

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI**

BEFORE SHRI.NARENDER KUMAR CHOUDHRY (JUDICIAL MEMBER)
AND
MISS. PADMAVATHY S. (ACCOUNTANT MEMBER)

I.T.A. No.1489/Mum/2020
(Assessment year : 2014-15)

Seema A Talesara
7B, Abilasa CHS, 46, August
Kranti Marg, Gowalia Tank,
Mumbai-400 036

PAN : AACPT2912Q
APPELLANT

vs Income-tax Officer-19(3)(3),
Mumbai, Matru Mandir, Tardeo,
Grand Road, Mumbai

RESPONDENT

Present for the Assessee	: Shri. Dharan Gandhi, Ld. Adv
Present for the Department	: Shri. P.D. Choughule (Addl. CIT) Ld. Sr. DR

Date of hearing : 11/01/2024
Date of pronouncement : 31/01/2024

ORDER

Per N.K. Choudhry (JM):

This appeal has been preferred by the Assessee, against the order dated 15/11/2019 impugned herein passed by the Commissioner of Income-tax (Appeals)-30, Mumbai (in short 'Ld. Commissioner') under section 250 of the Income-tax Act, 1961 (in short, 'the Act') for the A.Y. 2014-15.

2. In the instant case, at the outset, we observe that there is a delay of 59 days in filing the instant appeal, on which the Assessee claimed that the Assessee checked the income-tax portal on 11/03/2020 and came to know about the order dated 15/11/2019 passed by the Ld. Commissioner. The tax consultant missed to check the income-tax portal due to time barring assessment proceedings under the Act and various other compliances pertaining to GST and therefore the delay has been occurred in filling of appeal. However the Assessee filed the appeal on 13th March, 2020 itself, but with an application for condonation of delay. The delay in filing the appeal was purely on account of oversight and neither there was any malicious intention nor any undue gains that have been derived from the same and even otherwise, the Assessee had no intention to jeopardize the interest of the Revenue by delaying the filing of appeal. The Ld. DR on the contrary, refuted the claim of the Assessee. We have given thoughtful consideration to the claim of the Assessee and do not find any contrary material and / or reason to contradict the said claim of the Assessee qua delay and therefore by considering the reasons for condonation of delay as genuine and bonafide, we are inclined to allow the contention of delay of 59 days in filing the instant appeal. Consequently, the delay is condoned.

3. Coming to the merit of the case, we observe that the Assessee had declared total income of R.6,43,160/- by filing its return of income on dated 12/07/2014, which was processed under section 143(1) of the Act. Subsequently, the case of the Assessee was selected for scrutiny through CASS and accordingly, statutory notices were issued to the Assessee, in response to which the Assessee submitted the

relevant details and documents. The Assessing Officer considering the same observed that Assessee has shown long term capital gain income of Rs.97,15,890/- and the same has been claimed as exempt. The said long term capital gain income is earned on account of sale of shares of M/s Kadwani Securities Ltd and Lifeline Drugs and Pharma Ltd. The Assessing Officer further on the basis of report of the Kolkata Investigation Wing, treated the said shares as penny stock as ingenuine and manipulated and ultimately, treated the sale price of the said share amounting to Rs.1,01,69,601/- as un-explained cash credit and added the same in the income of the Assessee.

4. The Ld. Commissioner on appeal, affirmed the said addition against which the Assessee is in appeal before us.

5. We heard the parties and perused the material available on record. The Assessee before us mainly challenged the assessment order on the legal aspect. The Assessee claimed that though the Assessing Officer in first para of the assessment order has duly recorded that the case was selected for scrutiny through CASS, accordingly, the statutory notice under section 143(2) of the Act was issued and duly served on the Assessee; however, no such notice was ever served upon the Assessee. The Assessee further claimed that she sought certain documents from the Revenue Department and thereafter only came to know that the notice issued under section 143(2) of the Act dated 18/09/2015 by the Assessing Officer, in fact was allegedly served through affixture on the reason that premise/residence of the Assessee was found closed. The Report/letter dated 30/09/2015 submitted by the Inspector to the ITO / Assessing Officer, for the sake of brevity is reproduced below:-

“Dated : 30.09.2015.

To :
The I.T.O.-19(3)(3),
Mumbai.

Sir,

As directed by you, I had gone to serve the notice u/s 143(2) of the I.T. Act, 1961 dated 18.09.2015 in the case of Smt. Seema Ashokkumar Talesara at 7B Abhilasha Co Opp Hsg. Soci.,46 August Kranti Marg, Gowalia Tank, Mumbai - 36. The premises was found closed. So, the notice was served through affixture by affixing the notice at a conspicuous place of premises.

Yours faithfully,

Sd/-

(Sunil R. Deshbhratar)
Inspector
O/o. ITO-19(3)(3), Mumbai”

5.1 The Assessee further claimed that in the aforesaid letter, it is nowhere mentioned ‘when the Inspector went to the premises to serve the notice through affixture’; secondly, ‘not a single public witness has been cited nor there is any asking and denial of any public witness’, therefore, the same dents the basic criteria/mandatory notice u/s 143(2) of the Act, for completing the assessment order and consequently assessment order itself is liable to be set aside.

5.2 On the contrary the Ld. refuted the claim of the Assessee and supported the orders passed by the authorities below.

6. We have given thoughtful consideration to the peculiar facts and circumstances of the case and rival contentions of the parties. The Assessee has raised the following additional grounds of appeal, which are legal in nature and emanates from the material available on record and therefore the same are admitted for adjudication in view of judgment of Apex Court in NTPC Ltd. Vs CIT {229 ITR 383}:-

"4. The Ld.CIT(A) erred in holding that notice u/s 143(2) of the Act was served on the Appellant by way of affixture. No notice u/s 143(2) of the Act was issued to the Appellant and therefore, the order u/s 143(3) of the Act dated 23.12.2016 is bad in law.

5. The Ld.CIT(A) erred in relying upon the Inspectors Report dated 30.09.2015 to hold that notice u/s 143(21) of the Act was served by way of affixture, without providing a copy of such report to the Appellant for its rebuttal."

5.3 The Revenue department was specifically asked to file its reply in respect to the aforesaid grounds which relates to non-issuing the notice under section 143(2) of the Act as alleged by the Assessee. It is admitted fact that though the Revenue Department filed its response to the contention raised by the Assessee; however, failed to file the details of sending 143(2) notice through registered post (RPAD) or any other mode/ or details of the authorization issued by the ITO / AO to the Inspector for serving notice through affixture.

5.4 It is trite to say that notice under section 143(2) of the Act is a statutory notice and service of the same upon the Assessee is required to be done before finalization of the assessment by any of following modes:

- Personal service;
- By registered post {RPAD};
- By speed post;

- By courier service;
- By fax message;
- By electronic mail service.

5.5 When the service of notice in any of aforesaid modes, can not be served through ordinary process, owing to the reasons as specified in Order V Rule 17 of the Civil Procedure Code (in short 'CPC') which reads a 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, 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 order for serving the notice/summon through affixture can be passed by the Court/Competent Authority and notice/summon can be served in following mode which reads as under:

“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 ‘whose presence the copy was affixed.’”

5.6 Hence by considering the mandate of Order V Rule 17 of CPC, we are of the considered view that after receipt of order/direction for substituted serve through affixture, the service of notice/summon

through affixture can only be done in certain circumstances as stated above, by affixing the copy of the notice on the outer door or on a conspicuous part of the house in which the Defendant/Assessee ordinarily resides or carries on business or personally works for gain, and thereafter the serving officer shall return the original summon to the Court/Officer , by 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 'whose presence the copy was affixed.

5.7 In simple terms, by serving notices under the Act, a report is to be drawn up by the Serving Officer/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 who identified the premises and witnessed the affixing of notice and in the absence of identifier, mention the efforts made to find out any identifier. The Serving Officer/Inspector can prove the service by solemnly affirming the facts and particulars of service as reported and by producing the documents such as photos etc.. The report is to be filed as an endorsement to the original notice after being docketed in the order sheet. The report should be verified by an affidavit. In the absence of such an affidavit, it is imperative that the Assessing Officer must examine the Inspector on oath.

5.7 Admittedly, in the instant case, the Revenue department failed to produce any material on record that at the initial stage the notice u/s 143(2) of the Act was ever tried to be served through ordinary

course/mode, whereas the Assessee by filing its duly sworn affidavit has claimed that the Assessee along with her family members are residing for the past 26 years at the address where the affixture of notice has allegedly been affixed/served. The Assessee in para: 4 of the affidavit specifically stated that the Assessee and her family members were residing at the last address for the entire months of September, 2015 and October, 2015. Further, in para 5 it is stated that physical communications such as society maintenance receipts, past electricity bills, MTNL telephone bills during the period of September, 2015 and October, 2015 were served either by post or courier at the aforementioned address. The Assessee in support of her claim also submitted co-operative society bill, electricity bills and telephone bills etc..

5.8 The Revenue department has only claimed that the provisions of section 292BB of the Act has taken care of the case of the Assessee, as section 292BB of the Act clearly covers any infirmities / non service of the notice, if there was requisite participation on the part of the Assessee. We otherwise do not have any material and / reason to contradict the claim of the Assessee. The notice under section 143(2) is mandatory. Admittedly, the Revenue department failed to produce / prove the sending of the notice through ordinary post or through RPAD, etc. and also failed to bring on record any order passed for substituted service by affixing the notice and even otherwise the report of the Inspector on the basis of which the Revenue department is claiming that notice has been served through affixture, in fact, shrouded with many doubts, as in the report it is nowhere mentioned:

- *Under what circumstances the notice was affixed and*

- *When the notice was affixed and also*
- *Not mentioned the name and address of the person(s) (if any) by whom the house was identified and/or tried to be contacted before affixing the notice.*

On the aforesaid observations, we are of the considered view, that the service through affixture remained un-proved/un-substantiated, as no efforts were made to serve the notice u/s 143(2) of the Act through ordinary process and there is no specific order for substituted service by the AO and even otherwise the affixture as appears in report of Inspector (supra), is also not as per the procedure established by law. Hence we don't have hesitation to hold that in the instant case, infact no service of notice 143(2) of the Act has been made and/or attributed. We also observe that Hon'ble Apex Court in the case of CIT Vs Laxman Das Khnadelwal {417 ITR 325 (SC) has clearly held that absence of service of notice, cannot be cured by invoking the provisions of section 292BB of the Act.

We are also of the considered view, that the service of the prescribed notice such u/s 143(2) of the Act on the Assessee is a sine qua non or condition precedent for the validity of the assessment proceedings. If no notice is issued or if the notice issued is shown to be invalid, then proceedings initiated and carried out by the Assessing officer without a notice or in pursuance of invalid notice, would be void-ab-intio and shall vitiate the entire proceedings and invalidates the Assessment Order as well, hence the Assessment order being passed sans serving notice u/s 143(2) of the Act, is liable to be quashed, thus the same is quashed accordingly.

6. In the result, appeal of the Assessee stands allowed.

Order pronounced in the open Court on 31/01/2024.

Sd/-

sd/-

(MISS. PADMAVATHY S.)	(NARENDER KUMAR CHOUDHRY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Pavanan

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar, **ITAT, Mumbai**