

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, 'F': NEW DELHI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
Ms. ASTHA CHANDRA, JUDICIAL MEMBER**

**ITA No.1108/DEL/2016
[Assessment Year: 2011-12]**

Shri Rajesh Kumar, S/o-Shri Phool Chand, Village Bamroli, Gurgaon, Haryana	Vs	Income Tax Officer, Ward-1(3), 5 TH Floor, HSIIDC Bldg. Udhog Vihar, Phase-5 Gurgaon (Haryana)
PAN-ANZPK3967E		
Assessee		Revenue

**ITA No.2824/DEL/2018
[Assessment Year: 2011-12]**

Shri Rajesh Kumar, S/o-Shri Phool Chand, Village Bamroli, Gurgaon, Haryana	Vs	Income Tax Officer, Ward-3(4), Gurgaon
PAN-ANZPK3967E		
Assessee		Revenue

Assessee by	Sh. K. Sampath Adv. & Sh. V Rajakumar Adv.
Revenue by	Ms. Princy Singla, Sr. DR

Date of Hearing	08.02.2023
Date of Pronouncement	23.02.2023

ORDER

PER SHAMIM YAHYA, AM,

These appeals filed by the assessee are directed against the respective orders of Ld. CIT (Appeals)-2 & Ld. CIT(Appeals)-1, Gurgaon, dated 13.01.2016 & 201-02.2018 pertaining to Assessment Year 2011-12, which are relating to quantum addition as well as levy of penalty.

2. The grounds of appeal in quantum appeal being ITA No.1108/Del/2016 reads as under:-

“On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in confirming the following actions of the Assessing Officer:

1. in passing order u/s 143(3) of the Act at an income of Rs.1,29,53,152/-against the returned income in a sum of Rs.3,15,290/- without serving statutory notice u/s 143(2) of the Act;

2. in making the following additions to the returned income:

a. Rs.41,80,585/- on account of alleged undisclosed purchases;

b. Rs.84, 10,000/- on account of alleged unexplained licence fee paid;

C. Rs.47,200/- by disallowing exemption u/s 80C of the Act

3. In completing assessment us 143(3) of the Act on the basis of an invalid return of income;

All the above actions being arbitrary, erroneous, unwarranted and unjust.”

3. Brief facts of the case are that the assessee has filed return of income on 28.03.2012 at total income of Rs.3,15,290/- on presumptive basis. Subsequently the case was selected for scrutiny and statutory notice u/s 143(2) of the Act was issued on 29.09.2012. The AO further referred to show-cause notice and assessee’s response and finally the following addition were made as under:-

<i>I Addition on account of undisclosed purchases</i>	<i>Rs. 41,80,545/-</i>
<i>II Addition on account of exemption u/s 80C</i>	<i>Rs. 47,200/-</i>
<i>III Addition unexplained licence fee paid</i>	<i>Rs. 84,10,000/-</i>

4. Against the above order, the assessee appealed before the Ld. CIT(A).

5. One of the ground taken before the Ld. CIT(A) was that no notice u/s 143(2) has been served upon the assessee within the specified time and hence the assessment framed u/s 143(3) is bad in law. With regard to the

plea that notice u/s 143(2) has not been served, the Ld. CIT(A) noted following submissions:-

“The assessee filed his return of income for the assessment year 2011-12 on 28.03-2012 and the address of the assessee given in the return is as under:

*Rajesh Kumar
Village Bamroli post office GURGAON 122001*

The A. O. issued notice under section 143(2) under speed post No. EH46199239 3IN on 29.09.2012 on the following address:

*Rajesh Kumar
Lakhani Bhardwaj Associates
301 3rd floor Apna Bazar GURGAON 999999*

The assessee has no connection with Lakhani Bhardwaj & Associates except that he got issued his PAN through it in 2006/07. The above notice has therefore not been properly addressed to the assessee.

The assessee vide RTI application dated 7.5.2014 requested the I.O. to furnish photo stet certified copy of notice issued under section 143(2). on the basis of return filed on 28.3.2012 alongwith proof of service of the said notice on the assessee as provided in section 282 of the IT Act. The AO. supplied to the assessee a copy of notice issued u/s 143(2) dated 29.9.2012 along with copy of evidence of having sent the above notice by speed post on 29.9.2012 at the address of Lakhani Bhardwaj & Associates but he did not furnish evidence for service of the above notice on the assessee. The assessee thereafter filed an appeal to the FFA -cum-Addl. CIT Range-I Gurgaon who vide his order dated 8.8.2014 directed the AO to furnish the complete proof of service of the notice issued u/s 143(2) dated 29.9.2012 to the assessee as available in his office. The A.O. in spite of the order of the FFA did not supply the proof of service of notice issued us 143(2) dated 29.9.2012 on the assessee. The assessee is filing his own affidavit to effect that the above notice has not been received/ served upon him. THE SERVICE OF NOTICE UNDER SECTION 143(2) DATED 29.9.2012 WITHIN THE PEROD OF LIMITATION AS PROVIDED IN PROVISO TO SECTION 143(2) IS MENDATORY AND IT IS NOT SAVED BY THE PROVISIONS OF SECTION 292BB of the Act.

Reliance is placed in the following cases:

23.1.2009 Their lordship S.B. Sinha and Dr. Mukundakam Sharma ji. Dismissed the department's SLP against the judgment dated 23.5.2008 of Delhi High Court in ITA No. 396 of 2007, whereby the High Court dismissed department's appeal following its decision in the assessee case wherein it had come to the conclusion that no notice us 143(2) of the Act which is mandatory requirement of law

*had been served upon the assessee within the prescribed period:
CIT v. Nulon India Ltd(C) No. 2105 of 2009 (312 ITR St. 3).*

*17.04.2009: There lordship S.H. Kapadia and AFTABALAM JJ. Dismissed the department's SLP against the judgment dated 29.7.2008 of P& H High COURT in ITA No. 488 of 2008 whereby the High Court affirmed the order of the Tribunal holding that service of notice on the assessee was not valid service in terms of section 143(2) of the I. T.Act as service by affixture in the first instance was not valid particularly when there was no reason to believe that the assessee was avoiding service of notice and consequently this being not merely an irregularity but an illegality, the assessment could not be framed w/s 143(3) of the Act CIT v. AVI OIL INDIA (P) ltd; S.L.P. © No. 9702 of 2009 (ITR 317 Si. 10)
S/o Sh. Phool Chand, Village Bamroli Asstt. Year 2011-12*

CIT v. CEBON INDIA LTD. (2012) 347 ITR 583 (P&H)

Held: dismissing the appeal that the concurrent findings has been recorded by the CIT(Appeal) and the Tribunal on the question of date of service of notice. The notice was not served within the stipulated time. Mere giving dispatch No. would not render the finding perverse. In the absence of notice being served, the I.O. had no jurisdiction to make assessment absence of notice being served able A..r section 292BB.

Firstly the above notice was not properly addressed to the assessee and secondly the department could not prove the service of notice under section 143(2) dated 29.9,2012 on the assessee within the period of limitation provided in the Act. The A. O therefore, does not set jurisdiction to make assessment. The assessment thus made on 28.03.2014 is bad in law for lack of jurisdiction and it may please be cancelled.”

6. The Ld. CIT(A) obtained remand report from the AO in this regard. The Ld. CIT(A) held that he has perused the remand report and it is an admitted fact that notice u/s 143(2) dated 29.09.2012 was duly issued and send through Speed Post. He observed that only contention in this regard address shown by the assessee is his return of income was as under:-

“Rajesh Kumar,
Village Bamroli,
PO.=Gurgaon,”

7. The Ld. CIT(A) further noted that the assessee has contended that the notice u/s 143(2) issued at the address of Rajesh Kumar, Lakhani Bharwaj Associates, 301, 3rd Floor Apna Bazar Gurgaon, which was not proper. The Ld. CIT(A) thereafter observed that it is seen from PAN record of the assessee and the address shown by the assessee in PAN record is as under:-

“Rajesh Kumar,
Lakhani Bharwaj Associates,
301, 3rd Floor Apna Bazar Gurgaon,”

8. The Ld. CIT(A) held that the notice u/s 143(2) was thus issued by the AO at this address shown in the PAN record of the assessee, which was served well within the prescribed time. That the assessee having provided address in PAN data to the department and a notice issued on that day on that address is deemed to have been served. Hence, the Ld. CIT(A) rejected this plea of the assessee.

9. Against this order, the assessee is in appeal before us.

10. We have heard both the parties and perused the records. The ld. Counsel for the assessee submitted that the AO himself has passed the assessment order with the name and address of assessee at Village Bamroli, Gurgaon.

11. The Ld. Counsel for the assessee submitted that the assessee's application under RTI Act for evidence of service of notice has not been answered. The Ld. Counsel for the assessee further referred to the copy of acknowledgment and return of income for AY 2011-12, where the address was clearly mentioned as Village Bamroli, Gurgaon. He further referred to paper book page 24 for the acknowledgment of ITR for the Assessment

Year 2008-09 where again the address of the assessee was mentioned as Village Bamroli, P.O. Gurgaon. He further referred to page-25 of the paper book for acknowledgment for the Assessment Year 2009-10, where also the address of the assessee was same as Assessment Year 2008-09 and similar position is for Assessment Year 2010-11 at paper book pages 26, where the address was written as Village Bamroli, Gurgaon. In these circumstances, it is the submission of the Id. Counsel for the assessee that there was no occasion for the AO to issue notice at the address of Rajesh Kumar, Lakhani Bhardwaj Associates, 301, 3rd Floor, Apna Bazar, Gurgaon. Thus, it proved that the notice u/s 143(2) has not been served. In this regard, the plea of the Id. Counsel for the assessee and cases relied upon by the assessee is summarized as under:-

The subject appeal is filed against order dated 13.01.2016 passed by CIT (A)-2, Gurgaon in appeal No. 117/14-15. Three grounds stand taken in the subject appeal of which Ground 1 relates to validity of assessment order having been passed without service of the mandatory notice u/s 143(2) of the Act, while Ground 2 relates to the three substantive additions. These submissions relate to the preliminary Ground 1 concerning jurisdiction alone.

The assessee has been regularly filing its returns of income from the address at Village-Bamroli, PO-Sikanderpur, Gurgaon. Copies of its returns and income form part of the paper book dated 17.12.2018 (return dated 11.05.2008 for AY 2008-09 at PB 24; return dated 16.02.2010 for AY 2009-10 at PB 25; return dated 23.03.2011 for AY 2010-11 at PB 26; return dated 28.03.2012 for AY 2011-12 which is the subject Assessment Year at PB 09). Each return has been filed with the same address as above. For AY 2009-10 there was a scrutiny assessment which too was finalized through notices served at the above address. The appeal filed by the assessee was also finalised through notices served at the above address.

Ground 1 before the Ld. CIT(A) was taken specifically with regard of non-service of the notice u/s 143(2) of the Act on the assessee. The Ld. CIT(A) notes the relevant facts at para 3 of

the impugned order. At para 3.2 there is reference to the issuance of a notice u/s 143(2) of the Act upon –

Quote

The A.O. Issue notice under section 143(2) under speed post No. EH461992393 IN on 29.09.2012 on the following address:-

*Rajesh Kumar
Lakhani Bhardwaj Associates
301, 3rd Floor, Apna Bazar GURGAON 999999*

Unquote

The address as mentioned was not the assessee's address at anytime. As pointed out earlier it is not the address provided by the assessee in any return of income or document or any other communication addressed to the Department.

Page 3 of the impugned order, contains detailed reference to the long proceedings under the RTI Act for obtaining proof of service or otherwise of the notice u/s 143(2) of the Act. The AO, despite repetitive applications has refused to respond or comply. At para 3.3 of the impugned order the Ld. CIT(A) further notes that despite repeated opportunities in remand proceedings the AO did could not rebut the assessee's averments of non-service of notice u/s 143(2) of the Act.

At page 8 of the impugned order the Ld. CIT(A), however, negatives the assessee's contentions holding that since the tax department's PAN data contained the address at which the AO had dispatched the notice U/s 143(2) of the Act, the contentions of non-service could not be raised when such notice had indeed been issued within time.

The notice itself is at page 4 of the Paper Book which states that there were certain points with the assessee's return dated 28.03.2012 in respect of which the AO had desired further information. This shows that at the time of issuance of notice the AO had before him the assessee's return for the year at hand.

The returns, as stated above, contained the assessee's correct and complete address. That was the address at which the returns of the income for several past years were filed and indeed in one of those years even a scrutiny assessment was done. The Ld. CIT(A)'s order for AY 2009-10 was also at the same address as given in the returns, both past and current. When all the returns themselves contained the address of the assessee as of village Bamroli in Gurgaon, the AO had no valid

reason to issue a notice U/s 143(2) of the Act at a different address which was not that of the assessee. At page 5 of the paper book is the speed post booking list admitting to issuance of the notice at the wrong address.

By 28.03.2012 when the notice for assessment U/s 143(2) of the Act was made out, the material on record contained the correct address of the Appellant in the several notices for different proceedings under the Act. The instances are cited as under:

- (i) Section 143(2) notice dated 28.06.2011 for AY 2009-10;
- (ii) Section 271 (1) (b) notice dated 17.10.2011 for AY 2009-10;
- (iii) Section 271(1) (b) notice dated 17.11.2011 referring to several notices dated 13.09.2010, 12/16.11.2010, 28.06.2011;
- (iv) Section 250 notice of CIT(A) for AY 2009-10 as per mention in the order.

Placed at page 6 of the paper book is the application dated 07.05.2014 under RTI Act asking for a copy of notice u/s 143(2). At page 7 of the paper book, is an appellate order dated 07.08.2015, directing the AO to furnish the information as required by the Assessee (Para 5 of the order) within 15 days. The RTI order has not been complied with by AO to date.

Before parting with the evidence on this point the assessee also adverts to page 23 of the Paper Book which contained notice u/s 142(1) dated 21.03.2014 wherein the said notice has been made out at both the addresses, i.e. the assessee's correct address as well as the address stated to be with the department. Had only the AO exercised due and proper care at the relevant and opportune time while issuing the notices 143(2) as he did while sending the notice 142(1) dated 21.03.2014, the assessment proceedings would not have got derailed and miscarried and this awkward situation would not have arisen at all.

The plain language of section 143(2) of the Act requires the service of a notice upon the assessee. This condition is jurisdictional. A notice must be served, and done so upon the assessee. The AO does not assert the service of any notice u/s 143(2) on the assessee in the subject case. More particularly, it is an admitted position that the notice us 143(2) of the Act dated 28/29.09.2012 has never been served on the assessee.

At the time of issuance of the said notice, the AO had with him, the assessee's returns for several past years where the

correct address was consistently mentioned. Despite the protracted proceedings under TI Act, the AO persisted in failing to provide any proof of the service of notice U/s 143(2) upon the assessee for he knew full well that doing so would expose the blatant error on his part. As admitted by the Ld. CIT(A) in the impugned order itself, despite several opportunities, the A failed to rebut the factual averments in this regard during the appeal proceedings too.

The Ld. CIT(A) reasoning that an address existing on some data base maintained by the tax department to the exclusion of the assessee actual address as per returns of various years on record is adequate for deemed service is erroneous factually and unsustainable legally for three reasons as under:

- a. The plain language of section 143(2) of the Act requires actual service of notice on the assessee. The proviso does not provide for a presumption of service. In other words service of a notice by the AO is a fact which is required to be established by the AO for a valid assumption of jurisdiction. In the present case, there has not even been an attempt to prove the service of notice upon the assessee;
- b. Entirety of assessee's efforts even under the aegis of the RT have been frustrated by the AO's silence and non-cooperation.
- c. When year on year, the assessee has been filing the return of income with a particular address, it is not known as to why some other address was found pertinent by the AO. For retaining an outdated database the AO / CIT(A) cannot blame assessee for their errors and omissions with references to the database. Three annual returns over a period of over four years cannot be considered as the adequate time span for the Department to update its database;
- d. The very fact that during issuance of notice U/s 143(2) of the Act the AO admits to having the assessee's return with him, incontrovertibly shows that at the time of issuing the notice the AO was also having the assessee's correct address. A simple comparison of notice u/s 143(2) with notice 142(1) supra shows that the AO had every opportunity to serve the notice 143(2) of the Act at the proper address as had been chosen by him for the Section 142(1) notices.
- e. Case at hand is fully covered by the Delhi Tribunal order in ITO vs. Ajay Raj (2019) 108 Taxmann.com 543.
- f. There is unanimity of judicial opinion on the point of the invalidity of an assessment made without service of notice u/s 143(2). Some of the cases are as below:-

- (i) CIT vs. Lunar Diamonds Ltd. (2006) 281 ITR 1 (Del);
- (ii) CIT vs. Eqbal Singh Sindhana (2007) 304 IT 177 (Del);
- (iii) CIT vs. Nulon India Ltd. (2008) 312 ITR (St) 3
- (iv) CIT vs. Mas Compel India Ltd. (2012) 345 IT 58(Del);
- (v) CIT vs. Cebon India Ltd. (2012) 347 ITR 583 (P&H).

In view of the above it is quite clear that since the notice u/s 143(2) of the Act has not been served the assessment order dated 28.03.2014 made on the basis of that unserved notice is bad in law which may please be annulled.”

12. Further, in this regard, following case laws has been referred in support of the assessee.

- i. ITO vs. Ajay Raj (2019) 108 taxmann.com 543 (Delhi-Trib.)
- ii. ACIT vs. Hotel Blue Moon (2010) 321 IT 362 (SC)
- iii. Nulon India Ltd. vs. ITO (2010) 323 ITR 681 (Del)
- iv. CIT vs. Cebon India Ltd. (2012) 347 ITR 583 (P & H)
- v. CIT vs. Lunar Dimonds Ltd. (2006) 281 IT 1 (Del)
- vi. CIT vs. Mascomptel India Ltd. (2012) 345 IT 58 (Del)
- vii. CIT vs. Surinder Pal Anand (2010) 192 Taxman 264 (P & H)

13. Per Contra, Ld. DR supported the plea that the address mentioned from PAN records is proper for service of notice.

14. Upon careful consideration, we note that the AO was fully aware that the address of the assessee for the notice u/s 143(2) in the return of income was at Bamroli, Gurgaon. Similar address in the return of income were mentioned for preceding three Assessment Years as reflected in the paper book, where again the address of the assessee was Bamroli, Gurgaon. The AO himself has mentioned in the notice that certain points are to be clarified from the return of income. Furthermore, as mentioned earlier, the AO has issued several notices even prior to this notice, where

the address mentioned in the notice was Bamroli, Gurgaon. The example in this regard have been mentioned as under:-

- (i) Section 143(2) notice dated 28.06.2011 for AY 2009-10;
- (ii) Section 271 (1) (b) notice dated 17.10.2011 for AY 2009-10;
- (iii) Section 271(1) (b) notice dated 17.11.2011 referring to several notices dated 13.09.2010, 12/16.11.2010, 28.06.2011;
- (iv) Section 250 notice of CIT(A) for AY 2009-10 as per mention in the order.

15. The above have not been controverted by the Revenue. Furthermore, the assessee has also tried to seek information by RTI Act to get evidence of service of notice upon the assessee which as per documentations referred above have not been yet complied with. In fact, for the same year, the notice u/s 142(1) was send on the address Bamroli, Gurgaon, Thus, when year after year the assessee was filing return of income at a particular address where notices were also sent by the Department at that address in earlier period, there is no reason why the notice u/s 143(2) was said to have been served at Lakhani Bhardwaj Associates 301, 3rd Floor, Apna Bazar GURGAON. The above discussion amply proves that notice u/s 143(2) has not been served at the proper address of the assessee. Hence, the assessee's grievances that notice u/s 143(2) was not served upon him is found to be correct. The case laws referred the above duly support the above proposition. Hence, the assessee deserves to succeed on account of non-service of notice u/s 143(2) of the Act. Hence, the assessment framed in absence of proper notice u/s 143(2) is liable to be quashed and is quashed as such. Since, we have already quashed the assessment on account of lack of notice u/s

143(2), adjudication on merits is only academic interest, hence we are not engaging in the same.

ITA No.2824/Del/2018

16. The grounds involved in the penalty appeal reads as under:-

“On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in confirming the order of the Assessing Officer imposing penalty u/s 271(1)(c) of the Income Tax Act, 1961 on vague, frivolous and ambiguous ground of concealing particulars of income and furnishing inaccurate particulars. The order of the CIT(A) is opposed to the norms of natural justice as due and adequate opportunity was not provided. It is prayed that the order being arbitrary, erroneous, unlawful, unjustified and opposed to natural justice must be quashed.”

17. Since we have already adjudicated the quantum issue, as aforesaid, in ITA No.1108/Del/2016 for Assessment Year 2011-12 and the additions have been deleted; hence the levy of penalty u/s. 271(1)(c) of the Act does not survive. Therefore, we set-aside the orders of the authorities below and deleted the levy of penalty.

18. In the result, ITA No.1108/Del/2016 is partly allowed and ITA No.2824/Del/2018 is allowed.

Order pronounced in the open court on 23rd February, 2023.

Sd/-
[ASTHA CHANDRA]
JUDICIAL MEMBER

Delhi; Dated: 23.02.2023.

Shekhar,

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-
[SHAMIM YAHYA]
ACCOUNTANT MEMBER

Asst. Registrar,
ITAT, New Delhi