IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER

ITA Nos.170 to 175/CTK/2019
Assessment Years : 2009-10 to 2015-16

Shri Narayan Kumar Khaitan, Prop. M/s. Sri Ganesh Metaliks, LL26, Civil Township, Rourkela	Vs.	ACIT, Central Circle, Sambalpur
PAN/GIR No.AOUPK 0356 F		
(Appellant)	..	(**Respondent**)

Assessee by : Shri B.Panda, Sr. Adv/Shri B.Panda, Adv.
Revenue by : Shri M.K.Gautam, CIT (DR)

Date of Hearing : 15/6/ 2022
Date of Pronouncement : 15/6/2022

O R D E R

Per Bench

These are appeals filed by the assessee against the separate orders passed u/s.263 of the Act by the Pr. CIT (Central), Visakhapatnam, all dated 25.3.2019 for the assessment years 2009-10 to 2015-16, respectively.

2. Shri B.Panda, Sr. Advocate/Shri B.Panda, Advocate appeared on behalf of the assessee and Shri M.K.Gautam, ld CIT DR appeared on behalf of the revenue.

3. At the time of hearing, ld A.R. of the assessee sought adjournment for two months. These appeals have been filed on 6.8.2019. The appeals have been posted on multiple occasions of more than 14 times. No further purpose would be served in granting further time in this case. Consequently, the adjournment application filed by the assessee is rejected and appeals are being disposed off. Ld CIT DR was asked to proceed with the case.

4. It was submitted by ld CIT DR that the assessee has filed an additional ground on 3.11.2020, wherein the assessee has challenged the service of the notice u/s.263 of the Act. It was the submission of ld CIT DR that the original assessment in the case of the assessee was completed on 12.12.2011 u/s.143(3) of the Act. It was the submission that there was a search in the group of M/s. Shivom Minerals Ltd and Group at Rourkela on 24.9.2014. It was the submission that certain incriminating materials have been found in the course of search and proceedings u/s.153C of the Act had been initiated on the assessee. The assessments u/s.143(3) r.w s 153C came to be completed on 30.11.2016 for the assessment years 2009-10, dated 16.12.2016 for the assessment year 2010-2011, dated 30.11.2016 for the assessment year 2011-12, dated 30.11.2016 for the assessment year 2012-13, dated 31.12.2016 for the assessment year 2014-15 & 2015-16, respectively.

5. It was the submission that subsequently, it was noticed that the assessment orders passed u/s.143(3) r.w.s 153C of the Act were erroneous and prejudicial to the interest of the revenue. Therefore, the Pr. CIT (Central), Visakhapatnam invoked his powers u/s.263 of the Act and issued notice to the assessee at the address of the assessee as mentioned in PAN. The notice is dated 6.3.2019 and date of compliance was given on 18.3.2019. On 20.3.2019, one Mr Uttam Kumar claiming to be the staff of the assessee vide letter dated 18.3.2019 intimated the Pr. CIT that his employer being the assessee is in judicial custody and he was unable to attend the notice immediately and sought reasonable time of one month to organize the submission of data. It was the submission that the Pr. CIT on the ground that Shri Uttam Kumar did not have the Power of Attorney to represent the assessee, proceeded to revise the order u/s.143(3) r.w.s 153C of the Act and held the said assessment orders as erroneous and prejudicial to the interest of the revenue. Pr. CIT also observed that as there is no reply of the assessee to the show cause notice, he presumed that the assessee does not have any explanation to offer and directed the AO to consider the issue as mentioned in the show cause notice and to pass the assessment order as per law after giving opportunity to the assessee. The order u/.s.263 of the Act was passed on 25.3.2019. It was the submission by ld CIT DR that notice u/s.263 of the Act was sent by Speed Post at the address as mentioned in PAN and consequently, it was a valid

service of notice. For this proposition, he placed reliance on the decision of Co-ordinate Bench of this Tribunal in the case of P.A.,Chacko Muthalaly vs ACIT (2014) 50 taxmann.com 54 (Mum), wherein, the Co-ordinate Bench of the Tribunal has held that once the notice u/s.143(2) of the Act has been sent through post and postal authorities have duly acknowledged that same has been served on a given date on correct address of person on whom post was addressed, then it cannot be said that service of notice through post has been done, on some subsequent date or to some other person. The presumption in law in such a case is that it has been served upon the assessee. He further placed reliance on the decision of Hon'ble Jharkhand High Court in the case of Milan Poddar vs CIT, (2012) 24 taxmann.com 27 (Jharkhand), wherein, it has been held that though the Speed Post is not specifically mentioned in statute, the service by speed post is valid as it is included in generic word "post' or 'Registered Post'. When the notice sent by speed post does not return as undelivered, the finding is that it is deemed to have been delivered on the assessee. Further reliance was placed on the decision of Hon'ble Delhi High Court in the case of CIT vs Madhsy Films Pvt Ltd., (2008) 175 Taxman 347 (Delhi) to support the proposition that once the notice has been issued to the assessee u/s.143(2) of the Act and has been dispatched by speed post at its address as per the return of income and same has not been returned back, it could be presumed that it had reached assessee, especially when no affidavit had

been filed by the assessee to the effect that notice was not received by it. Reliance was placed on the decision of Hon'ble Allahabad High Court in the case of CIT vs Privilege Investment Pvt Ltd., (2017) 88 taxmann.com 559 (All) to support the proposition that notice issued u/s.148 sent by post to the addressee at his proper address, would be deemed to have been delivered to him in ordinary course, if not returned undelivered and such service is sufficient. Further reliance was placed on the decision of Hon'ble Supreme Court in the case of Sudev Industries Ltd vs CIT (2018) 99 TAXMANN.COM 109 (SC) to support the proposition that the service of the notice by the Inspector at the factory premises on the Security Guard and the assessee having appeared before the AO, it could be concluded that the provisions of section 292 BB of the Act would apply and the assessment proceedings could not be invalidated for want of proper service of notice. Reliance was placed on the decision of Hon'ble Supreme Court in the case of ITO vs Dharam Narain (2018) 90 taxmann.com 325 (SC) to support the proposition that the non-availability of the assessee to receive the scrutiny notice sent by registered post on multiple occasions and the service of notice on authorized representative of the assessee who the assessee now disown, is sufficient to draw an inference of deemed service of notice on the assessee. Ld CIT DR also relied upon the decision of Hon'ble Supreme Court in the case of CIT vs Thayaballi Mulla Jeevaji Kapasi (1967) 66 ITR 147 (SC) to submit that when attempts were made to serve notice of

reassessment upon assessee at his place of business and he was not in town at that time and no definite information could be secured inspite of inquiries as to whereabouts of assessee and only then notice was served by affixation on conspicuous part of business premises and the process server has also made a requisite endorsement on notice in presence of two witnesses, was held to be valid service. He further relied on the decision of Hon'ble Delhi High Court in the case of CIT vs Regency Express Builders Pvt Ltd., (2007) 161 TAXMAN 1 (Delhi) to support his proposition that when notice has been served to the employee of assessee within limitation is valid service especially when assessee raises no objection before the Assessing Officer and participated in proceedings was a valid service. He also relied upon the decision of Hon'ble Gujarat High Court in the case of Atulbhai Hiralal Shah vs DCIT (2016) 73 taxmann.com 320 (Gujarat) to submit that this decision has been approved by Hon'ble Supreme Court by dismissal of SLP filed by the assessee in 73 taxmann.com 325 (SC) to support the proposition that when the assessee has not joined the postal department to question why the remark "LEFT" was made , the AO was entitled to proceed on the basis of remark of postal department and only on the ground of non-service of notice, the reassessment proceedings could not be terminated. Ld CIT DR also relied on the decision of Hon'ble Bombay High Court in the case of K.C. Tiwari & Sons vs Commissioner Of Income-Tax, 46 ITR 236 (Bom) to submit that the service of notice is not

exhaustive and it is permissible to have the notice effected in a way other than two modes provided in the Act and just because there is some procedural irregularity in serving the notice, if the assessee has admitted that he had received the notice and asked for adjournment, the assessee could not subsequently be allowed to plead that there was no valid and legal service. It was the submission that notice had been served on the assessee and the employee of the assessee had appeared and sought adjournment, the onus lies on the assesee to claim that Shri Uttam Kumar was not an employee or that the notice was invalidly served. It was the further submission that the fact that the assessee is in Jail and as to which jail was not brought to the notice of the Pr. CIT, (Central), Vizag. It was the submission that it was not possible for the Pr. CIT to go searching for the assessee in various jails and the department cannot be expected to do the impossible. It was the further submission that the notice served by the issuance of notice u/s.263 was liable to be upheld and so also the order passed u/s.263 of the Act

6. In reply, ld A.R. of the assessee submitted that the Hon'ble Jurisdictional High Court in the case of Nandram Hunatram vs CIT, 37 ITR 500 (Orissa) has categorically held that the notices are to be served on the assessee and the notice communicated to the lawyer of the assessee, especially when there was no endorsement in the Voklatanama that the lawyer was authorised to accept the notice on behalf of the assessee,

therefore, it was not a valid service. It was the submission that the notice having not been validly served, the notice issued u/s.263 and consequential order u/s.263 was liable to be annulled.

7. We have considered the rival submissions. At this point, it would be worthwhile to peruse the provisions of section 263 of the Act. The provisions of section 263 of the Act require that if the Pr. CIT consider any order to be erroneous and prejudicial to the interest of the revenue, he may "after giving the assessee an opportunity of being heard" revise the same . It must be clearly explained here that the service of notice on the assessee is not a pre-condition much less the condition but the assessee must be granted the opportunity of being heard. Admittedly, it is for the purpose of granting the assessee an opportunity of being heard that the notice is served on the assessee. In the present case, the assessee is clearly an individual. Now if a notice is to be issued on an assessee who is an individual. The provisions of section 282 provides the methodology. There is also a provision for the service of notice on family. When the family is disrupted or firm, etc is dissolved or the firm in section 283. Service of notice in the case of discontinued business in section 284. A notice to be served on the assessee who is an individual has to be served on the assessee itself. The provisions of section 292BB speaks that the notice is deemed to be validly served in certain circumstances. This circumstance is basically when the assessee has appeared in any proceedings or co-

operated to an enquiry. In the case of an individual, as the issue is relating to the return which has been verified by him u/s.140 of the Act, the notice also must be served on that individual. True, under certain circumstances such notice can validly be served on another provided such individual authorises another person to act on his behalf. Now, the facts in the present case clearly show that notice u/s.263 of the Act was sent on the address of the assessee and the correct address. The fact remains that at that point of time, the assessee was under judicial custody but one Sri Uttam Kumar, claiming to be an employee of the assessee has responded to the notice. The Pr. CIT himself categorically held that the said Sri Uttam Kumar does not hold the power of attorney to represent the assessee. Ld Pr. CIT has been communicated by a letter that the assessee is in judicial custody. When an individual is in judicial custody, any notice on such individual can be served on him only through the Superintendent of the Jail, wherein, the individual is lodged. One should keep in mind that once the individual is taken under judicial custody, many of his constitutional rights stands curtailed. Nothing stopped the Pr. CIT from communicating the notice to the individual in jail. Once he was intimated that the assessee is in jail, the Pr. CIT was aware that the assessee is in judicial custody as on 20.3.2019. He had adequate time for serving the notice on the assessee in Jail through Superintendent of the Jail. Instead of this, the Pr. CIT proceeded to issue order u/s.263. He failed to serve notice on the assessee

even though he was informed of the judicial custody of the assessee. One must also keep in mind that when the assessee is in judicial custody, his address during the period of judicial custody does not change and it cannot be said that the assessee is absconding. The second condition that the assessee should be given an opportunity of being heard also stood violated insofar as the assessee has not been heard. In the circumstances, order passed u/s.263 got vitiated and is liable to be annulled and we do so.

8. A perusal of the decisions relied upon by ld CIT DR in the case of P.A,.Chacko Muthalaly (supra) is in regard to the service of notice by post. The assessee has not challenged the address or that the notice is not served on the addressee. The challenge is in regard to service of notice on the assessee. Same is the position in regard to the decision of Hon'ble Jharkhand High Court in the case of Milan Poddar (supra), the decision of Hon'ble Delhi High Court in the case of Madhsy Films Pvt Ltd (supra) and the decision of Hon'ble Allahabad High Court in the case of Privilage Investment Pvt Ltd (supra). Coming to the decision of Hon'ble Supreme Court in the case of Sudev Industries Ltd (supra), in that case, the assessee therein had co-operated in the assessment proceedings under the protection in the statute in the form of section 292BB. In the case of the assessee, there cannot be any claim of co-operation or observation in the proceedings insofar as the assessee was in judicial custody. Coming to the decision of Hon'ble Supreme Court in the case of Dharam Narain (supra),

wherein, notice has been served on the authorised representative of the assessee, which the assessee now disown same does not apply to the facts of the case of the assessee, insofar as Pr. CIT himself held that Uttam Kumar was not authorised representative. Now, it does not lie on the mouth of the revenue to claim that Sri Uttam Kumar is the authorised representative of the assessee. The decision of Hon'ble Supreme Court in the case of Thayaballi Mulla Jeevaji Kapasi (supra) provides that the service of notice by affixation is valid. Again in the present case, the notice ought to have been served on the assessee through the proper procedure which has not been followed especially when the Pr. CIT was aware that the assessee is in judicial custody. Thus, this decision is in fact in favour of the assessee. The decision in the case of Regency Express Builders Pvt Ltd. (supra) is again in respect of service of notice on an employee. But in the present case, the Pr. CIT himself has held Sri Uttam Kumar is not an A.R. of the assessee. The decision of Hon'ble Gujarat High Court in the case of Atulbhai Hiralal Shah (supra) also does not apply insofar as there is no remark by the postal authorities that the assessee is not available in regard to the correct location of the assessee being under judicial custody was very well within the knowledge of the pr. CIT. Coming to the decision of Hon'ble Bombay High Court in the case of K.C.Tiwari & Sons (supra) regarding the procedural irregularity in serving of the notice, it is noticed that in that case, the assessee had co-operated in the proceedings. Once the assessee has

co-operated then obviously the provisions of section 292BB itself would be debarred the assessee from claiming non-service of notice. Coming to the decision of Hon'ble Jurisdictional High Court in the case of Nandram Hunatram (supra) relied upon by ld Sr. counsel of the assessee is in relation to service of notice on an Advocate more so as authorised representative. In the present case, the service of notice is not on Advocate or Authorised representative of the assessee. Consequently, this decision also does not apply to the facts of the present case.

9. As we have already held the order u/s.263 is invalid on account of non-service of notice on the assessee, who is in judicial custody and on account of non-granting the assessee an opportunity of being heard, the additional ground filed by the assessee stands allowed and orders passed u/s.263 stand quashed.

10. In the result, appeals of the assessee are allowed.

Order dictated and pronounced in the open court on 15/6/2022.

(Arun Khodpia)
ACCOUNTANT MEMBER

(George Mathan)
JUDICIAL MEMBER

Cuttack; Dated 15 /06/2022
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : Shri Narayan Kumar Khaitan, Prop. M/s. Sri Ganesh Metaliks, LL26, Civil Township, Rourkela

2. The Respondent. ACIT, Central Circle, Sambalpur
3. The CIT(A)-, Bhubaneswar
4. Pr. CIT-(Central), Vishakhapatnam
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack