section 143(2) of the Income Tax Act, 1961 for the above assessment year was issued to assessee on 21.08.2009 and sent through speed post No.SPED710276260IN on 22.08.2009 which was not complied with. Subsequently notice U/s 142(1) of the Income Tax Act, 1961 along with detailed questionnaire was also issued to assessee on 15.04.2010 which also was not complied with. Another notice U/s 142(1) was issued on 30.07.2010 fixing the date for compliance on 19.08.2010 on which date again no body attended. Again on 6.09.2010, notice under Section 142(1) and show cause for non-compliance under Section 271(1)(b) of the Income Tax Act, 1961 was issued fixing the date for 15.09.2010. None attended on this date again. "

7 Ostensibly, if a jurisdictional notice under Section 143(2) has been sent on a wrong address, then there cannot be any presumption under the law that it has been served on the assessee in accordance with law. It is not that the Assistant Commissioner of Income Tax, Circle : 1, New Delhi, (the present Assessing Officer) was not aware of the address as this was mentioned in the return of income because in

para 3.1 he mentions that show cause notice was issued on both the addresses, i.e., the address of Gurgaon and New Delhi, both which is evident from the following passage in the assessment order:-

> "*The above show cause notice was sent at both the addresses of assessee i.e. 1417/3, Gali No. 7, Rajiv Nagar, Gurgaon, Haryana and on E-914, Chittaranjan park, New Delhi through speed post No. SPED710276260IN and No. SPED867576785IN on 8.12.2010. However, no compliance is made on the date fixed. Nobody has in fact attended the proceeding till date. "*

8. This issue was also challenged before the ld. CIT (Appeals) when the ld. CIT (Appeals) had rejected the contention, after observing and holding as under:-

> *"(7) The above written submissions, the remand report of the Assessing Officer and case laws relied upon by the appellant have been carefully considered. The appellant's written submissions mainly pertain to the appellant's contention that in the absence of service of notice under section 143(2) within the statutory time period, the assessment order framed under section 144 is void and invalid. The assessment order shows that the notice under section 143(2) was issued on 21.8.2009 and despatched through speed post on 22.8.2009. The Assessing Officer issued numerous notices under section 143(2) & 142(1) at (the address provided in the return of income namely E-914, Chittaranjan Park, New Delihi , and at the address obtained from the AIR information sheet of Gali No 7, Rajiv Nagar, Gurgaon. On one occasion, the notice is stated to have been served in person at his Gurgaon address. The appellant has relied on a number of case laws in support of his claim of non service of notice under section 143(2). However, the cited judgements have been rendered in specific sets of facts, such as service of notice beyond the Sukhpal Choudhary Appeal No. 321/10-11 A. Y. 2008-09stipulated period, service of notice by regular post instead of registered post, denial by affidavit, etc. In this case, the appellant*

has filed an affidavit that he has not received a single notice issued under section 143(2). However, no possible explanation has been provided as to why notices admittedly issued at the correct addresses of the appellant were never received by him. From the assessment order, it is seen that no less than seven notices were issued by the Assessing Officer. The original notice under section 143(2) dated 21.8.2009 was issued by speed post on 22.8.2009, of which the acknowledgement is available on the record of the Assessing Officer. The bald assertion by the appellant that no notice was ever served upon him is not supported by any evidence of mis-direction of notice, absence of appellant from the station, etc. The Allahabad High Court in the case of Sri Krishna vs CIT 142 ITR 618 had opined that an affidavit need not always be accepted as correct. An affidavit may be self-serving. It is also noted that the appellant filed, within time, an appeal against the assessment order which was sent to the same address, at which service of notice is denied. In these circumstances, the sole testimony of the appellant that notice was not served upon him cannot be believed. The Delhi High Court has held in the case of CIT vs Yamu Industries Ltd (2008) 167 Taxman 67, that where notice under section 143(2) sent by registered post to the correct address of the assessee had not been received back unserved, within a period of 30 days of its issuance, there was a presumption under law that the said notice had been duly served upon the assessee within the period of limitation. Hence the appellant's ground of appeal No. 1 that the assessment order is devoid of jurisdiction and has been passed without granting proper opportunity, is denied. "

9. The ld. CIT (Appeals) has tried to justify that even if the notice under Section 143(2) of the Act as mentioned in the AIR information i.e. Gali No 7, Rajiv Nagar, Gurgaon, has been sent, then also it is a valid service of notice. However, nowhere he has countered the assessee's affidavit and the submission that notice was either served on the assessee personally or at the address mentioned in the return of income.

10. Section 143(2) of the Act provides that:-

> "[(2) Where a return has been furnished under Section 139 or in response to a notice under sub Section (1) of Section 142, the Assessing Officer or the prescribed Income Tax authority as the case may be, if, considers it necessary or expedient to ensure that the assessee has not under stated the income or has not computed excessive loss or has not underpaid the tax in any manner, shall serve on the assessee a notice requiring him, on a date to be specified therein, either to attend the office of the Assessing Officer or to produce or cause to be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return.
>
> Provided that no notice under this sub Section shall be served on the assessee after expiry of six months from the end of the financial year in which the return is furnished]. "

Ergo, it is mandatory that notice u/s 143(2) has to be served on the assessee within the statutory time limit if he considers that there is any under-statement of income etc. in the return filed by the assessee. Thus, the Assistant Commissioner of Income Tax, Circle : 1, New Delhi, if he is scrutinizing the return of income then, if he considers necessary to vary the return income then he is suppose to send the notice and it is on the address mentioned in the return of income and that to be within the time prescribed under the first provision. If such a statutory requirement is not complied with, then the resultant effect is that assessment order itself is bad in law. This has been held so by the Hon'ble Jurisdictional High Court in the case of **CIT Vs. Hotline International Pvt. Ltd. (supra)** and **in CIT V. Lunar Diamonds Ltd. (supra).**

11. The Hon'ble Delhi High Court in the case of **CIT Vs. Lunar Diamonds Ltd. (supra)** held that the burden is on the revenue to

prove that notice was served within time and when assessee has filed an affidavit stating that it had not received the notice, then the burden was on the revenue to prove that notice was served upon the assessee within the prescribed limit. Here the revenue has failed to prove service on the assessee as stated above. Accordingly, we hold that failure to serve the notice on the assessee within the prescribed statutory time limit, assessment proceedings become void ab initio and consequently the assessment order is quashed.

12. Since we have quashed the assessment on the ground of non-service of notice under Section 143(2) of the Act in accordance with the law, therefore, the issues raised on merits are become purely academic.

Order pronounced in the open court on : **07/12/2021.**

Sd/-	**Sd/-**
(ANADEE NATH MISSHRA)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 07/12/2021.

MEHTA

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	7.12.2021
Date on which the typed draft is placed before the dictating member	7.12.2021
Date on which the typed draft is placed before the other member	7.12.2021
Date on which the approved draft comes to the Sr. PS/ PS	7.12.2021
Date on which the fair order is placed before the dictating member for pronouncement	7.12.2021
Date on which the fair order comes back to the Sr. PS/ PS	7.12.2021
Date on which the final order is uploaded on the website of ITAT	7.12.2021
date on which the file goes to the Bench Clerk	7.12.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	