IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "C", MUMBAI

BEFORE SH. B.R. BASKARAN, ACCOUNTANT MEMBER AND

SH. PAWAN SINGH, JUDICIAL MEMBER

ITA No.494/Mum/2014 for A Y : 2004-05

ITA No.495/Mum/2014 for A Y : 2008-09

Sh. Deepak Clifford Menezes Shop No. 2, Saibaba Society, Vakola, Santaruz (E), Mumbai -400055 **PAN: AAAPM7999L**	Vs	Assistant Commissioner of Income Tax, 19(2) Piramal Chambers Lalbaug, Mumbai -400012
Appellant		Respondent

ITA No.496/Mum/2014 for A Y : 2003-04

Mrs. Prescy Menezes Shop No. 5, Saibaba Society, Vakola, Santaruz (E), Mumbai -400055 **PAN: AANPM7554J**	Vs	Assistant Commissioner of Income Tax, 19(2) Piramal Chambers Lalbaug, Mumbai -400012
Appellant		Respondent
Assessee by		Sh. Deepak Trashwala (Advocate)
Revenue by		Sh. C.W. Angolkar DR
Date of hearing		03.11.2016
Date of pronouncement		09.11.2016

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH JUDICIAL MEMBER:

1. These three appeals under section 253 of the Income Tax Act ('Act') are directed by assessee(s) against three separate orders of order of Commissioner of income tax (Appeals) 18, Mumbai. In ITA No(s). 494-495/M/2013the assessee is assailing order dated 17/10/2013and 18/10/2013 for assessment year 2003-04 and 2008-09 respectively. And in ITA No 496/M/2013the assessee is assailing order dated 18/10/2013 for assessment year 2003-04. In all appeals facts are similar and common grounds of appeal are raised, thus all

the all appeals were clubbed together, hard and being decided by common order to avoid the conflicting decision.

2. In ITA 494/M/2013, the assessee has raised has raised following grounds of appeal:

(i) The proceeding initiated by the alleged issuance of notice under section 148 of the Act is invalid and bad in law.
(ii) The assessment order passed under section 143(3) rws 147 of the Act is invalid and bad in law.
(iii) The ld CIT(A) erred in dismissing the appeal and confirming the assessment order passed under section 143(3)rws 147 of the Act.
(iv) The ld CIT(A) erred in confirming the interest of Rs. 15,565/- charge under section 234A of the Act
(v) The ld CIT)A) erred in confirming the interest of Rs. 2,78,530/- charge under section 234B of the Act.
(vi) The ld CIT(A) erred in confirming the interest of Rs. 14,034/- charge under section 234C of the Act.

In ITA 495/M/2013, the assessee has raised has raised following grounds of appeal:

(i) The proceeding initiated by issuance of notice under section 148 of the Act is invalid and bad in law.
(ii) The assessment order under section 143(3) rws 147 of the Act is invalid and bad in law.
(iii) The ld CIT(A) appeals erred in dismissing the appeal and confirming the assessment order.
(iv) The ld CIT(A) appeals erred in confirming the income at Rs. 38,95,375/-as against the return income of Rs. 37,28,430/-
(v) The ld CIT (A) erred in confirming an ad hoc disallowance of Rs.109891/- being 15% of the business expenditure.
(vi) The ld CIT(A) erred in confirming income from other sources of Rs.7,62,078/- as against return income from other sources of Rs.7,04,922/-.
(vii) *The ld CIT(A) erred in confirming the interest under section 234A, 234B and 234C of the Act.*

In ITA 496/M/2013, the assessee has raised has raised following grounds of appeal:

(i) The proceeding initiated by issuance of notice under section 148 of the Act is invalid and bad in law.
(ii) The assessment order under section 143(3) rws 147 of the Act is invalid and bad in law.
(iii) The ld CIT(A) erred in dismissing the appeal and confirming the assessment order.
(iv) The ld CIT(A) erred in confirming interest of Rs 28, 5682/- charge under section 234B of the act.

(v) The ld CIT(A) erred in confirming interest of Rs 20,598/-charge under section 234C of the act.

(vi) The ld CIT(A) erred in confirming interest of Rs 2,242/-charge under section 234D of the act.

3. We have noticed that in all the appeals there are delay of 13 days in filing the appeal. The appeal(s) are accompanied with the application for condonation of delay along with the affidavit of assessee. In the application the assessee pleaded that the order of First Appellate Authority was received on 8th Nov 2013 and the appeal ought to have been filed on or before 7 January 2014, however the same was filed only on 21 January 2014. Thus, there has been a delay of 13 days in filing the appeal. It is further averred in the application that the relevant papers were handed over to Sh. V.S. Hadade Advocate on 1st January 2014. However Shri V.S. Hadade Advocate was not well and could not attend his office work till 16th January 2014 thus the delay of 13 days occurred due to sickness of the counsel. In the affidavit the assessee deposed that their Advocate Shri VS Hadade was not well from 2 January 2014 to 16 January 2014. The application is duly supported with the Medical Certificate. The ld AR of the assessee argued that there is sufficient cause for condonation of delay. The delay was not intentional or deliberate. The assessee has a good case and will suffer loss if the delay is not condoned. The ld AR prayed that a lenient view may be taken. On the other hand the ld DR for the revenue argued that he has no objection of the delays condone and the matter is decided on merit. Considering the contention of the application for a donation of delay, deposition in affidavit and the medical certificates filed in support of the condonation of delay application. We find that the appellant has shown sufficient cause for condoning the delay. Hence the delay in filing all the three appeals before this Tribunal is condone.

4. For appreciation of facts, first, we are taken ITA No. 494/M 2014. The brief facts of the case as gathered from the record are that assessee is an individual filed return of income for relevant assessment year on 27th Nov 2003 declaring total income at Rs.9,04,505/-. Subsequently, the assessee filed revised return of

income of Rs.16,11,703/- on 29th of May 2009. In the revised return of income the assessee offered income from other sources as interest received on fixed deposits which were not offered earlier. As per the assessing officer, the interest income was not shown in the original return of income and thus income has escape assessment to tax. Notice under section 148 was issued to the assessee only on 30 March 2010. The AO served the notice of reopening by way of a fixation on 31 March 2010. Subsequently, notice under section 142(1) was issued on 23 July 2010 and further on 9 December 2010 and 23 December 2010. The assessee appeared in response to the notice under section 142(1) and objected about the reopening of the assessment raising objection that notice under section 148 was neither received nor affixed at his address. The contention of the assessee was not accepted by AO. The AO proceeded for re-assessment of the income. The AO made various addition and disallowance is in the assessment order passed under section 143 (3) rws 147 of the Act. Aggrieved by the order of AO assessee filed appeal before the CIT(A) but without any success. Thus, the present appeal is filed before us.

5. We have heard the ld AR of the assessee and the ld DR for revenue. The ld AR for assessee argued that Ground No.1 to 3 are legal ground and may be decided first. In support of legal ground the ld AR of the assessee argued that no notice under section 148 was served upon the assessee. The Assessee never avoided receiving the notice under section 148. In fact no such notice was sent by AO for service. The notice allegedly issued on 30 March 2010 and affixed on 31st March 2010 is no service in the eyes of law. As no proper notice was served, the proceedings thus all the subsequent proceedings are invalid and void ab-initio. On merits it was argued by ld AR of the assessee that assessee filed revised return of income on 29th may 2009 revising income to Rs. 16,11,703/-. The assessee not only offered the income which was not offered due to inadvertence but also calculated the tax on additional income and interest under section 234B and 234C of the Act and paid the tax before filing the revise return of income. The assessee has not received any notice till night

December 2010 when notice of hearing under section 142(1) was received. The assessee objected that no notice under section 148 was either received or found at any place of assessee. The assessee requested to supply the copy of notice under section 148. Despite objection of the assessee the AO proceeded for re-assessment of income and also charge interest under section 234A, 234B and 234C. The ld CIT(A) has also not appreciated the contention and the submission made before him. The ld AR of the assessee submitted that as no notice under section 148 was served thus the reopening of assessment under section 147 independent law and the proceeding taken there around are invalid. The ld AR of the assessee relied upon the decision of the Delhi Tribunal in AVI- Oil India (P) Limited Versus ACIT [2007] 18 SOT 219 (Delhi). On the other hand the ld DR for the revenue supported the orders of authorities below and would argue that the notice under section 148 was served at the last known address of the assessee. The notice dated 30 March 2010 was affixed on 31 March 2010. The notice was affixed at the address mentioned in the revised return of income filed by the assessee. The address of shop given by the assessee found as closed. On verification by the inspector it was revealed that assessee had closed the shop 2 to 3 years back. As assessee was not found present at the Address provided in the return of income the notices were affixed at the conspicuous part of the premises. The ld DR for revenue relied upon section 292BB and the decision of Hon'ble High Court of Allahabad in Dr Sheo Murti Singh Vs CIT [2015] 64 taxman.com 276(Allahabad).

6. We have considered the rival contention of the parties and gone through the orders of authorities below. Section 282 of the income tax act prescribed the mode of service of notice which may be read as under;

282. Service of notice generally

(1) The service of a notice or summon or requisition or order or any other communication under this Act (hereafter in this section referred to as "communication") may be made by delivering or transmitting a copy thereof, to the person therein named,—

(*a*) by post or by such courier services as may be approved by the Board; or

(*b*) in such manner as provided under the Code of Civil Procedure, 1908 (5 of 1908) for the purposes of service of summons; or

(*c*) in the form of any electronic record as provided in Chapter IV of the Information Technology Act, 2000 (21 of 2000);

(*d*) by any other means of transmission of documents as provided by rules made by the Board in this behalf.

(2) The Board may make rules providing for the addresses (including the address for electronic mail or electronic mail message) to which the communication referred to in sub-section (1) may be delivered or transmitted to the person therein named.

Explanation.—For the purposes of this section, the expressions "electronic mail" and "electronic mail message" shall have the meanings as assigned to them in Explanation to section 66A of the Information Technology Act, 20004.

We may also refer the relevant rules of order 5 of CPC

17. Procedure when defendant refuses to accept service, or cannot be found— Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time 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 do, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

18. Endorsement of time and manner of service— The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

19. Examination of serving officer.— Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

We have noticed that last date for reopening of the assessment was 31 March 2010. The AO for the first time issued notice only on 30 March 2010. The AO has not made any attempt to serve the notice by post or courier, rather it was send through notice server (dasti / by hand). The same notice was allegedly

affixed on the premises of the assessee on the very next day i.e. on 31 March 2010. 31st March was the last day for reopening the assessment. The AO not recorded his satisfaction as to why the notice by any other mode was not send or that assessee was duly served by notice under section 148. There is no reference about the witnesses present on the spot while affixing the copy of the notice.

Section 282 of the income tax Act provides complete procedure for service of notice and summons. Clause (a) of subsection (1) of section 282 prescribes that notice by way of post or by courier. Clause (b) provides the manner as per Code of Civil Procedure. Clause (c) prescribes the service by electronic mode and lastly clause (d) by any means of transmission of documents as provided by CBDT. Order V of Code of Civil Procedure prescribes complete procedure for service of notice or summons. We have already referred the relevant Rule 17 to 19 of Order 5 (supra). No satisfaction as provided under Rule 18 and 19 was recorded. Admittedly, notice u/s 148 was not sent by way of registered post or through courier. The AO wake up only at the eleventh hour to serve the notice on 31st March, which was the last day for issuing notice. The notice was straightway affixed at the address of the assessee, no name of independent witness in whose presence it was affixed was recorded by the notice server. The mode of service of notice by way of affixation should not be resorted at the first instance that too on the last day of period of limitation. Interestingly, notices u/s 142(1) sent by the AO was duly served at the same address in ordinary manner. The manner in which the notice u/s 148 was served is surrounded by high degree of suspicious. Our view is also strengthening by the decision of coordinate bench in AVI-Oil India (P) Ltd Vs ACIT (supra).

The ld DR for revenue relied on section 292BB of the Act. Section 292BB may come in rescue when there is irregularity in the service of notice, the assessee has disputed that notice itself was not served. Moreover, the assessee made objection during the proceedings before the completion of reassessment. The ld DR further relied on the decision of Allahabad High Court in Dr. Sheo Murti Singh Vs CIT (supra), facts of which are different as in that case the assessee

refused to receive the notice and the same was affixed thereafter. However, in the case in hand the notice was affixed on the last day of limitation. Thus in our considered view the notice under section 148 was not served on the assessee and thus the proceedings initiated by AO are invalid. In the result the Ground No.1 to 3 raised in the present appeal are allowed. As the appeal of the assessee is succeeded on legal issue, hence the discussions on other issue have become academic.

7. In the result the appeal of the assessee is allowed.

ITA No. 496/M/2014

8. In this appeal the assessee has raised the identical grounds of appeal. The date and events and facts of this appeal are also similar. The notice under section 148 was allegedly served in the same manner as in ITA No. 494/M/2014, hence this appeal is also allowed.

ITA No. 495/M/2014 (AY-2008-09)

9. Brief facts of the case are that return of income was filed on 26.09.2008 declaring income at Rs. 32,73,980/-. Thereafter, assessee filed revised return of income on 29.05.2009 declaring total income at Rs. 37,28,430/- and included Income from House Property at Rs. 71,800/-, Income from Business & Profession at Rs. 23,64,157/- and Income from Other Sources at Rs. 704922/-. The assessment was reopened u/s. 147. Notice u/s 148 dated 16.03.2011 was served on the assessee. The assessee replied the notice u/s 148 and contended that the return filed on 29.05.2009 be treated as return filed in response to the said notice. Thereafter, notice u/s 142(1) dated 20.06.2011 was served along with the reasons of reopening. During the re-assessment proceeding, the assessee contended that due to theft in his office and the Computers of assessee were stolen on 13.02.2011 only sum of the bank accounts and other Ledger Accounts could be verified. The AO proceeded to re-assess the income of the assessee and made the adhoc disallowance @ 15% of expenses and assessed the income u/s 143(3) r.w.s. 147 of the Act at Rs. 38,95,475/-. Aggrieved by the order of AO, assessee filed appeal before the AO challenging the validity

of re-opening and further against the adhoc addition @ 15% of the expenses. The appeal of the assessee was dismissed by ld. CIT(A), thus, the present appeal is filed before us.

10. Ground No.1 & 2 of the present appeal are legal ground wherein the assessee has challenged the validity of the order passed u/s 143(3) r.w.s. 147 of the Act. We have heard the ld. AR for assessee and DR for Revenue and perused the material available on record. The ld. AR of the assessee argued that assessee filed revise return of income within the time allowed under section 139 (5) of the Act. The AO has issued notice under section 148 of the Act without specifying that the income has escaped assessment. Accordingly assessee contended that the reopening is bad in law. The ld DR for the revenue supported the order of authorities below.

11. We have considered the contention of the parties and perused the record. We notice that the AO has not stated any reason for reopening of the assessment, meaning thereby the AO has not entertained the belief that there was escapement of income. Since, the AO does not have any reason to believe that the income escape from the assessment. Hence, we find merit in the submission made by the assessee that reopening is bad in law. Thus, the legal grounds raised by assessee are allowed. As the appeal of the assessee is succeeded on legal issue, hence the discussions on other issue have become academic.

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

Order pronounced in the open court on 9th November, 2016.

Sd/-	Sd/-
(B.R.BASKARAN)	**(PAWAN SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 09/11/2016

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.

3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

(Asstt.Registrar)

ITAT, Mumbai