

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

**BEFORE SHRI G.S. PANNU, PRESIDENT AND
SHRI VIKAS AWASTHY, JUDICIAL MEMBER**

ITA NO. 2272/MUM/2014 : A.Y : 2009-10

Shivaji S. Desai
Sagar Darshan CHS, Tower No. 2,
Flat No. 1001, 10th Floor, Sector-18,
Nerul (W), Navi Mumbai. (Appellant)
PAN : AFFPD3240K

Vs. Income Tax Officer – 22(3)(4),
Mumbai. (Respondent)

Appellant by : Shri Prakash Pandit
Respondent by : Shri Abhijeet Chaudhary &
Shri Mehul Jain

Date of Hearing : 17/06/2022
Date of Pronouncement : 13/09/2022

ORDER

PER VIKAS AWASTHY, J.M:

This appeal by the assessee is directed against the order of Commissioner of Income Tax Appeals (Appeals)-33, Mumbai [in short 'Id. CIT(A)'] dated 01/02/2013 for Assessment Year 2009-10.

2. The assessee in appeal has assailed the findings of Id. CIT(A) in confirming addition of Rs.24,96,910/- in respect of income from sale stock and disclosed in Financial Year 2005-06 under the head 'Business Income'. The assessee has also raised an additional ground of appeal challenging validity of assessment in absence of valid service of notice under Section 143(2) of the Income Tax Act, 1961 (in short 'the Act').

3. Shri Prakash Pandit appearing on behalf of the assessee during hearing of appeal confined his submissions only in respect of additional ground raised. The assessee vide letter dated 03.10.2016 has raised additional ground of appeal. The same is reproduced hereinbelow :

“In the facts and circumstances of the case and in law the order passed by A.O u/s. 143(3) dated 28.12.2011 is abnotio void in absence of proper valid service of notice u/s. 143(2) within the prescribed mandatory time limit for the purpose of making assessment u/s. 143(3) of Income Tax Act.”

4. The Id. AR of the assessee submitted that the additional ground raised goes to the root of validity of assessment proceedings. The issue is purely legal in nature and hence can be raised in appellate proceedings. Narrating the facts, the Id. AR pointed that notice under Section 143(2) dated 26.09.2011 was allegedly served on the assessee by affixture on 28.09.2011 at the following address :

“Shiv Palm Beach Housing Society, Building No. B-15/2/2, Sector-4, Nerul, Navi Mumbai.”

As per Affidavit of the Assessing Officer, available on record, notice sent through speed post was also issued on the same aforesaid address. The Id. AR contended that the assessee never resided or carried its business on the said address where the notice was allegedly served by affixture or speed post. As per PAN data, address of the assessee is **“Shop no. 3/4, Plot No. C-10, Shiv Parvati, Sector-10, Nerul (W), Navi Mumbai”** and **“1001, Tower No.2, Sagar Darshan CHS, Plot No. 38, Palm Beach, Sector-18, Nerul, Navi Mumbai 400 706”**. The assessee is residing at the latter address since last 20 years. The summons issued under Section 131 of the Act dated 21.12.2011 were served

on the assessee on the said address. The assessee appeared before the Assessing Officer in response to said notice.

4.1 During pendency of appeal before the Tribunal, the assessee filed an application under Right to Information Act seeking following information from the Assessing Officer:

- (i) Copy of notice under Section 143(2) dated 26.09.2011;
- (ii) Copy of report addressed to Assessing Officer on service of notice by affixture given by the Inspector;
- (iii) Copy of notice under Section 142(1);
- (iv) Copy of ticket log-in summary; and,
- (v) Copy of order sheet of the Assessing Officer.

After receiving aforesaid information under RTI, the assessee filed additional ground of appeal challenging validity of assessment proceedings in the absence of valid service of notice issued under section 143(2) of the Act.

4.2 The Tribunal directed the Assessing Officer to file an Affidavit with regard to service of notice. As per the directions of Tribunal, the Assessing Officer filed an Affidavit dated 01.10.2018. The assessee filed counter-affidavit on 07.01.2019. The Id. AR asserted that the Assessing Officer was required under the provisions of Act to serve notice on the assessee through post. It is only when the notice is not served in the normal course that the Assessing Officer takes steps to serve notice through substituted manner of affixture. The Id. AR further referred to Order V Rule 17 to 20 of the Code of Civil Procedure, 1908 to contend that there is no order on record by the Assessing Officer to serve notice by affixture. Hence, there is no service of notice under Section 143(2) as mandated by the provisions of the Act. The Id. AR, in support

of his contentions, placed reliance on various decisions, some of them are as under :

- i) Heaven Distillery (P) Ltd. vs Income Tax Officer, 185 TTJ (Mumbai Trib) 197;
- ii) Purshotam Singh vs Income Tax Officer (2016) 47 CCH 0603 Asr Trib;
- iii) Chandra Agencies vs Income Tax Officer, 89 ITD Page 1 ;
- iv) CIT vs Kishan Chand, 328 ITR 173 (P&H);
- v) Travancore Diagnostics P. Ltd. vs ACIT, 390 ITR 167 (Ker); and,
- vi) ACIT vs Greater Noida Industrial Development Authority, 379 ITR 14 (All).

5. *Per contra*, Shri Abhijeet Chaudhary & Shri Mehul Jain representing the Department vehemently defended the contents of the Affidavit filed by the Assessing Officer. The Id. DR submitted that effort was made to serve the assessee on the address, i.e. Shop no. 3/4, Plot No. C-10, Shiv Parvati, Sector-10, Nerul (W), Navi Mumbai. The notice server returned the notice with remarks that there was no such address. After making inquiries from the local area, the notice server gathered information that the new address of the assessee is Shiv Palm Beach Housing Society, Building No. B-15/2/2, Sector-4, Nerul, Navi Mumbai. Consequently, the notice was served on the new address through affixture. The service report of the notice server dated 28.09.2011 is on record as Exhibit-C. The Id. DR further contended that upon service of notice, the assessee has participated in the assessment proceedings and has thereafter filed appeal against the assessment order before the Id. CIT(A). The assessee never raised any objection with regard to validity of service of notice issued under Section 143(2) of the Act either during assessment proceedings or thereafter in the first appellate proceedings. The assessee has raised objection for the first time at belated stage before the Tribunal. Once having participated in the assessment proceedings without any objection, assessee

now cannot raise question of validity of assessment on the issue of validity of service of notice.

6. We have heard the submissions made by the rival sides and have considered the decisions on which the Id. AR has placed reliance to buttress his submissions.

6.1 The assessee has raised a legal ground challenging validity of assessment *sans* service of notice, issued under Section 143(2) of the Act. Since, the issue raised by way of additional ground is a jurisdictional issue, hence, the same can be raised in appellate proceedings. The additional ground raised by the assessee being legal in nature is admitted for adjudication.

6.2 Notice under Section 143(2) of the Act was purportedly issued and served on assessee at: "Shiv Palm Beach Housing Society, Building No. B-15/2/2, Sector-4, Nerul, Navi Mumbai" on 28/09/2011. The aforesaid address was never conveyed by the assessee to the Assessing Officer as his address for service of notice. The PAN database, of the assessee has two addreses-

(i) Shop no. 3/4, Plot No. C-10, Shiv Parvati, Sector-10, Nerul (W), Navi Mumbai; and

(ii) 1001, Tower No. 2, Sagar Darshan CHS, Plot No. 38, Palm Beach, Sector-18, Nerul, Navi Mumbai 400706.

Notice under section 143(2) of the Act was never served on the assessee on either of the aforesaid address. The Assessing Officer clearly fell in error in serving statutory notice by affixture on a wrong address. Further, before resorting to serve notice through substituted method, the Assessing Officer was required to record reasons after receiving report from process server for

non-service of notice in ordinary course. The Assessing Officer has not placed on record any documentary evidence to substantiate that in the first instance any effort was made to serve the notice on either of the addresses as mentioned in the PAN database. Thus, in effect, there was no service of notice under section 143(2) of the Act on the assessee. It is true that despite non-service of said notice, the assessee participated in the assessment proceedings and thereafter filed appeal against the assessment order before the Id. CIT(A). The assessee never raised any objection challenging validity of service of notice issued under Section 143(2) of the Act, either during assessment proceedings or in the first appellate proceedings.

The requirement of sub-section (2) to section 143 of the Act is that the notice under this sub-section shall be served on the assessee within six months from the end of the financial year in which the return is furnished. Undisputedly, the return of income for the impugned assessment year on which assessment was framed was filed by the assessee on 12/07/2010. Thus, as per mandate of section, notice under section 143(2) could have been served on the assessee upto 30/09/2011. No notice issued under section 143(2) of the Act was served on the assessee till 30/09/2011. The assessee joined assessment proceedings consequent to notice under section 131 of the Act dated 21/12/2011 served on the assessee at a address registered in PAN database. The assessee came to know about scrutiny assessment proceedings much after the elapse of statutory period for service of notice under section 143(2) of the Act. Hence, the assessment proceedings suffer from jurisdictional defect. Since, the notice under section 143(2) of the Act was never served on the assessee, participation of the assessee in assessment

proceedings without statutory notice would not regularize fatal defect of no notice to the assessee under section 143(2) of the Act.

7. The co-ordinate bench of Tribunal in the case of *Heaven Distillery (P) Ltd. vs Income Tax Officer, 185 TTJ (Mumbai Trib) 197 (supra)* has held that service of notice by affixture in the first instance without making any effort to serve notice in ordinary way i.e. by post is not valid service. Hence, the assessment proceedings made on the basis of said notice is *void ab initio*.

7.1 The Tribunal in the case of *Purshotam Singh vs Income Tax Officer (2016) 47 CCH 0603 Asr Trib* taking a similar view has held that where notice was served through affixture without making any effort to serve notice in the ordinary way, is not a valid service, therefore, the assessment proceedings arising therefrom are unsustainable.

7.2 In *Chandra Agencies vs Income Tax Officer, 89 ITD Page 1*, the Delhi bench of the Tribunal in similar circumstances where notice under Section 143(2) of the Act was served by affixture in the first instance, without making effort to serve in ordinary course, the assessment made on the basis of such notice was held to be *void ab initio*.

7.3 In the case of *CIT vs Kishan Chand, 328 ITR 173 (P&H)*, the Hon'ble Delhi High Court held that where notice was served by affixture without trying other modes of service and there is no evidence on record that there was any refusal by assessee to accept service of notice, service by affixture was not proper, hence, unsustainable.

8. Thus, in light of facts of the case and the decisions discussed above, we find merit in additional ground raised by assessee. The service of notice

issued under Section 143(2) of the Act directly by affixture, and that too, on an address on which the assessee had never resided or carried its business is not a valid service. In fact, there is no service of notice issued under section 143(2) of the Act on the assessee. Assessment under section 143(3) made without notice under section 143(2) of the Act suffers from jurisdictional defect. Consequently, the assessment proceedings arising therefrom are vitiated.

9. Here we would like to observe that no argument was raised by the Revenue to take recourse to the provisions of section 292BB of the Act and to say that once the assessee has participated in assessment proceedings, it shall not be open to assessee to challenge the proceedings on the ground that notice was not served or the notice was not served on time or improper service of notice.

Be that as it may, the provision of Section 292BB of the Act comes to the rescue of Revenue to regularise any defect in service of notice. However, where there is no notice, the provision of Section 292BB of the Act does not cure the defect. The Hon'ble Apex Court in the case of CIT vs. Laxman Das Khandelwal reported as 417 ITR 325(SC) in an unambiguous terms has held that absence of service of notice cannot be cured by invoking the provisions of section 292BB of the Act. For the sake of completeness the relevant extract of the observation made by Hon'ble Apex Court are reproduced herein below:

"9. According to section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself."

As has been held herein above, it is a case of no notice under section 143(2) of the Act to the assessee. Therefore, the assessment made without notice under section 143(2) of the Act to the assessee is unsustainable.

9. In the result, the assessment order is quashed and the appeal of assessee is allowed.

Order pronounced in the open court on Tuesday the 13th day of September, 2022.

Sd/
(G.S. PANNU)
PRESIDENT

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, Date : 13.09.2022

SSL/VM

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "E" Bench, Mumbai
- 6) Guard file

By Order

Asstt. Registrar/Sr. Private Secretary
I.T.A.T, Mumbai