आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'ई', मुंबई ।

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

सर्वश्री एच.एल.कारवा,अध्यक्ष एवं आर.सी.शर्मा,लेखा सदस्य

BEFORE SHRI H.L.KARWA, PRESIDENT
&
SHRI R.C.SHARMA, AM

रोक आवेदन सं./**SA No.216/Mum/2014**

(Arising out of ITA No.5221/Mum/2014)

(**निर्धारण वर्ष /** Assessment Years:2008-09)

Shri Sanjay Badani, C/o Jayesh Sanghrajka & Co Chartered Accountants, Unit No.405 Hind Rajasthan Centre, D.S.Phalke Road, Dadar (E), Mumbai-14	Vs.	DCIT-10(3), Mumbai-20
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AABPB 9926 B**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

रोक आवेदन सं./**SA No.215/Mum/2014**

(Arising out of ITA No.5222/Mum/2014)

(**निर्धारण वर्ष /** Assessment Years:2008-09)

Shri Nilesh Badani, C/o Jayesh Sanghrajka & Co Chartered Accountants, Unit No.405 Hind Rajasthan Centre, D.S.Phalke Road, Dadar (E), Mumbai-14	Vs.	DCIT-10(3), Mumbai-20
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AABPB 9926 B**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

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आयकर अपील सं./**ITA Nos.5221/Mum/2014)**

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(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

आयकर अपील सं./**ITA Nos.5222/Mum/2014)**

(**निर्धारण वर्ष /** Assessment Years:2008-09)

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स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AABPB 9926 B**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by : Shri Harshvardhana Datar

राजस्व **की ओर से** /Revenue by : Ms. Amrita Misra

सुनवाई की तारीख **/ Date of Hearing : 9th September, 2014**

घोषणा की तारीख**/Date of Pronouncement : 9th September, 2014**

आदेश / O R D E R

BY BENCH **:**

These Stay Applications arose out of the appeals filed by the assessee before ITAT in ITA No.5222 & 5221/Mum/2014, in the matter of order passed u/s.143(3) r.w.s. 147 of the I.T. Act for the assessment year 2008-09.

2. In these stay applications, the assessee has basically argued legality of the assessment framed u/s.143(3) r.w.s.147 in view of the fact that there was no service of notice u/s.143(2). It was contended by learned AR that in respect to notice u/s.148 dated 30-8-2011, the assessee has filed return of income on 10-10-2011. The statutory time limit to serve notice u/s.143(2) was till 30-9-2012, ie. six months from end of the financial year in which return was furnished. As per learned

AR no notice u/s.143(2) has ever been issued and served on the assessee before completion of assessment. Due to non-compliance of statutory notice u/s.143(2), the assessee has filed objection against the jurisdiction, vide letter dated 10-10-2012 submitted at the office of AO on 2-11-2012 in accordance with the provisions of Section 292BB of the Act. As per learned AR the objection raised by the assessee has not been disposed by the AO and he proceeded with the assessment. The basic thrust of learned AR to substantiate the prima facie case in assessee's favour for grant of stay was non-service of notice u/s.143(2), which goes to the root of validity of the assessment so framed.

3. As the issue of notice u/s.143(2) goes to the root of validity of the assessment so framed, the bench considered it appropriate to hear this issue and decide the appeals on merits. Accordingly, learned DR was directed to produce the assessment records. The case was adjourned to 9-9-2014 for allowing DR to produce the necessary assessment records. Assessment records were produced by learned DR on 9-9-2014 which were examined by the Bench and matter is now decided on legality of the assessment so framed u/s.143(3) r.w.s.147 without service of notice u/s.143(2) of the I.T.Act.

4. The assessee in its appeals, has taken the following grounds :-

> *"1. On the facts and circumstances of the case and leg Ld. Commissioner of Income Tax (Appeals) erred in confirming the reopening the assessment in absence of reason to believe and*

material on records and such reopening of the assessment is bad law and erroneous in facts and it is liable to be quashed.

2. On the facts and circumstances of the case and leqal propositions; Hon'ble Commissioner of Income Tax (Appeals) erred in confirming the assessment/reassessment order in spite of the fact that notice under section 143(2) of "Income Tax Act, 1961 was not served to the assessee. Hence, the assessment .is bad in law and liable to be annulled.

3. On the given facts: circumstances and judicial pronouncements Ld. Assessing Officer erred in making addition of loan/advances between M/s Nishotech Systems Pvt Ltd and M/s Sanitech Engineering Pvt Ltd. by treating the same as deemed dividend u/s 2(22)(e), ignoring the fact that such addition is bad in law and erroneous in facts and liable to be deleted."

5. Learned AR vehemently argued that neither there was service of notice u/s.143(2) by postal authorities nor there was proper service by affixtures.

6. On the other hand, the contention of learned DR was that since notice sent u/s.143(2) by postal authorities were returned unserved, therefore, the Inspector served the notice through affixtures. Our attention was also invited to the Inspector's report placed in the paper book wherein vide letter dated 27-7-2012, the Inspector has reported to DCIT-10(3) that he has visited assessee's premises on 27-7-2012 to service the notice u/s.143(2) for the A.Y. 2008-09 in the case of Sanjay Badani. As per the Inspector, on reaching the said premises, it was found that the said premises was locked. Therefore, the said notice was served on assessee by affixture on 27-7-2012.

7. It was argued by the learned AR that in spite of asking under Right to Information, the department has not served proof of dispatch of notice nor the mode of service through affixtures nor the report of

Inspector for such service through affixation. Accordingly, copy of the Inspector's report was provided to the learned AR indicating service of notice through affixation on 27-7-2012. It was vehemently argued by learned AR that as per the Inspector's report dated 27-7-2012, there was no valid service by affixtures insofar as neither there is mention of any name and address of the witnesses who have identified the house of the assessee and in whose presence the notice was affixed. He contended that in case of service of notice by affixtures, the serving officer should state in his report the name and address of the person by whom house or premises were identified and in whose premises copy of summon was affixed and these facts should also be verified by an affidavit of serving officer, otherwise such service should not be accepted to be legally valid service of notice u/s.143(2). For this purpose, reliance was placed on the decision of Hon'ble Supreme Court in the case of **CIT Vs. Ramendra Nath Ghosh, 82 ITR 888**.

8. In view of the above factual position, we have to decide whether there was service of notice u/s.143(2) much less a proper service as per Rule 17 of Order V of CPC, which requires that before service of notice by affixture, notice server/service officer must make diligent search for person to be served and, he, therefore must take pain to find him and also to make mention of his efforts in report. The serving officer should also state in his report the circumstances under which he did so and the name and address of the person by whom house or

premises were identified and in whose premises copy of summon was affixed, otherwise such service could not be accepted to be a legally valid service of notice u/s.143(2).

9. We have considered rival contentions, carefully gone through the orders of the authorities below. The Scheme of the Act broadly permits the assessment in three formats; (i) acceptance of the returned income;(ii) acceptance of returned income subject to permissible adjustments u/s.143(l) of the Act by issuance of intimation; and (iii) scrutiny assessment under section 143(3) of the Act. This Scheme was originally introduced by Direct Tax Laws (Amendment) Act,1989 with effect from 1.4.1989. The issuance of notice under section 143(2) of the Act is in the course of assessment in the third mode, namely, scrutiny assessment. Section 143(2) of the Act requires that where return has been filed by an assessee, if the Assessing Officer considers it necessary or expedient to ensure that the assessee has not understated the income, or has not computed excessive loss, or has not under-paid tax in any manner, he shall serve on the assessee a notice requiring him either to attend his office, or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return. Therefore, the language of the main provision requires Assessing Officer to prima facie arrive at

satisfaction of existence of any one of the three conditions. Proviso under the said sub-section requires that no notice shall be served on the assessee after the expiry of six months from the end of the relevant financial year in which the return is furnished. On a plain reading of the language in which the proviso is couched it is apparent that the limitation prescribed therein is mandatory, the format of provision being in negative terms. The position in law is well settled that if the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, such requirements are, in all cases absolute and neglect to attend to such requirement will invalidate the whole proceeding.

10. The Hon'ble Apex Court in the case of **Assistant Commissioner of Income-tax vs. Hotel Blue Moon reported in [2010] 321 ITR 362** has considered the very issue. The Apex Court held that the Assessing Officer has to necessarily follow the provisions of section 142 and sub-sections (2) and (3) of section 143. It did not accept the submission of the Revenue that the requirement of the notice under section 143(2) can be dispensed with and the same is mere procedural irregularity. In the words of the Apex Court, it is held as under:

> "*16. The case of the revenue is that the expression 'so far as may be apply' indicates that it is not expected to follow the provisions of section 142, sub-sections(2) and (3) of section 143 strictly for the purpose of block assessments. We do not agree with the submissions of the learned counsel for the revenue, since we do not see any reason to restrict the scope and meaning of the expression ' so far as may be apply' . In our view, where the Assessing Officer in repudiation of the return filed under section 158BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of section 142, sub-sections (2) and (3) of section 143."*

11. During the course of hearing, the Bench specifically asked the learned AR with regard to the requirements of Section 292BB introduced w.e.f. 1-4-2008 with retrospective effect. In reply, learned AR contended that as per proviso to Section 292 BB, where the assessee has raised objection regarding issue of notice before the completion of such assessment or reassessment, the provisions contained u/s.292BB will not be applied. We found that provisions of Section 292BB was introduced w.e.f. 1-4-2008 relevant to A.Y. 2008-09 under consideration, according to which, where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was (*a*) not served upon him; or (*b*) not served upon him in time; or (*c*) served upon him in an improper manner. We found that in the instant

case, assessee has filed his objection before the AO and such objection has also been noted by the AO in his assessment order to the effect that assessee has objected non service of notice u/s.143(2) during the course of assessment proceedings itself. Thus, participation of assessee in the assessment proceedings will not disentitle the assessee his right to object to the service of notice u/s.143(2) of the I.T. Act, 1961.

12. After going through the assessment records, we found that notice issued u/s.143(2) dated 17-7-2012 returned unserved by postal authorities. Thereafter notice was affixed by the Inspector on 28-7-2012. For such service by fixture the Inspector has given his report vide letter dated 27-7-2012 which reads as under :-

> *"In connection with the subject matter it is brought to your kind notice that the undersigned visited the assessee's premises at 23/24, Vora CHS ltd., Plot No.52, U.B.Lane, Ghatkopar(E), Mumbai-400 077 on 27.07.2012 to serve the notice u/s.143(2) for A.Y.2008-09 in the case of Shri Sanjay Badani bearing PAN AABPB 9926B. However, on reaching the said premises it was found that the said premises was locked. Therefore, the said notice was served on the assessee by affixture by me on 27.07.2012."*

Here we have to examine as to whether service of notice by affixture was proper in terms of provisions of Order V, Rule 17 to 20 of CPC. As per provisions of Section 282 of the I.T. Act, 1961, notice under the Act is to be served either by post or as if it is summoned under the Code of Civil Procedure. Notice dated 17-7-2012 has been claimed to have been served through affixture on 27-7-2012 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 **CIT v. Ramendra Nath Ghosh [1971] 82 ITR 888**, held (pages 890 & 891) as under : -

> *" Admittedly, the assessees have not been personally served in these cases. Therefore, we have to see whether the alleged service by affixation was in accordance with law. It is necessary to mention that, according to the assessees, they had no place of business at all. They claim that they have closed their business long before the notices were issued. Hence, according to them, Mr. Neogi must have gone to a wrong place. This contention of the assessees has been accepted by the Appellate Bench of the High Court. Bearing these facts in mind, let us now proceed to consider the relevant provisions of law. Section 63(1) of the Act reads:*
>
> *"A notice or requisition under this 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 (V of 1908)."*
>
> *9. Rule 17 of Order V of the Civil Procedure Code reads:*
>
> *"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." (emphasis applied)*
>
> *As seen earlier the contention of the assessees was that at the relevant time they had no place of business. The report of the serving officer does not mention the names and addresses of the person who identified the place of business of the assessees. That officer does not mention in his report nor in the affidavit filed by him that he personally knew the place of business of the assessees. Hence, the service of notice must be held to be not in accordance with the law. The possibility of his having gone to a wrong place cannot be ruled out. The High Court after going into the facts of the case very elaborately, after examining several witnesses, has come to the conclusion that the service made was not a proper service. Hence, it is not possible to hold that the assessees had been given*

a proper opportunity to put forward their case as required by Section 33B."

13. As per sub-section (1) of section 282, the notice is to be served on the person named therein either by post or as if it was a summons issued by Court under the Code of Civil Procedure, 1908 (V of 1908). The relevant provision for effecting of service by different modes are contained in rules 17, 19 and 20 of Order V of CPC. Rules 17, 19 and 20 of Order Vof CPC lay down the procedure for service of summons/notice and, therefore, the procedure laid down therein cannot be surpassed because the intention of the legislature behind these provisions is that strict compliance of the procedure laid down therein has to be made. The expression after using all due and reasonable diligence' appearing in rule 17 has been considered in many cases and it has been held that unless a real and substantial effort has been made to find the defendant after proper enquiries, the Serving Officer cannot be deemed to have exercised 'due and reasonable diligence'. Before taking advantage of rule 17, he must make diligent search for the person to be served. He therefore, must take pain to find him and also to make mention of his efforts in the report. Another requirement of rule 17 is that the Serving Officer should state that he has affixed the copy of summons as per this rule. The circumstances under which he did so and the name and address of the person by whom the house or premises were identified and in whose

premises the copy of the summon was affixed. These facts should also be verified by an affidavit of the Serving Officer.

14. The reason for taking all these precautions is that service by affixture is substituted service and since it is not direct or personal service upon the defendant, to bind him by such mode of service the mere formality of affixture is not sufficient. Since the service has to be done after making the necessary efforts, in order to establish the genuineness of such service, the Serving Officer is required to state his full action in the report and reliance can be placed on such report only when it sets out all the circumstances which are also duly verified by the witnesses in whose presence the affixture was done and thus the affidavit of the Serving Officer deposing such procedure adopted by him would also be essential. In the instant case, the whole thing had been done in one stroke. It was not known as to why and under which circumstances another entry for service of notice by affixture was made on 27-7-2012 when sufficient time was available through normal service till 30-9-2012. Nor there is any entry in the note-sheet by the AO directing the Inspector for service by affixture and had only recorded the fact that the notice was served by the affixture. It appears that the report of the Inspector was obtained without issuing any prior direction for such process or mode. However, the fact remained that Serving Officer had not set out reason for passing subsequent entry nor for adopting the mode for service by affixture and without stating

the reasons for doing so, the adoption of the mode of substituted service could not be legally justified. Notice was served by affixture. The reasons for service through affixture has not been noted by the AO in the notesheet nor he has issued any direction for issuing notice through affixtures. The next entry of note sheet dated 28-7-2012 just indicates that letter was filed by the Inspector regarding service of notice by affixtures, dated 17-7-2012. Thus, on 17-7-2012, the first entry was made and without recording any apprehension about the delay by such mode second entry for affixation was made on 28-7-2012 without showing justification for the same. Thus, it is clear that report of the Inspector was obtained without issuing any prior direction for such process or mode. Thus, the adoption of mode of substituted service was not legally justified. It is also clear from the Inspector's report that there is no mention of name and address of the person who had identified the house of the assessee and in whose presence the notice u/s.143(2) was affixed. There is no evidence or indication in the report of Inspector that he had personal knowledge of the place of the business of the assessee and was, thus, in a position to identify the same. Therefore, neither the procedure laid down under order V. rule 17 had been followed nor that laid down under order V rules 19 and 20 had been adhered to. Neither before taking recourse to service by affixture, the Assessing Officer or the concerned officer had recorded the findings to justify the service by this mode nor afterwards called for the affidavit or certificate of service by affixture from the Serving

Officer. He had not certified that the service had been effected by adopting this course.

15. In view of the above, it is clear that there was no valid service of notice u/s.143(2) by way of affixation. Since in the instant case, the department has not been able to demonstrate that notice u/s.143(2) was served within the statutory time limit, the assessment made on the basis of such invalid notice could not be treated to be valid assessment and, hence, such assessment order deserves to be treated as *null and void* and liable to be quashed and annulled. Accordingly, we allow assessee's appeal on legal issue regarding non-service of notice u/s.143(2). As we have already allowed assessee's appeal on legal issue, we are not going to discuss the merits of the addition made on account of deemed dividend u/s.2(22)(e) of the Act.

16. As the facts and circumstances in the case of another assessee-Shri Nilesh Badani (ITA No.5222/Mum/2014) are *pari materia*, therefore, our observation made in the case of Shri Sanjay Badani (ITA No.5221/Mum/2014) will be applied *mutatis mutandis* to the appeal filed by Shri Nilesh Badani.

17. Since we have allowed the above appeals, the stay applications filed by the assessees have become infructuous.

18. **In the result, ITA No.5221/Mum/2014 and ITA No.5222/Mum/2014 are allowed in terms indicated hereinabove, whereas the stay applications No.216/Mum/2014 & 215/Mum/2014 are hereby dismissed**.

Order pronounced in the open court on this 9th Sept.2014.

आदेश की घोषणा खुले न्यायालय में दिनांकः 9th Sept,2014 को की गई ।

Sd/-	**Sd/-**
(एच.एल.कारवा)	**(आर.सी.शर्मा)**
(H.L.KARWA)	**(R.C.SHARMA)**
अध्यक्ष **/ PRESIDENT**	लेखा सदस्य **/ ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated 09/09/2014

प्र.कु.मि/pkm, नि.स/ PS

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

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai