IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE

श्री आर. एस. स्याल, उपाध्यक्ष एवं
श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND SHRI VIKAS AWASTHY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1763/PUN/2013
निर्धारण वर्ष / Assessment Year : 2009-10

Anil Kisanlal Marda, F-304, Vrundavan Apartments, Model Colony, Shivajinagar, Pune – 411 016	**Vs.**	ITO, Ward-3(1), Pune
PAN :ABKPM9882D (Appellant)		(Respondent)

Assessee by	Shri Sunil Ganoo
Revenue by	Ms. Nandita Kanchan & Shri N. Ashok Babu
Date of hearing	27-06-2019
Date of pronouncement	01-07-2019

आदेश / ORDER

PER R.S.SYAL, VP :

In this appeal, the assail is to the legal tenability of the order passed by the CIT(A)-II, Pune on 25-03-2013 in relation to the Assessment Year 2009-10.

http://itatonline.org

2. The assessee has raised following two additional grounds on 08-05-2014 and 03-04-2019 respectively:

> "1. Since the impugned appellate order is antedated, the same is bad in law and null and void and therefore the same may please be annulled."
>
> "2. Since the learned Assessing Officer has failed to issue and serve upon the appellant assessee the notice u/s.143(2) of the I.T. Act, 1961 within the prescribed time limit, the impugned assessment order framed by the learned Assessing Officer is bad in law, without jurisdiction and hence null and void and therefore the same may please be annulled."

3. The ld. AR submitted that the afore-extracted additional grounds were inadvertently omitted to be taken in the memorandum of appeal but are significant for the disposal of the appeal by the Tribunal. It was, therefore, prayed that the same be admitted. This was opposed by the ld. DR.

4. Having gone through the subject matter of the additional grounds taken by the assessee, it is discernible that the same are legal grounds involving adjudication on questions of law. The Hon'ble Supreme Court in *National Thermal Power Company Ltd. Vs. CIT (1998) 229 ITR 383 (SC)* has observed that "the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in

http://itatonline.org

accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item". Answering the question posed before it in affirmative, their Lordships held that on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee and the Tribunal has jurisdiction to examine the same. We find that both the additional grounds raised before the Tribunal involve pure questions of law and no fresh investigation of facts is necessary for their determination. We are, therefore, admitting such additional grounds to be espoused for disposal on merits.

5. Through the first additional ground, the assessee has challenged that the impugned order passed by the ld. CIT(A) is antedated and hence be declared null and void. The ld. AR claimed that albeit the ld. CIT(A) dated the order as 25-03-2013, but it was actually passed somewhere in the month of July,

http://itatonline.org

2013. In support of this contention, the ld. AR relied on the affidavit of the assessee as per which the assessee personally appeared before the ld. CIT(A) in the months of June and July, 2013 and requested him for grant of an opportunity of hearing in his appeals pending before him for the Assessment years 2008-09 and 2009-10. It has further been claimed that the ld. CIT(A)-II, Pune told him that he was proceeding on foreign tour to USA and the orders would be finalized after he returns in August, 2013. It has still further been stated that the ld. CIT(A) directed his staff to accept any application, if submitted by him. The assessee has averred in the affidavit that he submitted an application on 12-07-2013 for the instant year and a similar application was filed by him on 19-07-2013 for the A.Y. 2008-09. It has been claimed that the assessee has a strong belief and conviction that the impugned appellate order passed by the ld. CIT(A) was antedated and hence, null and void. Upon filing of this affidavit by the assessee, the Tribunal directed the ld. DR to obtain comments of the ld. CIT(A) who passed the impugned order. Such comments, in the form of a letter dated 08-09-2014 of Sh. A.S. Singh, the ld. CIT(A) who passed the impugned order, have since been filed before the Tribunal.

http://itatonline.org

6. We have heard both the sides and gone through the relevant material on record. The case of the ld. AR is that the ld. CIT(A) antedated the impugned order and its actual passing after 3 to 4 months from the conclusion of hearing has rendered it null and void. To buttress this contention, he relied on Instruction No.20/2003, dated 23-12-2003 by which the CBDT desired that the CIT(As) should issue orders within 15 days of the last hearing. This view was reiterated vide F.No.279/Misc. 53/2003-ITJ, dated 19-06-2015, whereby the ld. CIT(As) were beseeched by the CBDT to issue orders within 15 days from the last hearing.

7. It is overt from the above CBDT Instructions that CIT(As) have been advised to pass and issue orders within 15 days from the date of last hearing. Consequences of passing orders beyond the stipulated period of 15 days have not been spelt out in these instructions, except for mentioning that: `Any lapse on this account shall be viewed adversely’. There may be certain administrative action upon the CIT(As) who pass orders belatedly, but how does it affect the validity of the order in the eyes of law is not borne out of such Instructions. Further, nothing has been brought to our notice indicating initiation of

http://itatonline.org

any disciplinary action against the ld. CIT(A) for the alleged delay in passing the impugned order.

8. Be that as it may, we find that the contention of the assessee about the late passing of the impugned order by the ld. CIT(A) in July, 2013 as against the conclusion of hearing in March, 2013, is unfounded. Shri A.S. Singh, CIT(A)-II, Pune vide the aforesaid letter dated 08-09-2014 has stated that the impugned order was passed on the date mentioned in the order itself, namely, 25-03-2013. Further, this order was reported by him as one of the best appellate orders passed by him in March, 2013 in the monthly D.O. letter sent to the Chief Commissioner of Income Tax, Pune (CCIT) in the second week of April, 2013. A copy of such D.O. letter addressed to the CCIT, Pune has been enclosed as Exhibit-A. A perusal of Exhibit-A, being, monthly D.O. letter dated 10-04-2013 from Shri A.S. Singh, CIT(A)-II, Pune, transpires that he reported to have disposed of 442 appeals during the F.Y. 2012-13, which included 270 high demand appeals and 172 low demand appeals. On second page onwards of the letter, the ld. CIT(A) has referred to some of the good orders passed by him during the month of March, 2013. Page No.3 of the letter contains a reference to the disposal of

http://itatonline.org

appeal of the assessee for the A.Y. 2009-10 with tax effect of Rs.1.11 crore and odd. He has also discussed the crux of the order passed by him in the same para. This monthly D.O. letter has been addressed to Shri R.K. Roye, CCIT, Pune. The ld. AR or the assessee, who was also present during the course of hearing before the Tribunal, did not controvert the authenticity or genuineness of this letter dated 10-04-2013 addressed by Shri A. S. Singh to the CCIT, Pune. In the face of this letter addressed by Sh. Singh to the Chief CIT Pune, *inter alia,* referring to the passing of the impugned order, there remains no doubt whatsoever that the order was passed in the month of March, 2013 itself.

9. Shri A. S. Singh, CIT(A)-II, Pune, vide his letter dated 08-09-2014 has stated that he was nominated for Advanced mid-career training programme of IRS Officers at IIM, Bangalore from 03-06-2013 to 21-06-2013 followed by Advance mid-career training programme of IRS Officers in the USA from 13-07-2013 to 02-08-2013, for which a lot of preparation and paper work was required to be done before his departure to the USA. He has stated that due to these constraints there was some delay in the actual dispatch of a batch of appellate orders passed

by him in the month of March, 2013, including the impugned order, which did not mean that all such appellate orders passed were antedated. We have seen from the Dispatch register, which has been produced for our verification, that several orders passed by the ld. CIT(A) in the month of March, 2013, were actually dispatched in the month of July, 2013.

10. The assessee has averred in the affidavit that he personally appeared before Sh. A.S. Singh, the ld. CIT(A) in the months of June/July, 2013 and also filed two letters in his office. Our attention has been drawn towards one of such letters dated 13-07-2013, which bears the receipt stamp with date 12-07-2013. In the affidavit also, the assessee has stated that he filed a letter on 12-07-2013. Though there is difference in the dates, we agree with the ld. AR that mentioning of date as 13-07-2013 on the letter may be a typographical error and the same might have actually been delivered in the office of ld. CIT(A) on 12-07-2013. The assessee stated before this Tribunal that he personally met Shri A.S. Singh, CIT(A)-II, Pune on the given date and it was only on his advice that his office accepted the aforesaid letter on 12-07-2013. The assessee also stated that he met Sh. A.S. Singh, the ld. CIT(A) on 19-07-2013 and filed a

http://itatonline.org

similar letter for the A.Y. 2008-09 which also met with the same fate.

11. We have gone through the record called from the office of the CIT(A). The letter filed by the assessee in the office of CIT(A) on 12-07-2013 has been initialled by one H.S. with remarks Sr. TA. The ld. DR explained that H.S. refers to Shri Hareshwal Sharma, CIT(A)-I, Pune, who was holding additional charge at the material time in the absence of Shri A.S. Singh, regular CIT(A)-II, Pune who went to the USA from 13-07-2013 and returned on 02-08-2013. Similar is the position regarding the second letter filed by the assessee dated 19-07-2013 which also bears initials of H.S. This shows that on 12-07-2013 and 19-07-2013, Shri A.S. Singh, ld. CIT(A)-II, Pune, was not physically present in his office and the contention of the assessee that he personally met Shri A. S. Singh on these dates is found to be incorrect. The affidavit has been very carefully worded by mentioning that the assessee personally appeared before Sh. A.S. Singh, the ld. CIT(A)-II, Pune in the months of June and July, 2013. No specific dates have been given. Though in the earlier paras, the assessee has been very meticulous with the exact dates, like in para 3, he has specifically mentioned "that till

http://itatonline.org

26-07-2013, I was not aware of the aforesaid order was passed by the ld. CIT(A)-II, Pune". It is not comprehensible as to why the assessee did not mention the specific dates of June/July 2013 on which he allegedly met Sh. A.S. Singh.

12. On examination of the order sheet of the ld. CIT(A), it is observed that the appeal came up for hearing before him on different dates and as per record, the assessee was represented by his counsel alone. Last hearing took place on 20-03-2013 which records the presence of the assessee's counsel only, who filed the written submissions dated 04-03-2013 and explained the case. The hearing got concluded on 20-03-2013 and then there is an entry regarding the disposal of appeal on 25-03-2013. When there is no record of the attendance of the assessee before the ld. CIT(A) during the course of hearing spreading on several occasions, we are unable to understand as to what compelled the assessee to start appearing thereafter in the office of the ld. CIT(A) all alone and that too without his counsel. The above narration of factual panorama manifests that there is something amiss in the affidavit of the assessee.

http://itatonline.org

13. It is thus held that the ld. CIT(A)-II, Pune actually concluded the hearing on 20-03-2013 and passed the order on 25-03-2013, but the same was dispatched late, along with several other orders passed by him in the month of March, 2013.

14. If, for a moment we accept the contention of the assessee for quashing the impugned order, being, illegal on the *raison d`etre* advanced, a contention with which we do not actually agree, a fortiori which would follow is that the assessment order would revive in the absence of there being any valid first appellate order. It would again require direction from our end to the ld. CIT(A) to pass an order as the appellant urging the quashing of the impugned order in this case is the assessee and the impugned order has been passed against him. Further, on a specific query as to how the assessee was prejudiced by the supposed antedating of the impugned order in terms of either some limitation setting in or the right to file appeal against it being jeopardized, the ld. AR candidly admitted that no such legal right of the assessee was impaired.

15. In view of the foregoing discussion, we hold that the allegation levelled by the assessee that the impugned order was

http://itatonline.org

antedated by the ld. CIT(A), is not correct and is hereby rejected. The first additional ground is, ergo, dismissed.

16. Through the second additional ground, the assessee has challenged the non-service of notice u/s.143(2) of the Income-tax Act, 1961 (hereinafter also called `the Act') within the prescribed time limit. The ld. AR submitted that no notice u/s 143(2), as required under the proviso to section 143(2) of the Act, was ever served within the stipulated period of six months from the end of the relevant assessment year and hence the assessment order be declared a nullity. This was countered by the ld. DR, who stated that notice u/s 143(2) of the Act was issued by the Assessing Officer (AO) on 8.9.2010 at the address given in PAN, which fact is established from the return of the notice by the postal authorities. She admitted that even though the notice was sent at an address different from that given in the return of income, but supported the action of the AO in sending notice at the address given by the assessee in the PAN on the strength of Rule 127 of the Income-tax Rules, 1962 (hereinafter also called `the Rules') inserted w.e.f. 2.12.2015. She contended that the rule has a retrospective application. She commended us to the judgment of the Hon'ble Punjab & Haryana High Court in

http://itatonline.org

V.R.A. Cotton Mills P. Ltd. VS. UOI & Ors. (2013) 359 ITR 495 (P&H) in which it has been held that the date of 'issue' of notice be considered as compliance of the requirement of proviso to section 143(2) of the Act, which talks of `service' of notice within the stipulated period. Towing the aforesaid reasoning, she put forth that once the factum of `issue' of notice u/s 143(2) was established beyond any shadow of doubt, it should be considered as full compliance of the mandate of the proviso, which mentions `service' of notice on the assessee.

17. We have gone through the relevant material on record. In this regard, it is observed from the assessment order that the assessee filed his return on 31-10-2009 showing total income at Rs.87,06,746/-. It has been recorded in the assessment order that "notice u/s. 143(2) dated 08/09/2010 was issued and served on the assessee. Subsequently, notice u/s.143(2) dated 11-11-2011 was again issued and served on the assessee". Proviso to section 143(2) of the Act at the material time provided that "no notice under the said section shall be *served* on the assessee after the expiry of six months from the end of the relevant assessment year". The assessment year under consideration is 2009-10. Period of six months from the end of the relevant assessment

year expires on 30-09-2010. It means that a valid notice u/s. 143(2) could have been issued on or before 30-09-2010 enabling the AO to proceed with the assessment u/s. 143(3) of the Act. The AO has referred to two notices u/s. 143(2) dated 08-09-2010 and 11-11-2011. It is obvious that the second notice u/s. 143(2) dated 11-11-2011 is of no consequence as having been issued after a period of six months from the end of the relevant assessment year. Now we need to find out as to whether notice u/s. 143(2) dated 08-09-2010 was actually issued and served on the assessee on or before 30-09-2010.

18. As against the mentioning in the assessment order of the issue and the service of notice u/s. 143(2) dated 08-09-2010 on the assessee, the ld. AR contended that such notice was never served. The ld. DR was requested to place on record the evidence of service of notice. She invited our attention towards an envelope containing notice u/s.143(2) dated 08-09-2010 which was issued but returned by the postal authorities with remarks recorded on 27-09-2010 that the addressee is not living at the given address and the further address is not known. On a perusal of such envelope, it is observed that the notice was sent to the assessee at the address 39/11, Budhwar Peth, Solapur,

Maharashtra 413002. As against this, the assessee filed his return with Pune address of F-304, Vrundawan Apartments, Model Colony, Shivajinagar, Pune – 411 016. The AO has also recorded the Pune address of the assessee in the assessment order passed on 30-12-2011. On a pertinent query, the ld. DR admitted that the address given in the return is the same which has been mentioned in the assessment order. On a further question as to how the notice was sent at the Solapur address of the assessee when the return of income contained Pune address, the ld. DR submitted that the Solapur address has been given by the assessee in his PAN details and the system generating notice u/s. 143(2) took up such address from the PAN database. The ld. DR took us through Rule 127 which provides that notice etc. may be delivered on any of the addresses which, *inter alia,* include the address available in the PAN database of the addressee under sub-clause (i) of Rule 127(2)(a). She submitted that the notice sent by the Department on the address given by the assessee in PAN database was accordingly in order. She also invoked Section 27 of the General Clauses Act, 1897 to buttress her submission of valid service of notice, once a notice is sent through registered post.

http://itatonline.org

19. Considering the wide spectrum of arguments put forth by the ld. DR, we need to ascertain –

i. Whether the notice u/s 143(2) was actually issued ?

ii. Whether `issue' of notice is equal to `service' of notice ?

iii. Whether the notice can be considered as served by post?

iv. Whether the notice u/s 143(2) can be deemed to have been issued/served ?

i. <u>Whether the notice u/s 143(2) was actually issued ?</u>

20. The AO has recorded in the assessment order that notice u/s 143(2) dated 08.09.2010 was issued and served on the assessee. On perusal of the assessment records produced by the ld. DR, it is seen as an admitted position that such notice was though issued at Solapur address as against the Pune address given in the return of income, but the same was returned by the postal authorities and thereafter no other notice was issued within the stipulated period. Thus it is palpable that the notice issued and returned by the postal authorities coupled with no further notice issued by the Department has in substance the net effect of non-issuance of notice.

ii. Whether `issue' of notice is equal to `service' of notice ?

21.1. The next leg of the argument of the ld. DR was that once it was established that the notice u/s 143(2) was admittedly `issued' before the close of the stipulated period of six months from the end of the relevant assessment year, which is further evidenced from the fact that the same was returned by postal authorities, then such `issue' of notice should be considered as `service' of notice. For this proposition, she relied on *V.R.A. Cotton Mills (supra).*

21.2. We have gone through the judgment in the case of *V.R.A. Cotton Mills (supra)* in which it has been clearly laid down that the date of notice as required to be "served" u/s.143(2) is to be considered as the "date of issue of notice" by the AO, which supports the view point of the ld. DR. In reaching this conclusion, the Hon'ble High Court relied on the judgment of the Hon'ble Supreme Court in *Banarasi Devi Vs. ITO (1964) 53 ITR 100 (SC)* and dissented with its own judgment in *CIT Vs. Avi- oil India Pvt. Ltd. (2010) 323 ITR 242 (P&H)* in which it was held that notice u/s.143(2) should not only be issued but also

http://itatonline.org

served within the stipulated period and in the absence of such a valid service, the assessment is vitiated.

21.3. Similarly, the Hon'ble Gujarat High Court in *Shanabhai P. Patel vs. R. K. Upadhyaya, ITO (1974) 96 ITR 141 (Guj)* dealt with a situation in which reassessment notice was issued within time-limit but served beyond the prescribed period of four years. The Hon'ble High Court held that sec. 149 enjoins that a notice should be issued within prescribed period. It held that the words "service of notice" or "issuance of notice" have no fixed connotation but are interchangeable and same meaning should be given to both the words used in ss. 148 and 149. In reaching this conclusion, their Lordships also relied on *Banarsi Debi vs. ITO (1964) 53 ITR 100 (SC)*. The Revenue carried the matter before the Hon'ble Summit Court. In *R. K. Upadhyaya, ITO vs. Shanabhai P. Patel (1987) 166 ITR 163 (SC),* their Lordships highlighted the difference in the language of the 1922 Act under which the judgment in *Banarsi Debi vs. ITO (supra)* was rendered and the 1961 Act. It observed that : 'A clear distinction has been made out between the "issue of notice" and "service of notice" under the 1961 Act'. Reversing the judgment of the Hon'ble Gujarat High Court, it held that : `The High Court, in

http://itatonline.org

our opinion lost sight of the distinction and under a wrong basis felt bound by the judgment in *Banarsi Debi vs. ITO (supra).* As the ITO has issued notice within limitation the appeal is allowed and the order of the High Court is vacated'. From the above enunciation of law by the highest court of the country, there remains no doubt whatsoever that `issue of notice' cannot be substituted with `service of notice'.

21.4. It is pertinent to take stock of the judgment of Hon'ble Delhi High Court in *CIT Vs. Lunar Diamonds Ltd. (2006) 281 ITR 1 (Del.)* in which the assessment was held to be rightly quashed when no notice u/s.143(2) was served upon the assessee. In that case also, the judgment of Hon'ble Supreme Court in *Banarasi Devi Vs. ITO and others (supra)* was pressed into service, which constituted the foundation in the case of *V.R.A. Cotton Mills Pvt. Ltd.* (supra) for holding that date of service of notice is to be considered as the date of issue of notice. The Hon'ble Delhi High Court in *Lunar Diamonds Ltd. (supra)* held that the judgment in the case of *Banarasi Devi Vs. ITO and others (supra)* cannot be applied as it was rendered in the backdrop of section 4 of the Amendment which is not now relevant.

21.5. The Hon'ble Gujarat High Court in *Pr. CIT Vs. Nexus Software Ltd. (2017) 248 taxmann 243 (Guj.)* also dealt with a similar situation, in which the Revenue once again relied on the judgment of the Hon'ble Punjab & Haryana High Court in *V.R.A. Cotton Mills (supra)*. The Hon'ble High Court observed that : 'However, *we are not in agreement with the view taken by the Punjab & Haryana High Court that the expressions "serve" and "issue" would have the same meaning*. The word "served" used in Section 143(2) of the Act is very significant and very clear.'

21.6. The ld. DR also relied on the judgment of Hon'ble Supreme Court in the case of *Madan & Co. vs. Wazir Jaivir Chand 1989 AIR 630 (SC)* to bolster her argument that a registered letter addressed to the person at his residential address shall be deemed to be served. We do not find any relevance of the judgment in *Madan & Co. (supra)* to the facts of the instant case. That was a case involving interpretation of section 11 of the Jammu & Kashmir Houses and Shops Rent Control Act, 1966 in which the respondent issued a notice to the petitioner calling upon him to pay the arrears of rent and also terminate tenancy. The notice could not be served through postmaster who

tried to serve the same on the addressee but eventually returned with the endorsement "left without address, returned to sender". The question arose before the Hon'ble Supreme Court as to whether it should be considered as a proper service. Considering the section 11(1) of the Jammu & Kashmir Houses and Shops Rent Control Act, the Hon'ble Supreme Court observed that if the addressee refuses or declines to accept the notice, then it can be considered as a proper service. When a postman calls at the address mentioned and fails to contact the addressee and the same is returned to the sender because the tenant is away from the premises for considerable time, then such delay should be attributed to the tenant's own conduct and should be considered as "served". We do not find any applicability of the *ratio* laid down in the case to the facts as are obtaining before us. That was a decision under a different statute and in a different context in which notice was required to be given by the owner to the tenant for eviction of the premises. Non-acceptance of such a notice was held to be a valid ground for assuming service of notice as in the otherwise scenario the entire object of the statute would have frustrated and the tenant could have easily escaped the clutches of the stringent provisions of eviction by simply

http://itatonline.org

avoiding the service of notice, which is not the case within the purview of the Income-tax Act.

21.7. In addition to the series of the judgments discussed above holding that service of notice, which is different from issue of notice, is a pre-condition for assuming jurisdiction to frame the assessment, the Hon'ble jurisdictional High Court in the several decisions including *Pr.CIT Vs. Shri Jawahar Hiranand Bhatia* in Income Tax Appeal No.1268/2015 has held that service of notice u/s. 143(2) within the prescribed time is *sine qua non* for completion of assessment u/s. 143(3) of the Act. In our considered opinion, issuance of notice is different from service of notice and the two words cannot be used interchangeably.

iii. Whether the notice can be considered as served by post?

22.1. The ld. DR then contended that sending of notice through registered post satisfies the requirement of service and there is no further need to examine, if it was actually served on not. For this proposition, she relied on certain provision, which we will be shortly referring to.

22.2. Section 282 of the Act has caption `Service of notice generally'. Sub-section (1) provides that : `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…'. The term service by post has not been specifically defined in the Act. Thus, we will have to go by the meaning of this expression given in the General Clauses Act, on which the ld. DR has laid a great deal of emphasis.

22.3. Section 27 of the General Clauses Act, 1897, deals with the meaning of `service by post'. It states that: `Where any (Central Act) or Regulation made after the commencement of this Act authorizes of requires any document to be served by post, where the expression "serve" or either of the expressions "give" or "send" or any other expression in used, then, unless a different intention appears, the *service shall be deemed to be effected by properly addressing pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the*

letter would be delivered in the ordinary course of post'. It is manifest from the mandate of section 282 of the Act read with section 27 of the General Clauses Act that these provisions deal with the service of notice and more particularly the service of notice by post. Section 27 provides that service by post shall be deemed to be effected by properly addressing, pre-paying and posting by registered post. It means that when a letter containing the document is properly addressed, pre-paid and posted by a registered post, it will be considered as a valid service. It is not the end of the provision. There is a specific mention of the words *`unless the contrary is proved'*. It means that the presumption of valid service on properly addressing, pre-paying and positing by registered post is not irrebuttable. It can be rebutted if the contrary is proved. Extantly, we are dealing with a situation in which the contrary has been proved inasmuch as the Department has itself accepted that the notice sent by the registered post was returned by the postal authorities. Under such circumstances, there can be no presumption of valid service of notice in terms of the above provisions.

22.4. The ld. DR has harped on rule 127 to fortify her contention of valid service of the notice. Sub-section (2) of

section 282 provides that 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. Pursuant to this provision, rule 127 has been inserted by the IT (Eighteenth Amendment) Rules, 2015 w.e.f. 02-12-2015. It deals with the `*addresses'* at which a notice or summons etc. may be *delivered.* Sub-rule (2)(a) has some sub-clauses dealing with different addresses at which such notices etc. may be delivered or transmitted. Whereas sub-clause (i) refers to address available in the PAN database of the addressee, sub-clause (ii) refers to the address available in the income-tax return to which communication relates; sub-clause (iii) refers to the address available in the last income-tax return furnished by the addressee; and sub-clause (iv) refers to address of registered office of a company as available on the website of Ministry of Corporate Affairs. This shows that a notice etc. can be delivered to an assessee at any of the addresses given in rule 127(2)(a) which, *inter alia,* include address available in the PAN and also the address available in the income-tax return. It means that if a notice etc. is *delivered* at the address given in PAN, even if such

address is at variance with the address given in the income-tax return, it shall be considered as a valid delivery of notice. What emerges from rule 127 is that it simply provides different addresses of the assessee at which a notice etc. can be delivered or in other words served. This rule does not dispense with the otherwise legal requirement of serving the notice. Its effect is limited to the extent that if a notice etc. is delivered or served at the address given in the PAN, which may be different from the address given in the return of income, the assessee cannot assail the valid service of such a notice. But the fact of the matter is that the notice etc. must be delivered at the one of addresses given in the rule. Simply issuing a notice at the address given in PAN etc., which is not delivered to the assessee, may satisfy the requirement of the initial issue of notice at the correct address but not that of service of such notice until such notice is actually delivered or served. It can be seen from the discussion made above that no notice u/s 143(2) was delivered or served upon the assessee. Thus rule 127 does not assist the case of the Revenue in any manner. Before parting with this issue, we want to make it clear that the question as to whether or not the rule 127 will have retrospective effect is left open as adjudication on this issue

http://itatonline.org

is not warranted in the facts of the instant case since the notice was not delivered or served upon the assessee at any address.

iv. Whether the notice u/s 143(2) was deemed to have been issued/served ?

23.1. The ld. DR invoked the provisions of section 292BB to contend that since the assessment proceedings were attended by the assessee he cannot now claim that the notice was not issued or served on him.

23.2. We can better appreciate the contention on having a glimpse at section 292BB, which runs as under :

> "*Notice deemed to be valid in certain circumstances.*— Where an assessee has appeared in any proceeding or cooperated 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:
>
> Provided that *nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment* or reassessment.".

http://itatonline.org

23.3. This section was inserted by the Finance Act, 2008 w.e.f. 01-04-2008 and thus covers the assessment year/proceedings under consideration. It provides that where an assessee appears in any proceedings and co-operates in an inquiry relating to the assessment etc., it shall be deemed that any notice issued under any provisions of this Act, which is required to be served, has been duly served upon him as per law. When it is so, the assessee shall be prohibited from taking any objection in any proceedings that the notice was not properly served upon him. The proviso to this section states that if an assessee raises an objection before the completion of assessment that the notice was not properly served, then the provision deeming a proper service on attending the assessment proceedings etc., shall not apply. Further, what is relevant to note is that this section dispenses with the requirement of `service' of notice in the given circumstances and not the `issue' of notice. If a particular provision requires issue of notice within a stipulated period and no notice is actually issued, even though the requirement of service of notice will stand satisfied with the assessee attending the assessment proceedings, but the Revenue will still have to

http://itatonline.org

independently prove that the notice was issued. If issuance of a notice is not established, the adverse consequences will follow.

23.4. Since the proviso to section 143(2) talk of service of notice and not issue of notice, let us examine if the notice u/s 143(2) was served on the assessee in terms of section 292BB on his attending the assessment proceedings.

23.5. The assessee has placed on record a copy of his letter dated 28-11-2011 addressed to the DCIT, Circle-3, PMT Building, Pune objecting to the service of notice dated 08-09-2010 purportedly issued u/s. 143(2) and served upon him. The assessee categorically stated that "*I would like to state that the said notice 08-09-2010 has not been received by me"*. It has also been mentioned in para 4 of the assessee's aforesaid letter that *"hence, this notice is not a valid notice and bad in law. I request you to please quash the assessment proceedings*". This letter of the assessee bears the stamp of the office of ACIT, Circle-3, Pune with the date of 28-11-2011. On examination of the assessment folder produced before us by the ld. DR, it is found that the original of this letter bearing the date of receipt by the office of ACIT, Circle-3 as 28-11-2011, is available there.

http://itatonline.org

The assessment order in this case was passed on 30-12-2011. Thus, it is proved that the assessee did raise objection of the non-service of notice before the AO before the completion of assessment and such an objection has not been disposed of by the AO either in the assessment order or otherwise. It is evident from the assessment folder that notice u/s.143(2) dated 08-09-2010 was issued but never served upon the assessee and, in fact, returned by the postal authorities. It is further clear that no other notice u/s. 143(2) was issued by the AO before the cut-off date of 30-09-2010. Accordingly, proviso to section 292BB gets magnetized and the deemed service of notice u/s.143(2), by virtue of the main part of the section 292BB, is erased.

24. Now turning to the facts of the instant case, it is found as an admitted position that no notice u/s. 143(2) was actually served upon the assessee on or before 30-09-2010. The only notice which was issued on 08-09-2010 was returned by the postal authorities and thereafter no effort was made to serve another notice before the deadline. Since the requirement of `service' of notice u/s. 143(2) and not its `issue', is a jurisdictional condition, which is unfortunately lacking in the instant case, the sequitur is that the AO lacked jurisdiction to

http://itatonline.org

make the assessment. *Ex consequenti*, the assessment order passed in absence of a valid jurisdiction has to be and is hereby quashed.

25. In view of our decision on quashing the assessment for want of service of notice u/s. 143(2), there is no need to delve into the grounds raised by the assessee on merits.

26. In the result, the appeal is partly allowed.

Order pronounced in the Open Court on 01st July, 2019.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(R.S.SYAL)**
न्यायिक सदस्य **/JUDICIAL MEMBER**	उपाध्यक्ष/ **VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 01st July, 2019
सतीश

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u>:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) /
   The CIT (Appeals)-II, Pune
4. The CIT-II, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
   "**बी**" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

http://itatonline.org

		Date	
1.	Draft dictated on	27-06-2019	Sr.PS
2.	Draft placed before author	01-07-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

*