

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "S.M.C." NEW DELHI]

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER, S.M.C.

आ.अ.सं./I.T.A No.7782/Del/2019
निर्धारणवर्ष/Assessment Year: 2011-12

Shri Shuaib Ahmed, 1 st Floor, 2392, Rahim Manzil, Turkman Gate, Asaf Ali Road, Jama Masjid, Delhi - 110 006.	बनाम Vs.	Income Tax Officer, Ward : 65 (2) New Delhi.
PAN : AGIPA5185A		
अपीलार्थी /Appellant		प्रत्यर्थी/Respondent

निर्धारितीकीओरसे /Assessee by :	Shri Rajiv Jain, C. A.;
राजस्वकीओरसे /Revenue by :	Shri Om Parkash, Sr. D. R.;

सुनवाईकीतारीख/ Date of hearing :	20/10/2022
उद्घोषणाकीतारीख/Pronouncement on :	16/01/2023

आदेश / O R D E R

PER C. N. PRASAD, J. M. :

1. This appeal is filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-16 [hereafter referred to CIT (Appeals)] New Delhi, dated 10.07.2019 for assessment year 2011-12

2. The assessee has raised the following grounds of appeal:-

“1. That the appellant assessee challenges assumption of jurisdiction to complete the assessment u/s 147 of the Act because the ld. AO, Ward 46(4), New Delhi failed to serve the notice u/s 148 of the Act before completing the assessment on 06.12.2018.

2. That on the facts and in the circumstances of the case where limitation for completion of assessment was due to expire on 31.12.2018 and the ld. AO claimed to have served the notice u/s 148 of the Act dated 31.03.2018 upon the assessee by way of affixture on 04.12.2018 without allowing the period of 30 days as mentioned in the notice u/ s 148 of the Act to file his return of income, the assumption of jurisdiction is vitiated.

3. That where service of notice u/s 148 of the Act dated 31.03.2018 which is claimed to have been served upon the assessee on 04.12.2018 by way of affixture and the affixture report did not contain the name of any local witness who identified the address of affixture, the service by affixture on 04.12.2018 is bad in law and consequently, the assumption of jurisdiction, obtained on the basis of such service by affixture, is vitiated.

4. The assumption of jurisdiction is vitiated because the approval u/ s 151 of the Act was granted by the ld PCIT, Delhi-16, in a mechanical manner on a prefilled standard format, which was not even accompanied by the reasons of reopening recorded by the ld AO Ward-46(4), Delhi.

5. The assumption of jurisdiction is vitiated as the reasons of reopening recorded by the ld AO indicated the fact of deposit of cash aggregating to Rs. 14,28,900/- by the assessee in his bank accounts during the F.Y. 2010-11 and the reasons of believing escapement of income, as required by law *Idid not exist.*

6. *That where notice u/s 148 of the Act dated 31.03.2018 was served upon the assessee on 04.12.2018 and the assessment u/s 147/144 of the Act was completed on 06.12.2018, there is complete violation*

of principle of natural justice as no opportunity was granted to the assessee either to file his return of income in response to notice u/ s 148 of the Act or to participate in the reassessment proceedings and therefore, order dated 06.12.2018 passed u/s 147/144 of the Act is void and nullity in the eyes of law.

7. That where the assessee being a small trader having income below taxable limit, the ld CIT(A)-16, New Delhi was wrong in confirming the order of the ld AO, who taxed the entire amount of Rs.14,28,900/- deposited by the assessee in his bank during F.Y. 2010-11 without providing any benefit/relief for the cash withdrawn from the bank during F.Y 2010-11 and the opening capital balance of life savings of the assessee.”

3. The ld. Counsel for the assessee submits that ground Nos. 1, 2, 3 and 6 are in respect of service of notice under section 148 of the Income Tax Act, 1961 (the Act) and consequent completion of assessment as bad in law. The ld. Counsel for the assessee, at the outset, submits that notice u/s 148 of the Act dated 31st March, 2018 was claimed to have been served on the assessee by the Assessing Officer by way of affixture on 4.12.2018 without allowing the period of 30 days as mentioned in the notice u/s 148 of the Act to file return of income, thus the assessment of jurisdiction is vitiated. The ld. Counsel for the assessee submits that notice u/s 148 dated 31.03.2018 which was claimed to have been served on the assessee on 4.12.2018 by way of affixture and the affixture report did not contain the name of any local witness who made the above affixture and, therefore, the service by affixture on 4.12.2018 is bad in law and consequently the assumption of jurisdiction obtained on the basis of such service by affixture is vitiated and thereby the best judgement assessment made by the Assessing Officer u/s 144 read with section 147 of the Act on 6.12.2018 is void ab initio. The ld. Counsel placing reliance on the decision of the Ess Aar Exports Vs.

Income Tax Officer [(2005) 94 ITD 484 (Delhi)] submits that while effecting the service through affixture local witness ought to have been associated in order to identify the address of affixture was not effected with the statutory provisions assessment made u/s 144 read with section 147 of the Act as bad in law. Reliance was also placed on the decision of the Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Kishan Chand [(2010) 328 ITR 173 (P & H)] for the proposition that in the absence of any local witness service by affixture is nullity. The Id. Counsel placed reliance on the decision of Delhi Bench of the Tribunal in the case of Wg. Cdr. Sucha Singh Vs. Income Tax Officer in ITA. No. 1605/Del/2012 dated 11.04.2017.

4. The Id. Counsel for the assessee further submits that as the notice u/s 148 of the Act dated 31.03.2018 was claimed to serve on the assessee on 4.12.2018 and as the assessment u/s 144 read with section 147 of the Act was completed on 6.12.2018 there is complete violation of principles of natural justice as no opportunity was granted to the assessee either to file his return of income in response to notice u/s 148 of the Act or to participate in the re-assessment proceedings and, therefore, the order dated 6.12.2018 passed u/s 144 read with section 147 of the Act is void and nullity in the eyes of law.

5. The Id. DR relied on the orders of the authorities below.

6. Heard rival submissions perused the orders of the authorities below. In this case based on the AIR information that the assessee made certain cash deposits in his bank account the assessment was re-opened by issue of notice u/s 148 of the Act dated 31.03.2018. Perusal of the assessment order reveals that notice u/s 148 dated 31.03.2018 was issued requiring the assessee to file return of income within 30 days was sent through Speed Post which was returned un-served. Notice issued u/s 142

in the month of August and show cause notices issued in the month of November were also returned un-served. On 4.12.2018 the Assessing Officer served notice u/s 148 dated 31.03.2018 along with show cause notice dated 3.12.2018 by way of affixture. After service of notice u/s 148 dated 31.12.2018 and show cause notice dated 3.12.2018 by way of affixture on 4.12.2018 the Assessing Officer completed the best judgement assessment on 6.12.2018 bringing to tax the cash deposit of Rs.14,28,900/- made by the assessee in his bank account for the assessment year under consideration. On perusal of the assessment order it is noticed that the Assessing Officer even though issued notice as early as in March, 2018 (31.03.2018) the said notice came to be un-served and thereafter the Assessing Officer did not make any efforts to serve this notice on the assessee till 4.12.2018 as the assessment was time barring in the month of December, 2018. The Assessing Officer served notice u/s 148 dated 31.03.2018 by way of affixture on 4.12.2018 and immediately thereafter completed the best judgement assessment on 6.12.2018, even though the Assessing Officer required the assessee to file return within 30 days from the service of notice u/s 148 of the Act. This is completely in violation of principles of natural justice. Further the service report of notice by affixture is signed by Tax Assistant who has affixed the notice in the presence of Inspector of Income Tax as witness for the affixture of notice.

7. In the case of Ess Aar Exports Vs. Income Tax Officer (supra) the Tribunal held as under:-

“11. It is provided in [Section 282](#) of Income-tax Act that notice under the Act is to be served either by post or as if it was summoned under the Code of Civil Procedure. Notice dated 5.3.2001 has been claimed to have been served through affixture as provided in Code of Civil Procedure. Here provisions of Order V Rules 17 to 20 of CPC are

relevant. After taking notice of above statutory provisions, their Lordships of Supreme Court in the case of [Ramendra Nath Ghosh v. CIT](#), 82 ITR 888, observed as under (as per head note):

"The Inspector of Income-tax who had to serve notices under [Section 33B](#) of the Income-tax Act, 1922, claimed to have served the notices by affixing them on the assessee's place of business but in his report did not mention the names and addresses of the persons who identified the place of business of the assessee, nor did he mention in his report or in the affidavit filed by him that he personally knew the place of business of the assessee. The assessee, however, claimed that they had closed their business long before the notices were issued. On writ petition filed by the assessee, the High Court held that there was no proper service on the assessee and the orders of the Commissioner pursuant thereto could not be sustained. On appeal to the Supreme Court:

Held, affirming the decision of the High Court, on the facts, that the service of the notices was not in accordance with the law and, therefore, it could not be said that the assessee had been given a proper opportunity to put forward their case as required by [Section 33B](#) of the Income-tax Act.

Held also, that the question whether the assessee had been served in accordance with the law or not was essentially a question of fact and though the High Court had jurisdiction to entertain their writ petitions challenging the service of notice, the assessee should not have been allowed to invoke the extraordinary jurisdiction of the court."

12. In case of [A.A. Kochnadi v. Agriculture ITO](#), 110 ITR 406, their Lordships of Kerala High Court observed as under:

"Where service of a notice on the assessee or his authorized agent or an adult member of his family is not possible, statutes authorize substituted service and such service attributes constructive knowledge of the assessee. To

attribute such constructive knowledge, the substituted service must be in accordance with the prescribed procedure, that is, by [Section 64](#) of the Agricultural Income-tax Act, 1950, in this case, which provides that a notice can be served as if it were a summons issued by a court, that is, as provided in Order V Rules 17, 18 and 19 of the Code of Civil Procedure, 1908. In the absence of proof of service as required, in the said Rule 17, such service could not be treated as valid service. A mere statement that service was effected by affixture would not be enough."

13. It is clear from above that constructive knowledge of notice can be attributed to the assessee if service, has been effected as provided by the Statute. All the requirements of substituted service must be shown to be fully satisfied, In the case of Ramendra Nath Ghosh (supra), their Lordships also noted provisions of rule 17 Order V of the Civil Procedure Code and reproduced the same at pages 890/891 of the report. It is seen that the provision requires that names and address of the persons, if any, by whom the house was identified and in whose presence the copy was affixed has to be stated in the report. If above is not done and the officer does not mention in his report nor in his affidavit that he had personally knew the place of the business of the assessee, the substituted service cannot be treated as "valid" and effected in accordance with law. Their Lordships in the decision emphasized that a service without following the procedure as laid down in the rule is not valid Their Lordships added "The possibility of his (processor) having gone to a wrong place cannot be ruled out". Local persons of area where the place (house) of the person to be served is situated are to be associated for two obvious reasons. First, that the place is properly identified. Secondly, such report may not be prepared by the process server and other persons sitting in their office.

14. In the light of clear provisions of law, we are unable to hold that service in this case was effected in accordance with statutory provisions. The report of the Process Server is witnessed by Ms. Indu Rani, the Income-tax Inspector. There is no evidence of any independent person having been associated with identification of place of business

of the assessee. There is no evidence that the process server or Ms. Indu Rani had personal knowledge of place of business of the assessee and was, thus, in a position to identify the same. In the absence of above material evidence, notice dated 5.3.2001 cannot be accepted as served on the assessee in accordance with law. Constructive knowledge of the above notice cannot be attributed to the assessee. In these circumstances, we hold that assessment made Under [Section 144](#) was bad in law. The same is required to be set aside. The AO can issue fresh notice if so authorized under the law. The matter is restored to his file.”

8. The principles laid down in the above decision applies to the facts of the assessee’s case. In the case on hand there is no any evidence of any independent person having been associated with identification of place of the assessee, local person of area where the place of the assessee to be served is suggested are to be associated to identify the place of the assessee and such report may not be prepared by the process server and other persons sat in their office without involving local person of area. For obvious reasons it is very much necessary that local persons of the area are to be associated in the process of service of notice by affixture. This process of law has not been followed in serving the notice by way of affixture and the decision squarely applied to the assessee’s case.

9. The Hon’ble Punjab & Haryana High Court in the case of CIT Vs. Kishan Chand (supra) affirmed the decision of the Tribunal in holding that resort to affixture could not be straight away taken without taking other modes of service. The Hon’ble High Court while holding so, observed as under:-

“2. The assessee is individual and as a sequel to the search and seizure operation was conducted on his premises, he filed revised return. The Assessing Officer framed assessment under section 144 of

the Act on the basis of best judgement. The Commissioner of Income Tax (Appeals) accepted the appeal mainly on the ground that the assessee had not been served. Evidence with regard to service by affixture was rejected on the ground that resort to affixture could not be straightaway taken without first taking other modes of service. The Tribunal affirmed the said finding. It was observed:

“From the facts of the case, I find that the search and seizure operations had been taken at the business and residential premises of the appellant as far back as August, 1976, and the income of the assessment year 1969-70 could be assessed by issuing a notice by March 31, 1978. Notice under section 148 was issued on March 23, 1978, and the Income Tax Officer was naturally anxious to see that the notice gets served by March 31, 1978. Though he meticulously complied with all the formalities prescribed with regard to the service of notice through the affixture yet the hurry which he had to make is quite apparent. As pointed out, search had taken place in the year August, 1976, and when no action had been taken up to March 23, 1978 taken recourse to service by affixture can be said only a sheet formality and not the real service as held by their Lordships in different judgements of the different High Courts, referred to above....”

3. Learned counsel for the Revenue is unable to show that there was any refusal of the assessee to accept service as has been assumed in the question referred. On the other hand, the Tribunal has categorically held that no other mode was adopted and steps for service of notice were taken about a week before the time was expiring.

4. In view of the finding of the Tribunal which is not shown to be perverse, the question referred has to be answered against the Revenue and in favour of the assessee. Ordered accordingly.”

10. In the case of Wg. Cdr. Sucha Singh Vs. Income Tax Officer in ITA. No. 1605/Del/2012 dated 11th April, 2017 the co-ordinate bench of the Delhi Tribunal held as under:-

“5.3 Coming to the facts of the case, it is undisputed that the property located at 123, Hargobind Enclave, Delhi was sold by the assessee during assessment year 2008-2009. It is also undisputed that the return of income for assessment year 2009- 2010 was filed by the assessee on 04/09/2009 whereas the notice under section 143 (2) was dated 14/09/2009 and was served by affixture on 24/09/2009 and, thus, the last known address before the issue of service of notice was H - 234, Naraina Vihar, Naraina, New Delhi i.e. the address mentioned in the return of income for assessment year 2009-2010. The remand report of the AO also admits that all the notices under section 143 (2) remained unserved. Thus, the service of the very first notice has, undisputedly, been done by way of affixture whereas order V, rule 12 of CPC provides that wherever it is practicable, service has to be effected on the defendant in person or on his agent. Order V, rule 17 of CPC further provides that the affixture can be done only when the assessee or his agent refuses to sign the acknowledgement or cannot be found. Thus, for resorting to I.T.A. No. 1605/Del/2012 Assessment year 2008-09 9 affixture, efforts have to be made to serve the notice upon the assessee and only after reaching a finding that the notice cannot be served upon the assessee, the mode of affixture can be resorted to. Further rule 17 of order V of CPC mandates that an independent local person be the witness of service through affixture and for the purpose of having been associated with the identification of the place. However a perusal of the affixture report shows that there was no independent local person as a witness and there is no evidence that anyone identified the place as belonging to the assessee before such affixture. It is seen that the Income Tax Inspector has signed as the local

independent person but such witness cannot be considered to be a local independent person for the purposes of rule 17 of order V of CPC. The Hon'ble Punjab and Haryana High Court in the case of CIT versus Naveen Chander reported in 323 ITR 49 has held that the fixation is required to be done in accordance with the procedure laid down in the Code of Civil Procedure, and where in the report of the inspector/notice server, who claimed to have affixed the notice, there was no evidence of any independent local person having been associated with the identification of the place of business of the assessee, it was a clear violation of the mandate I.T.A. No. 1605/Del/2012 Assessment year 2008-09 10 of rule 17 of order V of Code of Civil Procedure, which laid down the procedure to serve notice by affixture. Since there was no valid service of notice, the assessment proceedings were held as invalid. Therefore, in view of the factual matrix of the case, it is our considered opinion that the Department has failed to prove a valid service of notice on the assessee before embarking upon the assessment proceedings. Since the entire reassessment proceedings were based on assumption of jurisdiction through the issue of notice under section 143 (2) of the Act, which was not validly served on the assessee, we hold that the assessing officer was patently wrong in completing the assessment without effecting the service of notice in accordance with section 282 (1) of the Income Tax Act, 1961 read with order V rule 12 and order V rule 17 of the CPC. Therefore, on the facts and circumstances of the case, we have no option but to quash the entire assessment proceedings. Accordingly, we quash the assessment proceedings and allow the appeal of the assessee on the legal issue. In view of our adjudication in favour of the assessee on the legal issue, the other grounds become academic in nature and are not being adjudicated upon.”

11. In the case on hand also the Assessing Officer except sending the notice through Speed Post in the month of March, 2018 no efforts have been made to serve notice u/s 148 of the Act on the assessee through

other modes. Since the notice returned un-served the Assessing Officer could have sent notice through notice server for service of notice on the assessee which process was not followed and at the fag end of the due date for completion of assessment i.e. in December, 2018 the Assessing Officer chose to serve the notice by way of affixture on 4.12.2018 and complete the assessment immediately on 06th December, 2018 not even giving time for the assessee to file return of income in response to the said notice even though the said notice specifies filing of return within 30 days of time from the date of service of notice.

12. In view of what is discussed above and since the ratio of the above decisions apply to the facts, I hold that there is no proper service of notice u/s 148 of the Act on the assessee and consequently the best judgement assessment made u/s 144 read with section 147 of the Act dated 6.12.2018 is void and nullity in the eyes of law. Thus, the re-assessment order is quashed and grounds of appeal Nos. 1, 2, 3 & 6 are allowed.

13. Since the re-assessment was quashed on the legal issue, I am not inclined to go into other technical grounds and the grounds on merits raised by the assessee as the same would become academic at this stage.

14. In the result, appeal of the assessee is allowed as indicated above.

Order pronounced in the open court on : 16/01/2023.

Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Dated : 16/01/2023.
MEHTA

Copy forwarded to :

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

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	16.01.2023
Date on which the typed draft is placed before the dictating member	16.01.2023
Date on which the typed draft is placed before the other member	16.01.2023
Date on which the approved draft comes to the Sr. PS/ PS	16.01.2023
Date on which the fair order is placed before the dictating member for pronouncement	16.01.2023
Date on which the fair order comes back to the Sr. PS/ PS	16.01.2023
Date on which the final order is uploaded on the website of ITAT	16.01.2023
Date on which the file goes to the Bench Clerk	16.01.2023
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	