

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष  
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 74/JP/2023  
निर्धारण वर्ष/Assessment Year : 2011-12.

Smt. Bhanwari Devi, Rajiv Nagar, Shahjahanpur, Alwar.	बनाम Vs.	The Income Tax Officer, Ward 2(2), Alwar.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AZRPB 5567 B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Rajesh Agarwal( CA)

राजस्व की ओर से / Revenue by : Smt. Monisha Choudhary (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 22/03/2023

उदघोषणा की तारीख / Date of Pronouncement: 01/05/2023

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

This appeal by the assessee is directed against the order dated 06.12.2022 of Id. CIT (A), National Faceless Appeal Centre (NFAC), Delhi passed under section 250 of the IT Act, 1961 for the assessment year 2011-12. The assessee has raised the following grounds :-

1. Under the facts and circumstances of the case, the Id. CIT (A) erred in confirming the action of Assessing Officer of passing order u/s 271(1)(b) without serving the notice and providing opportunity to the assessee.
2. Under the facts and circumstances of the case, the Id. CIT (A) erred in confirming the action of Assessing Officer in imposing penalty of Rs. 40,000/-.

3. The appellant prays to leave to add, alter or amend foresaid grounds of appeals at or before the time of hearing of appeal.

2. The appeal filed by the assessee is delayed by 13 days. The assessee has explained the delay by filing an application dated 17<sup>th</sup> February, 2023 for condonation of delay along with supporting affidavit of the assessee and requested for condonation of delay. The contents of the application for seeking condonation of delay are reproduced as under :-

- “ 1. The assessee is illiterate lady aged 63 years. She is housewife and has no source of earning. The assessee was not aware of the assessment order dated 06.12.2022. The assessee is neither having her personal email id nor having any person conversant with email. She has mentioned email id of her family member.
2. While checking ITD portal in the proceeding Tab, the assessee's counsel came to know about the passing of order by the Id. CIT (A).
3. During the year under consideration, the rural agriculture land outside the municipal limits in which she was co-owner was compulsorily acquired by the Government of Rajasthan and the sale proceeds invested in term deposit with bank. The AO completed the assessment order u/s 147 r.w.s. 144 even any notice was never served to the assessee. Ld. Assessing Officer also imposed penalty u/s 271(1)(b) for non-attendance of hearing. Assessee filed appeal but learned CIT (A) passed the order without considering the facts of the Assessee and confirm the action of the AO and affirming the penalty order u/s 271(1)(b) of the Income Tax Act, 1961.
4. There is no intention of Assessee to avoid the proceedings. Assessee being the old lady and not conversant with the technology, it is kindly requested to condone the delay in filing of appeal and oblige so that justice may be given to the assessee.”

3. Having considered the rival submissions as well as going through the contents of the application, we are satisfied that the assessee has explained a reasonable cause for not filing the appeal within the period of limitation. Accordingly, we condone the delay of 13 days in filing the present appeal.

**Ground nos. 1 & 2 are inter-linked relates to confirming the action of the AO of passing order u/s 271(1)(b) without serving notice and providing opportunity to the assessee and also confirming penalty of Rs. 40,000/- made by the AO.**

4. The brief facts of the case are that the assessee is a lady aged 63 years. She is a housewife and has no source of earning. During the year under consideration, a rural agriculture land situated outside the municipal limits, co-owned by the assessee, was compulsorily acquired by the Government of Rajasthan and the sale proceeds were invested in term deposit for Rs. 10,00,000/- with bank. As she had no income exceeding maximum amount not chargeable to tax and therefore she is not required to file return as per the Income tax law. The AO received information from departmental software that assessee made time deposit of Rs. 20,00,000/- in the Punjab National Bank during the financial year 2010-11. Since, the assessee had not filed her return of income for A.Y. 2011-12, the AO presumed that investment was made out of income from undisclosed source which escaped assessment. The AO issued a notice u/s 148 asking the assessee to file return, however such notice was never served to the assessee. Thereafter, the AO completed the assessment under section 144 as a best judgment assessment treating Rs. 20,00,000/- as Income from undisclosed sources and issued Penalty notices u/s 271(1)(b) alleging that there is

no compliance on part of assessee in response to notices issued by him. Being aggrieved by the order of the AO, the assessee preferred appeal before the Id. CIT (A). The Ld. CIT (A) did not accept the contention of assessee holding that, penalty has been levied u/s 271(1)(b) of the Income Tax Act. The CIT(A) without considering the reply of the assessee, dismissed the appeal of the assessee. Now the assessee is in appeal before us.

5. Before us, the Id. Counsel for the assessee submitted his written submissions, which are reproduced hereunder :-

“ 1. The Ld. AO has imposed penalty u/s 271(1)(b) alleging that there is no compliance on part of assessee in response to notice issued by him from time to time. But none of notices were ever received by the assessee. Also, the show cause notice u/s 271(1)(b) dated 26.12.2018 was not received by the assessee. Since, the notices were never been served on the assessee, the notices are invalid and imposing penalty for invalid notices is not as per law.

Assessee received a penalty order u/s 271F dated 28.05.2019 first time for AY 2011-12. Assessee did not received any notice or assessment order for the year under consideration. A letter was also submitted on 12/06/2019 to the department requesting therein to provide the original assessment order/certified copy of assessment order. **(Copy at PB1)**

This is very strange that when the penalty order could be served at assessee's premises, why the notice u/s Sec 148, notice u/s 142(1) and the assessment order could not be served properly. The address mentioned in the 271F penalty order and assessment order is same at which the assessee is residing. This shows that true and fair efforts were not made by the Ld. AO to serve the notice of sec. 148 upon the assessee. In real, the assessee was not provided any opportunity to defend herself at all. This implies that the notices

were not real and the AO was in a hurry to complete the assessment u/s 144 without giving the assessee a fair chance to present his submission.

As per AO, notices were issued as follows:

<b>Notice under Section</b>	<b>Date</b>	<b>Mode of service</b>	<b>Remark</b>
148	28/03/2018	By Registered Post	Never Served to assessee
142(1)	16/08/2018	Not mentioned in order	Never Served to assessee
142(1)	08/10/2018	Not mentioned in order	Never Served to assessee
Show Cause Notice for levy of penalty U/s 271(1)(b) and Show cause notice for ex-parte assessment U/s 144	01/11/2018 and 22/11/2018	Not mentioned in order	Never Served to assessee

The AO has not mentioned in the order about the efforts of serving the notice that:

- Whether the assessee refused to accept the notice.
- Whether the assessee was not found at the place.
- Whether the assessee was not residing at that place.

All these facts indicate that the service of notice only a formality and no true or genuine efforts were made to serve the notice. In reality no notice was ever served upon the assessee by post or affixture.

**What is a proper service of notice under the provisions of the Income-tax Act, 1961 (the Act). This issue is vital because an improper service may vitiate an entire assessment.**

The issue of service of notice generally is covered by section 282 of the Act. This says that a notice or requisition under the Act may be served on the

person therein named either by post or as if it were a summons issued by a Court under the Code of Civil Procedure, 1908 (the CPC).

In **CIT vs. Ramendra Nath Ghosh, 82 ITR 888(SC)**, the hon'ble court has discussed the Rule 17 of Order V of CPC which read as under:

*" Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed "*

### **OPPORTUNITY OF BEING HEARD IS A PRINCIPLE OF NATURAL JUSTICE**

It is also a principal of natural justice to provide an opportunity of being heard before giving any verdict.

Rules of natural justice are embodied in the provision of service of notice on the party likely to be affected by a proceeding conducted and concluded under the provision of Income-tax Act, 1961. Notice is knowledge of facts which would lead a person to make enquiry.

A notice of hearing is a prerequisite for assessment as it will be difficult for any person to avail himself of the opportunity of hearing unless he knows that a hearing is going to take place.

**Service of notice** is a condition precedent for the making of an order of assessment by the authorities under the Income-tax Act, 1961. The assessee in law is entitled to rebut the material placed before him, if he so chooses and any material placed on record without notice to the assessee cannot be relied upon by the Revenue being violative of the principles of natural justice. The importance of issuing notice in income tax proceedings is so much so that even an order of rectification which has the effect of enhancing the income tax liability of an assessee becomes invalid in law, if passed without issuing a valid notice and affording opportunity of hearing.

Principles of natural justice demand a service of **valid** notice to the assessee before any adverse action is to be taken against the assessee by Income Tax Authorities.

2. AO has levied the penalty u/s 271(1)(b) for non-compliance of the notices dt. 16/08/2018, 08/10/2018, 01/11/2018 and 22/11/2018. No penalty can be imposed for this notice as:

The notice has never been served on the assessee.

Jurisdictional ITAT Jaipur Bench in case of **Shri Chouth Mal Sahram Vs ITO Ward 7(4) Jaipur ITA No. 311/JP/2018 order dt. 05/07/2018** held that *As regards the penalty levied for non compliance of notice under section 142(1), we find that the assessee was not served with any of the notices issued by the AO due to the change of address and since the assessee has not filed any return of income, therefore, the AO was not having the present address of the assessee. Hence when the notice issued under section 142(1) was not served upon the assessee, and the AO has not conducted further enquiry regarding the current address of the assessee then in the facts and circumstances of the case that the assessee had already furnished*

*the current address in the quantum proceedings, we find that the reasons explained by the assessee are bonafide and reasonable.*

Since, no notice is received by the assessee it cannot be held non-compliance by the assessee.

In view of the above, the penalty u/s 271(1)(b) imposed by the learned AO may kindly be deleted.”

6. On the other hand, the Id. D/R supported the orders of the lower authorities.
7. We have heard learned Counsels of both the sides, perused the material available on record and gone through the orders of the revenue authorities. The only issue raised in the present appeal is upholding the order of the AO passed under section 271(1)(b) of the IT Act, 1961. At the very outset, the Id. A/R submitted that the AO imposed penalty under section 271(1)(b) of the Act alleging that there is no compliance on the part of the assessee in response to notices issued by him from time to time. But, on the contrary, it was submitted by Id. A/R that none of the notices was received by the assessee or served upon the assessee. It was submitted that since notices were never served on the assessee, therefore, order imposing penalty is liable to be quashed as per law. There is no evidence on record put on by the AO as to what efforts have been carried out by the AO to serve the said notices and there is no specific finding in the assessment order whether the assessee refused to accept the notice or was not found at the place or was not residing at that place. Simply penalty has been imposed by considering that the notices were issued. In our view, service of notice is only a formality and, therefore,

no true or genuine efforts were made by the AO to serve the notices. Since there is no proof on the court file with regard to service of notice, therefore, in our view, no penalty is attracted. The Id. A/R placed reliance on the judgment of Hon'ble Supreme Court in the case of CIT vs. Ramendra Nath Ghosh, 82 ITR 888 (SC) wherein the Hon'ble Supreme Court has discussed as under :

*" Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed "*

The Id. A/R also relied on the decision of the Jaipur Bench of the Tribunal in the case of Shri Chouth Mal Sahram vs. ITO in ITA No. 311/JP/2018 dated 05.07.2018 wherein the coordinate bench of the Tribunal has held as under :-

*"As regards the penalty levied for non compliance of notice under section 142(1), we find that the assessee was not served with any of the notices issued by the AO due to the change of address and since the assessee has not filed any return of income, therefore, the AO was not having the present address of the assessee. Hence when the notice issued under section 142(1) was not served upon the assessee, and the AO has not conducted further enquiry regarding the current address of the assessee then in the facts and circumstances of the case that the assessee had already furnished the current address in the quantum proceedings, we find that the reasons explained by the assessee are bonafide and reasonable."*

Therefore, in the facts and circumstances of the case as discussed above and also following the judgment of the Hon'ble Supreme Court, supra, and of the coordinate bench of the Tribunal, we set aside the impugned order and delete the penalty.

8. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 1/05/2023.

Sd/-

( राठौड़ कमलेश जयंतभाई )  
(RATHOD KAMLESH JAYANTBHAI)  
लेखा सदस्य / Accountant Member

Sd/-

(संदीप गोसाईं)  
(SANDEEP GOSAIN)  
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 1/05  
/2023.

Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Smt. Bhanwari Devi, Alwar.
2. प्रत्यर्थी / The Respondent- The ITO Ward 2(2), Alwar.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 74/JP/2023}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

