

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, AHMEDABAD**

**BEFORE SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER &
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

I.T.A. Nos.1033&1034/Ahd/2019
(Assessment Year: 2007-08)

Babulal Punmaji Gehlot, B-10, Laxmi Villa Green, Nr. 108, Emergency, Nava Naroda, Ahmedabad-382330	Vs.	Income Tax Officer, Ward-5(3)(3), Ahmedabad
[PAN No.ABM PG4411A]		
(Appellant)	..	(Respondent)

Appellant by :	Shri Nimesh Vayawala, A.R.
Respondent by:	Shri Ashok Kumar Suthar, Sr. DR
Date of Hearing	13.08.2024
Date of Pronouncement	23.08.2024

ORDER

PER SIDDHARTHA NAUTIYAL - JUDICIAL MEMBER:

These are appeals filed by the Assessee against the order passed by the Ld. Commissioner of Income Tax-5, (in short “Ld. CIT(A)”), Ahmedabad vide orders dated 25.03.2019 for Assessment Year 2007-08. The appeal filed by the assessee in ITA No. 1033/Ahd/2019 relates to order passed by Ld. CIT(A) in relation to quantum proceedings, whereas appeal filed by the assessee in ITA No. 1034/Ahd/2019 relates to order passed by Ld. CIT(A) upholding the levy of penalty under Section 271(1)(c) of the Act in relation to quantum proceedings for the same assessment year. Since common facts and issues for consideration are involved for both the years under consideration, both the appeals filed by the assessee are being taken up together.

We shall take up assessee's appeal in ITA No. 1033/Ahd/2019
(Quantum Proceedings)

2. The assessee has taken the following grounds of appeal:

ITA No. 1033/Ahd/2019

“1. The Appellant submit that the learned CIT(A) has grossly erred in law and on facts to confirmed the addition made by the Ld A.O. amounting to Rs. Rs. 62,37,123/- regarding the Secured Loans and Unsecured loan taken from various Banks and Financial Institutions in earlier years also and the same have been verified / examined and accepted by the Ld A.O. in A.Y 2006-07 and passed the order u/s 143(3). Hence the addition of unexplained cash credit to be deleted fully.

2. The Appellant submit that the learned CIT(A) has grossly erred in law and on facts to confirmed the addition made by the Ld A.O. amounting to Rs. 2,08,67,654/- on account of estimation of Net Profit @ 8% on Gross Sales which is unreasonable without appreciating the facts that the Accounts was Audited u/s 44AB and the report and Audited Balance sheet is available on record and also the previous year i.e. A.Y.2006-07 assessment was made u/s 143(3) and the details were verified. Hence the said addition to be deleted fully.

3. The Appellant submit that the learned CIT(A) has grossly erred in law and on facts to not accepting and allow the plea for condonation of delay in filing of appeal before him. The fact is that appellant had not received notice for hearing and also the copy of order which was passed u/s 143(3) r.w.s. 144.of the Act. on dt.31-12-2009 because due the change of address. However appellant have made the application before Ld A.O. on dt: 05/01/2017 and get the copy of order and after that filing the appeal before him. Even though the appellant submit the affidavit for the same also. So your honour is requested to please condone the delay in filing of appeal before learned CIT(A).

4. The Appellant submit that penalty u/s 271(1) (c) not to be imposed on the basis of certain disallowance / addition.

5. The Appellant craves leave to add, alter and amend any of the Grounds of Appeal on or before the hearing of the appeal”

ITA No. 1034/Ahd/2019

“1. The Appellant submit that the learned CIT(A) has grossly erred in law and on facts to confirmed the penalty imposed u/s 271(1)(C) on the basis of addition made by the Ld A.O. for the Secured Loans and Unsecured loan taken from various Banks and Financial Institutions and estimation of Net Profit @ 8% on total turnover

without appreciating the details and documents available on record. Hence the penalty imposed on that addition may be deleted.

2. *The Appellant submit that the learned CIT(A) has grossly erred in law and on facts to not accepting and allow the plea of condonation of delay in filing of appeal before him. The fact is that appellant had not received notice for hearing and also the copy of order which was passed u/s 143(3) r.w.s. 144. of the Act. on dt.31-12-2009 because due the change of address. However appellant have made the application before Ld A.O. on dt: 05/01/2017 and get the copy of order and after that filing the appeal before him. Even though the appellant submit the affidavit for the same also. So your honour is requested to please condone the delay in filing of appeal before learned CIT(A).*

3. *The Appellant craves leave to add, alter and amend any of the Grounds of Appeal on or before the hearing of the appeal.”*

3. The brief facts of the case are that the assessee is an individual and is engaged in the business of trading of grains, grams, flour etc. During the year under consideration, the assessee filed return of income declaring total income of Rs. 9,12,500/-. The case of the assessee was selected for scrutiny and notice under Section 143(2) of the Act was issued on 24.09.2008 which was duly served upon the assessee on 30.09.2008. In response to the said notice, none appeared on behalf of the assessee. Thereafter, the Assessing Officer issued various notices dated 24.09.2008, 02.02.2009 and 23.07.2009. However, all the notices issued by the Assessing Officer remained uncomplied with. Thereafter, the Assessing Officer issued final notice dated 08.12.2009, giving a final opportunity to the assessee to cause appearance, however, again none appeared on behalf of the assessee and no details were filed. Accordingly, the Assessing Officer proceeded to finalize the assessment order on the basis of material available on record.

4. On verification of return filed by the assessee, and data available on record, the Assessing Officer observed that the assessee had shown unsecured loan of Rs. 62,37,123/-. The Assessing Officer was of the view

that since the assessee did not furnish any details, the unsecured loans and the source thereof remained unexplained. Accordingly, the Assessing Officer added a sum of Rs. 62,37,123/- as unexplained cash credit in the hands of the assessee. Further, on verification of return of income filed by the assessee, the Assessing Officer observed that the assessee had shown gross sale of Rs. 26,08,45,675/-. In absence of any details such as opening stock, closing stock, purchase, sales, various business expenses claimed by the assessee, the Assessing Officer finalized assessment under Section 143(3) r.w.s. 144 of the Act and estimated net profit @ 8% of gross sales amounting to Rs. 2,08,67,654/- and added the same to the total income of the assessee. The Assessing Officer also initiated penalty proceedings under Section 271(1)(c) of the Act for concealment of income. The said assessment order was passed on 31.12.2009.

5. The assessee filed appeal against aforesaid assessment order of Ld. Assessing Officer on 05.01.2017, after gap of over seven years. The Ld. CIT(A), in order to verify the correct date of service of order (passed under Section 143(3) of the Act on 31.12.2009), called for the case records from the concerned Assessing Officer. On verification of the case records, the Ld. CIT(A) observed that the assessment order was served by the assessee Affixture on 27.01.2010, whereas the assessee has e-filed the appeal on 01.01.2017, which is beyond the prescribed period of limitation. The assessee filed Affidavit for condonation of delay before Ld. CIT(A) in which the assessee submitted that the assessment order dated 31.12.2009 was not received by the assessee due to change of address. However, the assessee came to know about the passing of order only once demand was

raised upon the assessee and thereafter, the assessee filed an application for obtaining a copy of the order and the assessment order was received by the assessee on 05.01.2017. On consideration of the facts before the Ld. CIT(A), he was of the view that the assessee did not furnish any reasonable and sufficient cause which prevented him to appeal within stipulated time. The Ld. CIT(A) observed that the appeal was filed late by seven years and the only reason given by the assessee for the inordinate delay in filing of appeal was that due to change in address of the assessee, the assessment order was not received by the assessee and hence there was delay in filing of the present appeal. Accordingly, Ld. CIT(A) refused to condone the delay in filing of appeal by the assessee and dismissed the appeal of the assessee with the following observations:

“4.5 In view of the above judicial pronouncements, the basic principle emerges that the delay should be bonafide and there should not be any negligence on the part of the appellant. However in the appeal under consideration, the appellant has taken the vague and unsupported plea for the delay and which is not verifiable from the records. It is noted from the assessment order that notice u/s 143(2) dated 24.09.2008 was properly served upon the assessee on 30.09.2008. It is also fact that during appellant proceeding, appellant did not object the service of the above notice. It is also noted that during the year under consideration the appellant was doing business in the name of 4 proprietorship concerns which shows that he was a prudent person therefore it was expected from the him to know that the assessment order will be passed in compliance of notice u/s 143(2) of the IT Act. However his conduct during the assessment proceeding, clearly shows his deliberate non compliance before the AO. Thus it appears that the appellant deliberately did not take cognigence of the assessment order passed. Since the notice u/s 143(2) was received by the appellant therefore the contention of the appellant that the he was not aware of the assessment order passed is not tenable. The appellant has not submitted any evidence either along with the appeal or during appellate proceedings to justify the non receipt of the assessment order. Therefore, the delay made in filing the appeal does not deserve to be condoned and appellant's request for condonation of delay is not entertained and rejected. Therefore the appeal is dismissed on this count.

5. Accordingly, the appeal stands dismissed.”

6. The assessee is in appeal before us against the aforesaid order passed by Ld. CIT(A) refusing to condone the delay in filing of appeal. Before us, the Counsel for the assessee submitted that the assessee had suffered business losses in 2009 and the business of the assessee was closed down and the assessee had also sold his residential house in the year 2009, in the month of November 2009, therefore, the assessment order was not served upon the assessee. The contention of the Counsel for the assessee before us was that the assessment order was not served either in person or by Registered Post and the assessment order was served upon the assessee by “affixture”. However, the Counsel for the assessee submitted that the copy of the satisfaction note showing the circumstances under which the Department decided to serve the assessment order by affixture have not been provided to the assessee. The Counsel for the assessee submitted that the Affidavit of the notice server stating that notice could not be served in the normal way and the assessee was trying to avoid the service has also not been provided to the assessee. Therefore, the contention of the Counsel for the assessee before us was that the mandatory provision as laid down for service of assessment order were not followed by the Department and hence, the assessment order had not been validly served upon the assessee. The Counsel for the assessee submitted before us that the procedure laid down for service of assessment order as mandated under Section 282 of the Act was not followed by the Income Tax Department. The Counsel for the assessee submitted that the Department had not made any attempt to serve the assessment order in normal course and the service of assessment of by affixture at a place which was not functional and closed is not a valid service of assessment order. The Counsel for the assessee placed reliance

on the case of **CIT vs. Ramendranath Ghosh 82 ITR 888 (SC)** and on the case of **CIT vs. Shersingh 37 taxmann.com 418** in support of the above contention.

7. In response, the Ld. D.R. submitted that even the assessee has not denied service of notice dated 24.09.2008 under Section 143(2) of the Act, which was duly served upon the assessee on 30.09.2008. Therefore, even despite valid service of notice on the assessee during the course of assessment proceedings, the assessee deliberately refused to participate in assessment proceedings and any absence of in compliance on part of the assessee, the Assessing Officer had no option but to pass best judgment assessment order under Section 143(3) of the Act r.w.s. 144 of the Act, on the basis of material available on record. Secondly, the Ld. D.R. placed before us the relevant assessment records and from the same, it was observed that the Assessing Officer had tried to serve the assessment order on the assessee by “speed post” and the assessment order could not be served on the assessee with the remarks “returned back”. Accordingly, the D.R. submitted that the Assessing Officer had followed the due process as mandated under Section 282 of the Act under which, the Assessing Officer first sent the assessment order through “speed post” and once the speed post was “returned back” then the assessment order was served upon the assessee by way of affixture at the last known address. Thirdly, the Ld. D.R. also pointed out that the assessee could not be allowed to take advantage of his own deliberate non-compliance. In this case, admittedly, notice under Section 143(2) of the Act dated 24.09.2008 was duly served upon the assessee on 30.09.2008. However, the assessee deliberately choose not to

file any response to the said notice and hence, the Assessing Officer was left with no option to pass an ex-parte order under Section 144 of the Act, on the basis of material available on record. Further, the Ld. D.R. also submitted before us that the conduct of the assessee is also evident from the fact that the assessee filed appeal before the aforesaid order passed by the Ld. CIT(A) only when the bank account of the assessee at IDBI Bank, Ashram Road Branch, Ahmedabad was attached under Section 222 to 225 of the Act by the Tax Recovery Officer against non-payment of tax demand against the aforesaid assessment order. Accordingly, it was only when the Tax Department marked a lien to the tune of Rs. 2.15 crores on the assessee's bank account held with IDBI Bank that the assessee immediately filed appeal against the assessment order dated 31.12.2009, on 01.02.2017 i.e. after a gap of over seven years. Therefore, had the Income Tax Department not attached the bank account of the assessee towards recovery of tax arrears, the assessee would have never filed appeal before the Ld. CIT(A) against the impugned assessment order. Therefore, the case of the Ld. D.R. is that first the assessment order was served by speed post, which was "returned back" and only thereafter, the Department served the assessment by way of affixture at the last known address. The assessee has claimed to have change it's address, however, the assessee did not inform the Income Tax Department about the change in address and also the details of change in address were also not updated in the PAN data base. The assessee, therefore, was deliberately avoiding the services of notice by the Tax Department and it was only when the bank account of the assessee, held by the assessee at IDBI Bank, Ashram Road Branch, Ahmedabad was attached by the Tax Recovery Officer in proceeding under Section 222 to

225 of the Acct that the assessee finally decided to file appeal before CIT(A), and that too after a gap of over seven years. Accordingly, the Ld. CIT(A) has not erred in facts and in law in refusing to condone the delay in filing of the present appeal.

8. We have heard the rival contentions and perused the material on record.

9. On going through the facts of the instant case, it is evident that the assessee has been deliberately avoiding receipt of notices issued by the Income Tax Department and had also deliberately not participated in assessment proceedings. The assessee had changed his address and such change in address was also intimated to the Income Tax Department and neither was the PAN data base was updated by the assessee to keep the Income Tax Department informed about the whereabouts of the assessee. It was only when the bank account of the assessee was attached by the Tax Recovery Officer that the assessee decided to file appeal before the Ld. CIT(A) and that also after a gap of over seven years. It would be useful to reproduce Section 282 of the Act which lays down the procedure for service of notice:

“(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); or*

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

10. As per the provisions of Section 282 of Income Tax Act,1961, the service of notice of summon or requisition or order under the I.T. Act may be made by delivering a copy thereof, by post or by such courier services as may be approved by the Central Board of Direct Taxes. Sub-Rule (1) of the Rule 127 of the Income Tax Rules, 1962 provides that for the purposes of sub-Section (1) of Section 282, the addresses (including the address for electronic mail or electronic mail message) to which a notice or summons or requisition or order or any other communication under the may be delivered or transmitted shall be as per sub-Rule (2). Clause (a) of sub-Rule (2) of Rule 127 states the following:

“The addresses referred to in sub-rule (1) shall be- (a) for communications delivered or transmitted in the manner provided in clause (a) or clause (b) of sub-section(1) of section 282

(i) the address available in the PAN database of the addressee; or

(ii) the address available in the income-tax return to which the communication relates; or

(iii) the address available in the last income-tax return furnished by the addressee; or

(iv) in the case of addressee being a company, address of registered office as available on the website of Ministry of Corporate Affairs Provided that the communication shall not be delivered or transmitted to the address mentioned in item (i) to (iv) where the addressee furnishes in writing any other address for the purposes of communication to the income-tax authority or any person authorized by such authority issuing the communication;”

11. The Assessing Officer can also serve the assessment order by affixture. Service by affixture is resorted to in two circumstances: First, when the assessee or his agent refuses to sign the acknowledgement for

service or when the serving official, after using all due and reasonable diligence, cannot find the assessee in his residential or business premises within a reasonable time and second, when there is nobody else authorized to receive the notice. In the above circumstances, the Income Tax Inspector can effect the service by affixture on his own initiative without waiting for an order from the AO. A report is to be drawn up by the Income Tax Inspector, on the facts and circumstances of the service by affixture, specifying the date and time of service and the name of the identifier if any.

12. Therefore, for the purpose of deciding the question of condonation of delay, it needs to be assessed whether the Assessing Officer had followed the due process laid down for service of notice by affixture in the instant facts. While, from the facts placed on record before us, the Assessing Officer had initially tried to serve the assessment order by way of speed post which could not be done since the assessee had left the premises without intimation regarding the new address, and therefore, the Assessing Officer had no option to take resort to service of assessment order by affixture. However, from the facts placed on record before us, it is not clear where the complete process of affixture as laid down under Section 282 of the Act r.w.r. 127 of the Income Tax Rules, 1961 has been followed by the Income Tax Department. Accordingly, in the interest of justice, the matter is restored to the file of Ld. CIT(A) to call for the relevant assessment records for the purpose of verifying whether the due process of service of assessment order by way of affixture has been followed in the instant case. Here it is also pertinent to point out that the assessee has not pressed for vacating / setting-aside of the assessment order, as being bad in law, but the

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only request of the Counsel for the assessee before us is that in case it is found that the due process for service of notice has not been followed by the Income Tax Department, then the Ld. CIT(A) may condone the delay in filing of the appeal before him and thereafter, decide the issue on merits after giving due opportunity of hearing to the assessee. Accordingly, the matter is set-aside to the file of Ld. CIT(A) for carrying out the verification as directed in the preceding paragraphs.

13. Since the matter related to the quantum appeal has been restored to the file of Ld. CIT(A), the penalty proceedings are also restored to the file of Ld. CIT(A), as well.

14. In the combined result, both the appeals of the assessee are allowed for statistical purposes.

This Order pronounced in Open Court on	23/08/2024
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Sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Ahmedabad; Dated 23/08/2024

TANMAY, Sr. PS

TRUE COPY

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad