

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : F : NEW DELHI

BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.1822/Del/2016
Assessment Year: 20000-01

Shri Mahipal,
C/o Vijay Kumar Gupta,
Advocate, Opp. Jain Mandir,
Main Bazar, Ballabhgarh,
Faridabad -121004.

Vs Income Tax Officer,
Ward-II(4),
Faridabad

PAN: ATVPP9291R

(Appellant)

(Respondent)

Assessee by : Shri Vijay Gupta, CA
Revenue by : Ms Harpreet Kaur Hansra, Sr. DR
Date of Hearing : 03.12.2024
Date of Pronouncement : 11.12.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the order dated 29.01.2016 of the Commissioner of Income-tax (Appeals), Faridabad (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in Appeal No.03/2014-15 arising out of the appeal before it against the order dated 28.02.2014 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') by the ITO, Ward II(4), Faridabad (hereinafter referred to as the Ld. AO).

2. On hearing both the sides, it came up that the assessee is primarily pressing ground No.1 coming out of allegation that the impugned assessment order has been passed u/s 147 of the Act without serving the statutory notice u/s 148 of the Act. In this context, it can be observed that in the assessment order, it is mentioned that the notice was issued to the assessee on 22.03.2007 with the approval of JCIT, Range-2, Faridabad. However, the mode of service is not mentioned and this issue was also raised before the Id.CIT(A) and it was disposed of by following observations in paras 8 and 8:

“8. Ground No. 1, deals with the issue of notice u/s 148. The written submissions of the Ld. Counsel on this issue are placed on record.

9. The Ld. AR in his written submissions on page 9, has himself mention that the notice was sent by Registered Post on 30.03.2007 and the same was not received back by the AO and also the fact that the notice was served through affixture on 30.03.2007. Moreover, it is also seen from the appellant's submission that the notice server has reported that the appellant refused to received the notice on 22.03.2007. In view of these facts, I am convinced and satisfied that the service of notice u/s 148 in the present case was proper and accordingly this Ground No. 1 is dismissed.”

3. The Id. DR has primarily relied the aforesaid observations of the CIT(A) and also relied on the submissions given by the AO dated 06.07.2021 wherein rebutting the affidavit of the assessee that no notice u/s 148 of the Act was served, the AO has submitted as follows:-

“1. As per the record, notice u/s 148 was issued vide dairy No. 5814 on dated 22.03.2007 and the notice server of the department was directed to get the notice served. The notice server on dated 22.03.2007 submitted in writing that the assessee refused to accept the notice. Copy of the notice u/s 148 issued on 22.03.2007 and the report of the Notice Server on the notice is enclosed for kind reference.

2. The copy of the notice u/s 148 was also sent through speed post and the speed post was not received back as per record, the copy of the proof of the customer receipt issued by the post office of the, speed post is enclosed for your kind reference.

3. The notice u/s 148 was also served upon the assessee by affixture u/s 282 of the Income Tax Act, 1961 and code of civil procedure, 1908 (5 of 1908) on 30.03.2007. The copy of the order of the A.O. directing the authorized Inspector of this office to serve the said notice by affixture on some conspicuous place on the last known address of the assessee is enclosed for your kind reference.”

4. After going through the averments of the AO and the accompanying documents, we find that notice was issued on 22.03.2007 but that was allegedly not served and a report of refusal was received. Though this notice was allegedly dispatched through speed post. However, there is no accompanying record of receipt-despatch register showing that this notice was actually issued in due course of duty. When the assessee had approached the Department calling for delivery status of the notice u/s 148, the assessee was informed that the records have been weeded out.

5. The assessee has also drawn our attention to the fact that the notice when issued on 22.03.2007 merely mentions: ‘Shri Mahilal, S/o Shri Dhanpal, Village Fatehpur Chandela, Faridabad’ and on the envelop of the speed post it was written: ‘Shri Mahipal, Village Fatehpur Chandela, Faridabad.’ The assessee had filed the electoral roll of this village showing there are numerous persons with the name ‘Mahipal’ in this village. Thus, it not a fit case, to attach any presumption of due issue and service of the notice, on the basis of official records of AO or the postal authorities.

5. Then, we find that a notice dated 30.03.2007 is shown to be issued with a direction for service u/s 282 of the Act r.w. provisions of CPC 1908. In this letter AO has narrated that an opinion was formed that the assessee cannot be served any ordinary post, is deliberately avoiding the service, therefore, one Shri L.N. Tikku, Inspector in the office of ITO, Ward-II(4), Faridabad was directed to serve notice by affixture on conspicuous place on the last known address of the assessee. However, the AO has not supported the issue of this notice with any corresponding note sheet entry mentioning that AO was satisfied that assessee cannot be served in ordinary course or is otherwise evading the notice. We are of the considered view that AO was supposed to record reasons to serve the assessee by substituted service and then to have issued the notice.

6. We find that there is merely an endorsement report mentioning, 'Notice Affixed' dated 30.03.2007. It is not witnessed by any independent person. It does not say what was the address where it was affixed. It does not show how it was verified that this was the last address of the assessee. As for the purpose of affixation, provisions of Order V, Rule 20 of the CPC should have been adhered to and after going through the report on the notice, we find that all the basic ingredients for resorting to substituted service are missing.

7. The settled proposition of law is taken note of by a coordinate bench in the case of **Shuaib Ahmed, New Delhi vs Ito Ward - 65(2), New Delhi decided on 16 January, 2023 vide I.T.A. No. 7782/Del/2019**, where in

reliance was placed on the decision of **Ess Aar Exports Vs. I.T.A. No. 7782/Del/2019 Income Tax Officer [(2005) 94 ITD 484 (Delhi)]** and the settled proposition of law is discussed in length and we consider it appropriate to reproduce the same here in below;

“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 I.T.A. No. 7782/Del/2019 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 un- served. 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 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 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."

8. The aforesaid principles to examine question of due service of notice when applied to present case, establish that it is not a case of a defect in issue of the notice, but, the facts establish non-service of notice in accordance with law. On the basis of the aforesaid discussion, we are of the considered view that the assessee was not served with the notice u/s 148 of the Act and the report of AO relied by the ld. DR has no credibility. Thus, we are inclined to sustain this ground No.1. **Accordingly, the appeal of the assessee is allowed.**

Order pronounced in the open court on 11.12.2024.

Sd/-

(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Dated: 11th December, 2024.

dk

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Copy forwarded to:

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

Asstt. Registrar, ITAT, New Delhi