IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA BENCH: AGRA

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER, AND DR. MITHA LAL MEENA, ACCOUNTANT MEMBER

ITA No.145/Agra/2018
(ASSESSMENT YEAR: 2009-10)

M/S K.P. ColdStorage, B-23, Kamala Nagar, Agra PAN: AACCK7095G **(Assessee)**	**Vs**.	Income Tax Officer 2(1)(2), Agra **(Revenue)**

Assessee by	ShriAnurag Sinha, AR.
Revenue by	Shri Waseem Arshad, Sr. DR.

Date of Hearing	21.02.2019
Date of Pronouncement	22.03.2019

ORDER

Per Dr. M. L. Meena; A.M.:

This appeal, filed by the assessee, calls into question correctness of order dated 12.12.2017 passed by the learned CIT(A)-II, Agra in the matter of assessment order dated 21.12.2016 passed under section 147/144 of the Income Tax Act, 1961 for Assessment Year 2009-10 by the learned ITO 2(1)(2), Agra.

2. Brief facts of the case as mentioned in the assessment order are that an information was received from the ADIT(Inv.), Unit-2, Agra that there were huge cash deposits in the bank accounts maintained by the

above named assessee during the period F.Y 2008-09 relevant to A.Y 2009-10. Based on this information notice under section 148 of the Act was issued on 31.03.2016 by the learned ACIT-2(1), Agra. The notice so issued culminated into assessment framed by the learned ITO 2(1)(2), Agra determining total income at Rs. 2,21,60,400/- as against Rs.12,45,390/- originally returned by the assessee.

3. Before the learnedCIT(A), assessee raised various grounds regarding validity of re-opening and also submitted that the additions on merits have wrongly been made. However, being unconvinced the learnedCIT(A) rejected the appeal both on legal grounds as well on merits and confirmed the assessment order as such.

4. Being aggrieved, assessee has come in appeal raising the following grounds:

1. *"BECAUSE, upon due consideration of facts and in law the Ld. CIT(A) was not justified in disposing off the appeal without serving any Notice upon the 'appellant' and also without adjudicating the merits of the case.*

2. *BECAUSE,even after observing in the appellate order that the appeal has been taken up for decision on merits but the Ld. CIT(A) has not considered the objections and submissions as was made through the grounds of appeal and without perusal of the assessment records available with the respondent.*

3. *BECAUSE, upon due consideration of facts and in the overall circumstances of the case 'appellant' denies its liability to be assessed in*

terms of Notice dated 31.03.2016 said to be issued under section 148 of the 'Act'by the ACIT 2(1)(1), Agra.

4. *BECAUSE, while holding the assessment to be valid the Ld CIT(A) omitted to consider that no Notice under section 148 of the 'Act' was served upon the 'appellant' and ex-parte assessment was completed without serving any Notice under section 148 of the 'Act' till the completion of assessment which render the Assessment Order void-ab-initio.*

5. *BECAUSE, Ld. CIT(A) failed to consider that Notice issued under section 148 by the ACIT 2(1)(1), Agra if any, issued was No notice in the eyes of Law having been issued without jurisdiction.*

6. *BECAUSE, the Ld. CIT(A) has omitted to consider that assessment framed by the ITO 2(1)(2) on the basis of Notice issued by the ACIT 2(1)(1), Agra is also without jurisdiction and liable to be held void-ab-intio.*

7. *BECAUSE, the purported 'Reasons' as reproduced in the Assessment Order are No 'Reasons' in the eyes of Law. The so called 'Reasons' do not show any application of mind on part of the **'AO'** to show that any Income liable for Tax has escaped Assessment warranting recourse to Notice under section 148 of the Act.*

WITHOUT PREJUDICE TO THE ABOVE

8. *BECAUSE,addition of Rs. 70,00,000/- is bad on facts and in law and has been made purely on unfounded presumptions and surmises without any evidence brought on records and confronted to the assessee.*

9. *BECAUSE,addition of Rs. 1,39,15,000/-representing cash deposited in various Bank Accounts of the 'appellant' which is duly recorded in the books of accounts is bad on facts and in law and has been made purely on unfounded presumptions and surmises without any evidence brought on records and confronted to the assessee.*

10. *BECAUSE, in any case and in any view of the matter impugned additions/disallowances and impugned assessment order is bad in law, illegal, unjustified barred by limitation, contrary to facts and law based upon incorrect assumption of facts and further without allowing adequate opportunity of hearing in violation of principals of natural justice and therefore, the additions made deserves to be quashed.*

11. BECAUSE, the assessment order to the extent making addition is bad in law and against the facts of the case.

12. The 'appellant' craves leave to add, alter or vary the grounds of appeal before or at the time of hearing."

5. Before us, ShriAnuragSinha, Learned A.R of the assessee stated at bar that assessee do not press grounds of appeal no.1 & 2 and above grounds may be treated as withdrawn. Assessee vide grounds of appeal No. 3 & 4 has challenged that no notice under section 148 of the Act was served upon the assessee and ex-parte assessment was completed without serving any notice under section 148 of the Act till the completion of assessment which renders the assessment order to be held void-ab-initio.

6. Assessee has furnished an Affidavit of Shri. Rajesh Kumar Agarwal, Partner of the assessee firm under Rule-10 of the ITAT Rules 1963 which after hearing both the parties has been taken on records and admitted for consideration.

7. It was submitted by the assessee that objection regarding no service of notice under section 148 of the Act was duly raised before the learned Assessing officer immediately after receipt of notice under section 142(1) of the Act vide Letter dated 25.11.2016 (APB-21) by submitting as under:

Date: 25th November 2016

The Income Tax Officer-2(1)(2),
AaykarBhawan,
Agra

Re: - K.P. Cold Storage, Agra-Notice under section 142(1) dated 04.11.2016- A.Y 2009-10-Objections against proceedings

Respected Sir,

1. Kindly refer to your Notice dated 04.11.2016 intimating that a Notice u/s 148 dated 31.03.2016 bearing F.No. ACIT-2(1)/AGRA/148/2015-16/1930 was issued and served upon the assessee.

2. It is submitted that no notice bearing F. No. ACIT-2(1)/AGRA/148/2015-16/1930 dated 31.03.2016 alleged to have been issued under section 148 of the I.T. Act, 1961 has been received by the assessee.The subject Notice dated 4.11.2016 issued by you is barred by limitation and therefore, vitiated in law. The said notice dated 4.11.2016 is without jurisdiction and therefore, cannot be proceeded with.

3. It may also be apprised that territorial jurisdiction over the assessee lies with ACIT, Circle-I, Agra as evident from the jurisdiction detail as appearing on e-filing site of the Income Tax Department. Copy enclosed

In the above background of the matter it will be in accordance with the law that the Notice u/s 142(1) is dropped as being illegal, without jurisdiction and is not further proceeded with.

Encl: (a) Jurisdictional detail

Rajesh Agarwal

Partner K.P Cold Storage

Sent through speed post after being denied to accept by hand as ASK Centre as well as by the learned AO on 25.11.2016"

8. However, the objection so raised was rejected by the learned Assessing officer vide his Letter dated 05.12.2016 (APB 25 to 26) by observing as under:

(i) Para-2 of your letter dated 25.11.2016

"Your contention that subject notice (i.e. u/s 142(1) dated 04.11.2016 issued by the undersigned is barred by limitation and therefore vitiated in law as no notice issued u/s 148 dated 31.03.2016 has been received by you, is not acceptable under the provisions of law as the said notice has been properly issued and served upon you under the provisions of income Tax Act, 1961. Moreover, limitation to complete the reassessment proceedings initiated u/s 148 starts and is counted from the date of service of Notice u/s 148 and not from the notice issued under section 142(1). Therefore, the notice u/s 142(1) dated 04.11.2016 is not without jurisdiction"

9. Before the learned CIT(A) specific objection was raised vide ground No-2 stating that the assessment order is void-ab-intio as no notice was served upon the assessee till the completion of the assessment, but again the same was rejected by the learned CIT(A) who though proceeded ex-parte but dealt with the grounds raised in memo of appeal.

10. It was submitted by the assessee that none of the authorities below have taken into consideration the fact that when assessee denies service of notice in its very first communication to the learned Assessing officer, in that eventuality the learned Assessing officer was under an obligation to show with evidence that notice dated 31.03.2016 has properly been served in accordance with the procedure prescribed under the Law and the jurisdiction to proceed with the assessment has been lawfully acquired. It was submitted that neither the learned Assessing officer nor the learned CIT (A) have brought any such evidence on records which may show that notice dated 31.03.2016 as claimed to have been issued ever got served upon the assessee. Thus, as per the submission of the learned Counsel, in absence of any evidence available with the revenue that the notice so claimed to be issued on 31.03.2016 got served upon the assessee the consequent assessment framed in pursuance of notice dated 31.03.2016 is liable to be held void-ab-intio.

11. Assessee drew our attention to his Paper Book to show that despite his best and consistent efforts, the learned Assessing officer refused to furnish evidence regarding service of Notice dated 31.03.2016 upon the assessee or upon any of his duly appointed agent. He invited our attention to his application dated 09.10.2017 filed under

the Right to information Act whereby interalia assessee has required " certified copy of evidence of service of notice dated 31.03.2016", (APB-27 to 29) application dated 02.01.2018 seeking inspection of assessment records, (APB-30 to 32) application dated 07.05.2018 (APB-), application dated 11.05.2018 (APB-33 to 34), application dated 11.05.2018 (APB-35 to 36) application addressed to the learned Additional CIT, Range-4 requesting him to issue appropriate directions to the learned Assessing officer for allowing inspection of assessment records (APB-37 to 38) . These applications were finally responded by the learned Assessing officerwhovide his Letter dated 13.07.2018 denied inspection and certified copies on the pretext that since no proceedings are pending and therefore, assessee is not entitled for seeking inspection and copies of material (APB- 39 to 40). Soon thereafter, assessee, without giving up his efforts re-imitated his efforts and again filed an application dated 18.07.2018under the Right to Information Act and requested for evidence of service of notice upon the assessee (APB-42 to 43), in response to which the learned Assessing officer vide order dated 27.07.2018 replied that the "information sought is vague in nature. So, no information could be provided in this case" (APB-44). Again vide application dated 14.08.2018 assessee filed a fresh application before the learned Assessing officer seeking certified

copy of service upon the assessee (APB-45) which was allowed on 24.09.2018 showing that the service was made by Affixture and report of Affixture was also made available to the assessee. (APB-46 to 47).The learned AR referring to the report of Affixture submitted that service so made by Affixture is not in accordance with the law. He also pointed out that vide Synopsis dated 26.09.2018 filed before the Bench the learned Sr. D.R has claimed that notice was sent by Speed Post. It was submitted that no evidence is on records nor submitted by the learnedSr. D.R in his Synopsis or before the Benchthat such notice sent by speed post. He invited out attention to Letter dated 03.10.2018 filed in 'ASK' (APB-137) and personally before learned Assessing officer04.10.2018 (APB-138) stating and informing the learned Assessing officer that upon Inspection of Assessment records it was found that no evidence exists on assessment records that notice was ever sent by speed post. It was also submitted before us, that even if any evidence is now brought on records at this belated stage in that case too the assessee since, was dis-possed from the cold storage on 11.05.2012 by virtue of order passed on 19.07.2011 by the Hon'ble Allahabad High Court and thus, on the date of issuance of notice assessee was not in possession of the cold storage therefore, notice if all issued was wrongly addressed and could not have even reached the assessee. He stated that report of

notice server does state that cold storage was found closed even by him. He stated that all future correspondence was made by the learned Assessing officer at the residential address of partners, which notices were duly served and there is no evidence on records that any notice issued in future correspondence by the learned Assessing officer got served upon the cold storage address.

12. Learned Sr. D.R submitted that notice was validly issued and served upon the assessee by two recognised methodsi.e by Affixture and also by speed post provided under 282 of the Act and he invited attention to statement of the assessee recorded under section 131 (1) of the Act, specifically to question No. 8, he also stated that as per the provisions of Partnership Act assessee was required to intimate the change of address of registered office to the Registrar of Firms and no such intimation was given to Registrar. He disputed the contents of Annexure-“G’’ of the affidavit and submitted that cold storage has not been disposed off, only business operations have been discontinued. He also submitted that no evidence has been submitted by the assessee to show that Chetan Singh to whom possession was given was on behalf of the Firm or on behalf of the official liquidator. He thus placed heavy reliance to the order passed by the authorities below.

13. We have heard the rival submissions, perused the evidences on records and case laws referred and relied upon by the parties. During the course of arguments after hearing parties at length in respect of ground no. 3 & 4 it was made clear to the parties that as the case is being heard in respect of ground No. 3 to 4, pertaining to validity of proceedings under section 147 of the Act in absence of service of notice under section 148 of the Act, this being the jurisdictional ground therefore, if such grounds do not find favour with the view held by the Bench in such an eventually the case will be re-fixed for hearing in respect of other grounds raised in the memo of appeal, to such a proposal both the parties have agreed.

14. It is an undisputed position that proof of service of notice was provided to the assessee for the first time on 24.09.2018 by the learnedAssessing officer and partially vide Departmental Synopsis dated 26.09.2018, when the case was posted for hearing before ITAT. It is also an undisputed position in law that where assessee pleaded non-service of notice, it is for the department to place relevant material to substantiate their plea of service of notice. Authority in this regard is drawn from Hon'ble Madras High Court Judgment in the case of VankatNaickenTrustVs ITO (2000) 242 ITR 141 (Mad).

15. Now, as a matter of fact for the first time the department has come out clear to the assessee with its case that service of notice dated 31.03.2016 was made by Affixture on 31.03.2016 and has provided proof thereof in the shape of service report. Before adjudicating the validity of affixture, we would like to reproduce the report of affixture which is in hindi and reads as under:

> श्रीमानजीनोटिस148कीसर्विसकरनेगयाथाउपरोक्तपतेपरमालूमहुआकीकोल्डस्टोरेज बंदहैइसकेबादमेंइसफर्मकेपार्टनरश्रीराजेशअग्रवालकोनिवासबी-23, कमलानगरगयाजोआदमीसेआयाउसनेनोटिसलेनेसेमनाकरदिया |
>
> इसकारणसर्विसवापिस
>
> राधाकिशन
> 31.03.2016

15.1 On the same page of report another entry was made on the same day which is report by the Inspector of Income Tax, Shri. A.K Kaushik mentioning as under:

> आजदिनांक31.03.2016कोयहनोटिसu/s 148मुझेसर्विसकरनेकेलिएदियागयामैंश्रीराधाकिशनसर्वरकोसाथलेकरइसफर्मकेपार्टनरश्रीराजेशअग्रवालकेनिवासबी-23कमलानगर,आगरापरगयाकाफीदेरबादघरसेएकआदमीबहारआयाउससेपूछनेपरबतायागयाकीश्रीराजेशअग्रवालइससमयघरपरनहींहै|इसपरस्थितिमेंमेनेयहनोटिसश्रीराजेशअग्रवालकेघरपरचस्पाकरदिया|
>
> (ए. के. कौशिक)
> 31.03.2016
> आयकरनिरीक्षकसर्किल -2(1)(1), आगरा

16. Now, in the lights of above report of affixture, the short question which arises for consideration in this case is as to whether there was enough reason available on records to have resorted for service by affixture which is an alternate mode of service to be resorted when service by other modes are not found possible and thus one of the last mode of service notice and if so, whether notice claimed to have been served by affixture has been duly served upon the assessee as per procedure prescribed under law, prior to the commencement or even uptocompletion of the reassessment proceedings or not and whether the consequent assessment is valid in the eyes of law.

17. Before deciding the issue, it is considered expedient to reproduce here relevant portion of section 148(1), sections 282, of the Income Tax Act and Order V, Rule 12, Rule 17, rule 19, Rule 20(1) and Order III, Rule 2 of the Code of Civil Procedure 1908, which are relevant for the decision to the issue under consideration and which reads as under:

"148. Issue of notice where income has escaped assessment.—

(1) Before making the assessment, reassessment or re-computation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the

> prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139."

18. Section 282 of the Act provides as to how the notice under the Act is to be served. The relevant provision of this section reads as under:

> "282. Service of notice generally.—(1) 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 (5 of 1908)."

19. Order V, rule 12 of the Code of Civil Procedure 1908 provides that wherever it is practicable, service shall be made on defendant in person or on his agent. The relevant provision reads as under:

> "rule 12. Service to be on defendant in person when practicable, or on his agent.—Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient."

20. Order V, rule 17 of the Code of Civil Procedure lays down the procedure when defendant refuses to accept service, or cannot be found and it reads as under:

> "rule 17. Procedure when defendant refuses to accept service, or cannot be found:

> Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, 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 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."

21. Order V, Rule 19 of the Code of Civil Procedure lays down the procedure for examination of serving officer which reads as under:

> “rule 19: Examination of Serving Officer:
>
> "Where a summons is returned under rule 17, the court shall, if the return under that rule has not been verified by the affidavit of the Serving Officer and may, if it has been so verified, examine the serving officer on oath or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit and shall either declare that the summons has been duly served or order such service as it thinks fit.

22. Order V, Rule 20(1) provides for the circumstances under which the Court upon its satisfaction can direct notice to be served by Affixture. It reads as under:

> rule-20(1) Where the court is satisfied that there is reasons to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit."

23. Now, who are the recognized agents of the parties, the same has been defined in order III, Rule 2 of the Code of Civil Procedure, which reads as under:

> "rule 2. Recognised agents.—The recognised agents of parties by whom such appearances, applications and acts may be made or done are-
>
> (a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;
>
> (b)persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is

expressly authorized to make and do such appearances, applications and acts."

24. Thus, as per order V, Rule 12 of the Code of Civil Procedure referred to above, wherever it is practicable, the service has to be effected on defendant in person or on his agent who is empowered to accept service. Admittedly, in the present case, notice under section 148 of the Act was though attempted, but was not tendered to the assesseei.e Firm. It is an admitted case of the revenue that when the notice server went to serve the notice under section 148of the Act at the cold storage the notice server found the cold storage to be closed and thereafter the notice server went to the residence of the Partner at B-23, Kamla Nagar, Agra, from the house a man came out who refused to accept the service of notice under section 148 of the Act. This unnamed man stated to be coming out of the house of partners can by no stretch of reasoning be said to be the agent of the assessee Firm who has been empowered by the Firm to receive service of notice or even of its partner either in terms of order III, Rule 2 of the Code of Civil Procedureand therefore, no notice was tendered either to the assessee or his agent nor was it refused either by the assessee or his duly appointed agent who has been empowered by the Firm to receive service of notice. Thus, refusals by un-named person found at the house of the partners do not

amount to refusal by agent who has been empowered by the Firm or even by agent's agent to receive service of notice. Similar view was adopted by the ITAT, Delhi Bench in the case of AuramJewellery Exports (P) Ltd Vs ACIT (2017) 88 taxman.com 633 (Del) where on alleged refusal by the Chowkidar, whose name has not been mentioned in the report notice was served through affixture. The Bench while quashing notice under section 148 held that no effort was made by the assessee to serve notice upon the assessee rather paper work showing service has been completed within two days.

25. Under order V, rule 17 of the Code of Civil Procedure, the affixation can be done only when the assessee or his agent refuses to sign the acknowledgement or could not be found. Here, in the present case as per the report of the notice server he made his very first attempt to serve the notice at the cold storage which was found closed. Thereafter, rightly he went to the residence of the partnerShri. Rajesh Agarwalresident of B-23, Kamla Nagar, Agra and who being Partner of the Firm was agent of the Firm on whom service can validly be made. Here, as report of notice server an unidentified person came out who refused to receive notice, admittedly, in the present case, notice under section 148 of the Act was not tendered to the assessee nor the same

was refused at all by the assessee. It is an admitted case of the revenue that when the notice server went to serve the notice under section 148of the Act at the cold storage he found the cold storage to be closed and thereafter he went to the residence of the Partner at B-23, Kamla Nagar, Agra the man who came out refused to accept the service of notice under section 148 of the Act. This unnamed man by no stretch of imagination can be said to be the agent of the Firm or even Partner of Shri. Rajesh Agarwal either in terms of order III, Rule 2 of the Code of Civil and therefore, no notice was tendered either to the assessee or his duly appointed agent nor was it refused either by the assessee or his agent who has been empowered by the Firm.

26. There is neither any material on records nor brought to our notice during the course of hearing to assume for a moment that the duly appointed agent of the Firm was avoiding service and was keeping out of the way for being served with notice and thus there was reasons to believe that notice upon him could not be served in ordinary course, warranting recourse to service by Affixture. Thus, essential conditions of Rule-17 of Order-V of the Civil Procedure Code are not fulfilled and accordingly we have no hesitation to quash the order of the learned

Assessing officer directing service by Affixture, in absence of any material warranting circumstances for service to be made by Affixture.

27. From the chronology of the events as mentioned in the report of notice server it is abundantly clear that no valid reason have been brought on records for resorting to service by affixture as mandated in Order (V) rule 20(1) of the Civil Procedure Code. Thus, there was no reason to have believed that that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way. Thus service by resorting to affixture was a premature decision on part of the learned Assessing officer without any basis brought on report of the notice server.

28. This service by affixture is also against the specific Rule 20(1) of Order V of the CPC. Rule 20(1) of Order V of the CPC has been considered by the Hon'ble Allahabad High Court in the case of Jagannath Prasad Vs CIT (1977) 110 ITR 27 (All) where the Hon'ble High Court had the occasion to consider the validity of order of the ITO directing service by affixture. The Hon'ble Court held that "We have already extracted rule 20. Before action under rule 20 can be taken two conditions must exist, one that the court has reason to believe that the

defendant is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way. We will avoid going into the controversy as to whether the satisfaction of the court regarding these two conditions must be recorded in a written order. Nevertheless, there must be material on the record on the basis of which a reasonable person might come to the conclusion that either of these conditions is satisfied. The satisfaction of the court contemplated by Order V, rule 20 is an objective satisfaction. It is not a subjective one and, as such, relevant material must exist on the record to justify this conclusion. Counsel for the revenue has urged that inasmuch as the Income-tax Officer passed the impugned order it must be taken that he was satisfied that one or the other of these conditions existed. We are unable to concur with this view. The report given by the process server was to the effect that he had made enquiries at a number of places but could not find out, which, in the context, means the assessee. After this report the Income-tax Officer passed an order for affixture. From the mere fact that the process server could not find out the assessee it would not lead to the conclusion that the assessee was keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served. The report does not indicate that more than one attempt was made by the process server.

On the contrary, it indicates that on a single attempt he enquired at a number of places but could not find out the assessee. This, in our view, cannot constitute sufficient material for the satisfaction of the Income-tax Officer that the conditions requisite for the application of Order V, rule 20, existed. The order of the Income-tax Officer directing service by affixture is based on no relevant material on the record and, as such, has to be struck down."

29. Similar view was adopted Hon'ble Punjab & Haryana High Court in the case of KunjBehari vs. ITO (1983) 139 ITR 73 (P&H) (APB-58-59) wherein there Lordships have held that it is the duty of the Department to discharge the onus by showing that the authority concerned had reason to believe that the assessee was keeping out of the way for the purpose of avoiding service or that there were other good reasons to come to the conclusion that the summons could not be served in the ordinary way. Thus, the Hon'ble Court held that**"**a reading of the provisions of 0. 5, rr. 9, 12 and 20 of the CPC makes it amply clear that ordinarily the service has to be effected on the person concerned personally, but where the authority concerned is satisfied that there is reason to believe that the person concerned is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way, the authority can order

that the summons be served by affixing a copy thereof in some conspicuous part of the house (if any) in which the person, who is to be served, is known to have last resided or carried on business. In the present case, admittedly, according to the respondents, substituted service was affected. With a view to resort to the method of substituted service, it is the duty of the Department to discharge the onus by showing that the authority concerned had reason to believe that the assessee was keeping out of the way for the purpose of avoiding service or that there were other good reasons to come to the conclusion that the summons could not be served in the ordinary way. In spite of a specific averment having been made in the petition, nothing has been disclosed in the return to show that the abovementioned condition precedent was satisfied before substituted service was resorted to. The only averment made in the return is that the assessee was duly served by affixation. Nothing has been averred in the return, nor any record has been shown at the time of hearing to satisfy the Court that the authority, who ordered for the substituted service was satisfied that there was reason to believe that the assessee was keeping out of the way for the purpose of avoiding service or there was any good reason to come to the conclusion that the assessee could not be served in the ordinary way. In the present case, an ex parte assessment order was passed and

obviously the assessee had no knowledge of the passing of the order, therefore, the demand notice, is to be quashed.”

30. Even the report of the Inspector of Income Tax, Shri. A.K Kaushik states that notice was given to him and he along with notice server went to the residence of Shri. Rajesh Agarwalat B-23, Kamla Nagar, Agra. After a longtime one man came out of the house and upon enquiry, heinformed that Shri Rajesh Agarwal is not available at home now. Under the aforementioned circumstances, the notice was affixed at the residence of Shri. Rajesh Agarwal.

31. Perusal of the above report again does not inspire any confidence. In absence of the name and capacity of the person who allegedly came out of the house and who allegedly stated that right now Shri. Rajesh Agarwal is not at home service by affixture has wrongly been made. As observed before thatin view of Order III, Rule 2 of the Code of Civil Procedure that unidentified person coming out of the house could not be treated to be the agent of the Firm or its Partner. Therefore, service by affixture is in violation to Order III, Rule 2 of the Code of Civil Procedure and in this view of the matter notice cannot be held to have been served.Thus, neither there was any valid reason on records for directing service by affixture and affixture, if any made was made in violation of

the procedure provided under the Civil Procedure Code, as discussed above. In the case of AuramJewellery Exports (P) Ltd Vs ACIT (2017) 88 taxman.com 633 (Del) where on alleged refusal by the Chowkidar, whose name has not been mentioned in the report notice was served through affixture. The Bench while quashing notice under section 148 held that no effort was made by the assessee to serve notice upon the assessee rather paper work showing service has been completed within two days.

32. In the facts of the present case, enquiry about agent of the Firm Shri. Rajesh Agarwal was made on a single day at the residence where as per report of Inspector he was informed that “Shri Rajesh Agarwal is not at home “right now.” Temporary unavailability of Rajesh Agarwal in day time at his residence cannot lead to the conclusion that either Shri Rajesh Agarwal was avoiding service of notice or there was no likelihood of his returning to his residence. Therefore, service by Affixture on temporary unavailability cannot lead to the conclusion that there is no likelihood of Rajesh Agarwal being found at his home at reasonable point of time.

33. Further, service as claimed to have been made by affixture is in violation to Rule 17, Order V of the CPC which specifically requires that

the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed has to be mentioned in the report of the process server who affixed the notice. In this case from the report as reproduced above there is no mention of any name of the person who identified the house of Shri. Rajesh Agarwal and the so called service by affixture is not witnessed by any independent person, which not only is in violation of Rule 17, Order V of the CPC and also raises serious doubts about the claim of the Department of service by affixture.The requirement that report is to be authenticated by independent persons is with a view to avoid any attempt by the process server to prepare the report sitting in his office.This is also in conflict with the Judgment of Hon'ble Supreme Court in the case of CIT VsRamendraNathGhosh reported as (1971) 82 ITR 888 (S.C) (APB- 50 to 53)has held that"Service of notice by affixture is invalid wherename of person who identified assessee's business premises not mentioned in the report of Inspector and the Inspector also did not claim personal knowledge of assessee's premise"

34. ITAT, Agra Bench in the case of ITO 5(1), Firozabad Vs M/s Electronic Glass Industries inITA No. 427/Agra/2002, Order dated 29.12.2006 (APB- 76 to 78) upheld the order passed by the

learnedCIT(A) quashing notice served by affixture where the so called exercise of affixture holding that **"**We have heard both the parties. It is a settled law that service of roper notice is essential to assume the jurisdiction under section 147 of the Act. learned CIT (Appeals) has pointed out that the learnedAssessing Officer has not adopted the proper procedure for service of notice under section 148. There is no evidence on record to prove that the assessee was avoiding the service of notice. The learnedAssessing Officer has also not examined the notice server so as to ascertain that the service by affixture was made at the correct place. There is no evidence on record to suggest that process server knew the place of business or residence where the affixture was made. The Service by affixture is not witnessed by independent witnesses identifying the place of the affixture. In our view the learnedAssessing Officer has failed to follow the procedure to serve he notice u/s 148. There is no evidence to suggest that service was made at the correct place as witnessed by independent witnesses. Accordingly, we do not find any infirmity in the order passed by learned CIT (Appeals). Hence, no interference is called for. In the result, appeal filed by the Revenue stands dismissed."

35. Again the ITAT Agra Bench in the case of M/s Electronic Glass Industries Vs ITO 5(1), Firozabad inITA No. 403 & 495 /Agra/2003, vide its order dated 28.05.2010 quashed notice under section served by affixture where the allegation was that assessee upon being contacted on phone by the Inspector refused to receive Notice. The ITAT held that"After Considering the submissions and perusing the material on record, we find assessee deserves to succeed in these appeals. For both the years it has been claimed that notice was served through affixture. The learnedAssessing Officer as well as learned CIT (A) who dismissed the appeal of the assessee have recorded the contents of inspector's report in their respective order. The contents of Inspector's report are reproduced here as under:

> "Thus it is apparent that Sh. Vishwa Deep Singh and Sh. Rashtra Deep Singh are avoiding to take delivery of notice. In These Circumstances I affix the original notice on te front door of office of the firm M/s Electronic Glass Industry situated at Arya Nagar, Firozabad, ShriDeewan Singh, S.N. accompanied with me who identified the office of M/s Electronic Glass Industry. I affix the original notice in the presence of Sh. Deewan Singh Notice server of the office. Submitted or necessary action.
>
> Your faithfully,
> Sd/-
> Dated 23-05.2001 (Atma Ram)
> ITI"

On this Basis the Assessing officer has assumed jurisdiction or completing the assessment reopened under section 147/148 and thereafter has completed the assessment. The ld. CIT (A) has also confirmed the action of the Assessing Officer. The procedure for serving the notice by affixture has been provided under section 282. The notice through affixture can be served. However, it should be witnessed by two independent witnesses. In the present case no procedure has been followed as provided under section 282 of the Act. Therefore, It cannot be said that there was a proper service on the assessee. In the case of Ess Aar export vs ITO, 94 ITD 484, It has been held that "all the requirements of substituted service must be shown to be fully satisfied. Names and addresses of the persons, if any, by shown the house was identified and in whose presence the copy was affixed, have to be stated n the report. If above is not done and the officer does not mention in his report nor in his affidavit that he personally know the place of the business of the assessee, the substituted service cannot be treated as 'valid' and effected in accordance with law. The report of the process server was witnessed by the Income–tax Inspector. There is no evidence of any independent person having been associated with identification of the place of business of the assessee. There is no evidence that the process server or the Income- tax Inspector had personal knowledge of place of business of assessee and was thus in a portion to identity the same. In the absence of above material evidence notice dated 5th march 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 assessment made under section 144 is bad in law. The same is required to be set aside". While holding so, reliance has been placed on the decision of Hon'ble Supreme Court in the case of CIT vsRamendraNathGhosh, 82 ITR 888 (SC). The Hon'ble Allahabad High Court also in the case of

Jagannath Prasad and Othersvs CIT, 1101 ITR 27 has held the service by affixture has to be made as per procedure laid down under Order V Rule 20 of the CPC as Provided under section 282 of the IT Act. E Hon'ble High Court has held that conditions requisite for the application of Order V Rule 20, were not existed. Order of ITO directing service by affixture was not valid. The ratios of these decisions are squarely applicable on the facts of the present case as in present case also no proper service has been made on the assessee. Notice as alleged by department affixed on the front door of the office of the assessee is without any independent witness. Therefore, we have no hesitation in holding that issuance of notice under section 148 was bad in law. Since we have held that issuance of notice under section 148 bad in law, the assumption of jurisdiction for completion of assessment is also bad in law. Accordingly, we set aside the order of Assessing officer for both the assessment year 1993-1994 and 97-98 where notice has been served through affixture which is not valid in the eyes of law."

36. Similar view was adopted by the ITAT, Delhi Bench in the case of Wg. Cdr.Sucha Singh, C/o Manoj Kumar KanthVs ITO 2017 (7) TMI 1046 - ITAT Delhi to which one of us was the party:

"Non service of notice - validity of assessment - service by way of affixture - Held that:- 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"

37. It is also noted that service by affixture is in violation to order V, rule 19 of the Code of Civil Procedure and for this authority is drawn from the Judgement of Hon'ble Allahabad High Court in the case of CIT vs. SatyaNarainPoddar reported as (1973) 89 ITR 136 (All.) (APB-56 to 57) has held that **"**Rule 19 of O. 5, CPC, uses both the words "shall" and "may". In cases where the return under r. 17 is not verified by an affidavit of the serving officer, the rule says that the Court shall examine the serving officer on oath. It is only where the affidavit of the serving officer has been filed that the rule gives discretion to the Court to examine or not the serving officer on oath. Where the summons returned under r. 17 has not been verified by the serving officer, it is mandatory on the authority to examine the officer on oath and if he does not do so it would be non-compliance of the provisions of r. 19 and will make the service of the notice invalid in law. In the present case, the Tribunal has found that the process-server did not verify the return by an affidavit and that he was not examined on oath by the learnedITO. On the facts and in the

circumstances of the case, the Tribunal was right in holding that the service of notice under section 22(2) of the Indian IT Act, 1922, was invalid in law." Hon'ble Calcutta High Court inGajendra Kumar Banthia vs. UOI(1996) 222 ITR 632 (Cal.) held that **"**In terms of s. 282 of the IT Act a notice has to be served in the manner as is laid down in the CPC which provides that service of summons shall be made by delivering or tendering a copy thereof signed by the judge or such officer as he appoints in this behalf, and sealed with the seal of the Court. Therefore, delivering or tendering the same is the sine qua non for such service. Order V, r. 19 provides that where a summons is returned under r. 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit. In the instant case evidently the requirements under Order V r. 19, have been complied with. Hon'ble Kerala High Court in the case of M.O. Thomas vs. CIT(1963) 47 ITR 775 (Ker.) quashed re-assessment holding that"There is no verification of the service under r. 17 of O. V by an affidavit by the serving officer as enjoined by r. 19 of O. V. Curiously

enough, the learnedITO has declared the notice to have been served on 29th March, 1954, even without previously obtaining a sworn statement from the notice server. There is no indication whatever that any sworn statement has at any time been obtained from the serving officer. It is clear that r. 17 has been violated by the serving officer in that the serving officer has not used all due and reasonable diligence for finding out the assessee and for ascertaining whether there is any agent empowered to accept service on his behalf nor has he exercised due and reasonable diligence in finding out whether there is any other person on whom service could be effected. Rule 19 has been violated by the learnedITO concerned in that he has given a declaration that the notice has been duly served without the return being verified by an affidavit and without examining the serving officer on oath.*"*Similar view was taken by the Delhi Bench in the case of Ram Singh MathurVs ITO (2007) 112 TTJ 0989 (Del) wherein the Bench while quashing notice served by affixture held that "In addition thereto, r. 19 of order 5 requires that where notice is returned under r. 17, the Court shall, if the return under the rule has not been verified by an affidavit of the serving officer, examine the serving officer on oath touching his proceedings and may make such further enquiry as he deems fit and shall either declare that the notice has been duly served or pass such order as he thinks fit. In the present

case, there is no evidence to show that the notice server (ShriBabulal) was required to file an affidavit or that he was examined by the learned Assessing officer on oath. Such procedural irregularities do invalidate the service of the notice as held by the Kerala High Court in M.O. Thomas vs. CIT (1963) 47 ITR 775 (Ker). It is also seen that no reasonable attempts were made by the learned Assessing officer or the serving officer to find the assessee before serving the notice by affixture."

38. In the case on hands there is neither any affidavit furnished by the serving officer nor has he been examined on oath by the Assessing officer. Report by serving officer cannot be equated with affidavit required under the Rule-19, Order-V of the Civil Procedure Code as neither the report has any witness and in absence of any verification on oath in such a report.

39. Now, coming to the validity of next mode of service which as per the claim of the Department was by speed post at the address of the cold storage addressed at "K.P Cold Storage, Ujrai, Khandoli, Hathras Road, Agra."

40. The claim of the Department is that such notice was sent by speed post also on the above mentioned address. Assessee has challenged

that no such notice was ever sent by speed post, he invited attention to the affidavit dated 11.02.2019 filed under Rule-10 of the ITAT Rules 1963 to contend that as the department for the first time vide its synopsis has claimed that such a notice was sent by speed post and therefore, in compliance to such a assertion made by the department assessee has filed an affidavit denying service of notice. In such circumstances, as rightly contended by the learned AR the department should come out with evidence showing that a such a notice was ever sent by speed post. He placed reliance toVenkatNaicken Trust (supra) for the proposition that "when the assessee pleads that he was not properly served with notice, burden is on the Department to prove such service with relevant material."He submitted that after receipt of Synopsis dated 26.09.2018 inspection of assessment record as was requested long back vide application dated 02.01.2018 (APB-136) was allowed and carried out by the learned A.R and upon his inspection no evidence was found to be available on records of assessment in evidence of service by speed post. He invited attention to Letters dated 03.10.2018 (APB-137) filed in 'ASK' and Letter of even dated filed personally before the learned Assessing Officerbearing his signatures in acknowledgement of receipt of such Letter, having same contents stating as under:

"To,

The Income Tax Officer -Ward-2(1)(2)
AaykarBhawan,
Sanjay Place,
Agra.

Re: - M/s. K.P. Cold Storage,
Through Partner ShriRajeshAgarwal
Chamber No.7, Manu Video Complex
Wazirpura,Agra
P.A.NO. AAGFK5538H
Assessment Year: 2009-2010

Sir,

Your good self was pleased to allow Inspection of Assessment Records to the undersigned .From the Inspection so carried out it was noted that:

2. There existed no evidence available on records of assessment that Notice dated 31.03.2016 claimed to have been sent by Speed Post was delivered to the Postal Authorities for service on 31.03.2016.

3. There existed no evidence available on records of assessment in the shape of any Acknowledgement issued by the Postal Authority against booking of such an Article to be sent by Speed Post.

4. There existed no evidence available on records of assessment that Notice dated 31.03.2016 claimed to have been sent by Speed Post was either put to the process of Post on 31.03.2016 or even delivered to the addressee.

5. There existed no evidence available on records of assessment in the shape of Tracking Report in respect of so called Notice purported to have been sent by Speed Post issuedby Speed Post Authorities to prove that Notice got delivered to the addressee.

This Letter, besides being filed in 'ASK' is also handed over to you in person by the undersigned with the request that if the averments

made above are contrary to the facts available on assessment records in that eventuality the undersigned may kindly be apprised. It is also made clear to your good self that assessee will be filing this Letter before the Hon'ble ITAT in evidence of the contention that none of the above evidence is available on assessment records and therefore, no Notice dated 31.03.2016 claimed to have been sent by Speed Post was ever issued.

Respectfully Submitted

Dated: 03rd October 2018 Adv. AnuragSinha

41. In view of the above it was submitted that in absence of the any evidence available on records merely by a bare assertion service by speed post cannot be assumed more so when as per the own claim of the department the cold storage on the date of 31.03.2016 was found closed.

42. The learned Sr. D.R submitted that there exists evidence on records that such a notice was sent by speed post he invited attention to the stamp affixed on the notice dated 31.03.2016. He also submitted that there is a presumption of correctness in respect of official Act. He also submitted that assessee has not challenged issuance of notice dated 31.03.2016 only dispute being raised by the assessee is about its service which even if resolved in favour of the assessee will not render the assessment void-ab-intio and for this proposition he placed reliance

to the learned Third Member Bench decision of Agra ITAT in the case of ITO VsLal Chand Agarwal(2012) 134 ITD 91 (Agra) for the proposition that non service of notice will not render assessment void-ab-intio but in such a case set-aside is a proper course of action. He also relied upon Apex Court in the case of R.K. Upadhyaya v. Shanabhai P. Patel (1987) 166 ITR 163 to submit that an assessment framed in pursuance to a notice issued within the period of limitation, though served beyond such period, is valid in law.

43. In rejoinder, it was submitted by the learned A.R that in view of denial vide affidavit dated 11.02.2019 filed in the office of learnedSr. D.R on 13.02.2019 and Letter dated 04.10.2018 filed personally before the learned Assessing officer and in ASK on 03.10.2018 the department should have brought evidence on records to prove the affirmation given on oath by way of an Affidavit is wrong and submitted that advantage cannot be taken of any presumption given in section 27 of the General Clauses Act and section 114 of the Indian Evidence Act, as presumption if any in favour of the department stood rebutted vide affidavit dated 11.02.2019 and letters dated 03 & 04.10.2018 filed by the assessee. He also submitted that reliance to Learned Third Member order in the case of Lal Chand Agarwal (supra) is misplaced as the Hon'ble Allahabad

High Court upon appeal preferred by Lal Chand Agarwal reversed the order passed by Learned Third Member in Income Tax Appeal No. 479 of 2012.

44. In the light of the evidences on records and on the face of counter arguments advanced by the parties,we proceed to examine the provision of section 27 of the General Clauses Act and section 114 of the Indian Evidence Act, though the same was not specifically referred by the learnedSr. D.R in his pleadings. The provision can be summarized as under:

> Section 27 of the General Clause Act creates a legal fiction by which document is:
>
> (1) Posted;
> (2) After properly addressing and
> (3) Prepaying by registered post

45. Thus, for raising the statutory presumption of service under section 27 of the General Clauses Act what is relevant is whether the notice sought to be served, was firstly proved to have been sent, secondly it must be shown that it was properly and correctly addressed and was adequately paid for being sent by registered post or speed post to the addressee.

46. Similar presumption is raised under section 114 of the Indian Evidence Act where it is stated that the Court may presume that the, common course of business has been followed in a particular case that is to say, when a letter is sent by post by prepaying and properly addressing it the same has been received by the addressee. Undoubtedly, presumption sunder sections 27 of the General Clauses Act as well as under section 114 of the Evidence Act raises rebuttable presumption in favour of the sender regarding proof of service but before being entitled for the advantage of the presumption under the aforementioned sections it has to demonstrated with evidence that the essentials thereof are fully met and due compliances have been made in respect of steps provided therein and in the process of claiming presumption onus is on the sender to prove with evidence that the required compliances were duly made and therefore the sender is entitled to advantage of presumption.

47. However, in the facts of the present case the revenue cannot claim advantage of above presumption as despite specific challenged by the assessee no evidence has been brought on our records in the shape of any acknowledgement issued by the postal authority against booking of such an article being notice dated 31.03.2016 claimed to have been sent by speed post; no evidence is on records that notice dated

31.03.2016 was put to the process of post on 31.03.2016; no evidence is available on records of assessment in the shape of tracking report in respect of notice purported to have been sent by speed post to prove that either the alleged notice got delivered to the addressee or got returned to the department. Thus, in absence of any iota of evidence showing that the notice was ever put to the process of service and delivered to the post office for this purpose we are constrained to hold that no advantage can be availed by producing office stamped notice bearing office endorsement of the learnedAssessing officer and by referring to section 27 of the General Clauses Act and section 114 of the Indian Evidence Act. The presumption also do not applies in this case as no evidence has been brought on records to dispute the contents of affidavit specifically denying service of notice by speed post and in absence of any third party, postal department evidence leading credibility to the respondents record.

48. Reliance by the revenue to the Learned Third Member Bench decision in the case of ITO VsLal Chand Agarwal (2012) 134 ITD 91 (Agra) for the proposition that non service of notice will not render the assessment being held void-ab-intio as the said judgment upon being appealed before the Hon'ble Allahabad High Court stood reversed as found reported as Lal Chand AgarwalVs CIT (2016) 68 taxmann.com

102 (Allahabad). Reliance on the Judgement of R.K. Upadhyaya v. Shanabhai P. Patel (1987) 166 ITR 163 (SC) is also misplaced as in the case before the Hon'ble Supreme Court was with regard to the limitation for service of notice under section 148 of the Act. In the case of R.K. Upadhyaya (supra) the controversy wasthat a notice under Section 148 was issued on 31.03.1970 i.e. the last date of limitation, which notice wasserved on the assessee on 03.04.1970, after the expiry of limitation. The High Court held that since the noticewas served after the expiry of the period, the assessment order was invalid and had accordingly quashed thenotice for reassessment issued under Section 147 of the Income Tax Act, 1961. The Supreme Court held thatthe scheme of 1961 Act in so far as the notice for re-assessment was concerned was quite different than thatcontained under Section 34 of the Income Tax Act, 1922. The Supreme Court held that a clear distinction hasbeen made between "issue of notice" and "service of notice" under the Act. The Supreme Court held that oncea notice is issued within the period of limitation, the Income Tax Officer gets the jurisdiction to proceed toreassess and make the assessment order. The mandate of Section 148(1) of the Act is, that reassessment shallnot be made until there has been a service of notice which is a condition precedent to making an order ofassessment. In the facts of present case notice has not been

served till the completion of assessment as clearly stated in the ground of appeal. Thus, the case in a way advances the case of assessee where the Hon'ble Supreme Court has held that the mandate of Section 148(1) of the Act is, that reassessment shall not be made until there has been a service of notice which is a condition precedent to making an order of assessment.

49. Now, the question for consideration would be, when can be notice under Section 148 of the IT Act can be said to have been issued? At this stage, it would be appropriate to notice Section 149(1) of the IT Act. The term 'shall be issued' used in Section 149 of the IT Act is extremely important.

50. The expression "issue" has been defined in Black's Law Dictionary to mean "To send forth; to emit; to promulgate; as, an officer issues order, process issues from court. To put into circulation; as, the treasury issues notes. To send out, to send out officially; to deliver, for use, or authoritatively; to go forth as authoritative or binding. When used with reference to writs, process, and the like, the term is ordinarily construed as importing delivery to the proper person, or to the proper officer for service etc."

51. In P. RamanathanAiyer's Law Lexicon, the word "issue" has been defined as follows:-

"Issue. As a noun, the act of sending or causing to go forth; a moving out of any enclosed place; egress; the act of passing out; exit, egress or passage out (Worcester Dict.); the ultimate result or end. As a verb, 'To issue' means to send out, to send out officially; to send forth; to put forth; to deliver, for use, or un-authoritatively; to put into circulation; to emit; to go out (Burrill); to go forth as an authoritative or binding, to proceed or arise from; to proceed as from a source (Century Dict.) Issue of Process. Going out of the hands of the clerk, expressed or implied, to be delivered to the Sheriff for service. A writ or notice is issued when it is put in proper form and placed in an officer's hands for service, at the time it becomes a perfected process. Any process may be considered 'issued' if made out and placed in the hands of a person authorised to serve it, and with a bona fide intent to have it served."

52. Thus, the expression "to issue" in the context of issuance of notice, writs and process, has been attributed the meaning, to send out; to place in the hands of the proper officer for service. The expression "shall be issued" as used in Section 149 of the IT Act would therefore have to be read in the aforesaid context. Thus, the expression "shall be issued" would mean to send out to the place in the hands of the proper official for service. After issuing notice and after due dispatch, it must be placed in hands of the serving officer like the post office by speed post or by registered post etc., by which the officer issuing notice may not have

control over the said notice after issuance of the said notice. It must be properly stamped and issued on the correct address to whom it has been addressed. Mere signing of notice cannot be equated with the issuance of notice as contemplated under Section 149 of the IT Act.

53. Thus, we hold that notice claimed to have been sent by speed post was no notice in the eye of law in absence of any evidence of its being put to the process of post for delivery having been brought on our records.

54. Though we have already held service claimed to have been made by speed post to be invalid in law. In addition to the above, there is one more objection raised by the learned A.R and duly rebutted by the learned Sr. D.R whichrenders the service by speed post invalid. Vide its Affidavit dated 11.02.2019 assessee has submitted as under:

> *"BEFORE THE HON'BLE INCOME TAX APPELLATE TRIBUNAL,*
> *AGRA BENCH, AGRA*
> *ITA No.145/Agra/2018 Assessment Year 2009-10*
>
> *Affidavit under Rule 10 of Income tax Appellate Tribunal Rules, 1963*
>
> *AFFIDAVIT OF SHRI RAJESH KUMAR AGARWAL AGED ABOUT 47 YEARS SON OF LATE SHRI MAHESH*

CHAND AGARWAL PARTNER M/S K.P. COLD STORAGE, CHAMBER NO.7, MANU VIDEO COMPLEX, WAZIRPURA ROAD, AGRA. (Hereinafter referred to as the 'Deponent')

I, the Deponent named above in its capacity as a Partner in Firm M/s K.P. Cold Storage having its office at Chamber No.7,Manu Video Complex, Wazirpura Road, Agra (the appellant in ITA No. 145/Agra/2018 for Assessment Year 2009-10) which is pending before this Hon'ble Tribunal.

Since there are certain facts which are not borne out from records, therefore, it is considered necessary and expedient to bring those facts on record by stating the same on Affidavit in terms of Rule 10 of Appellate Tribunal Rules, 1963.

I, the 'Deponent' named above hereby state on oath as under:

2. *That the 'Deponent' alongwith his Father Shri. Mahesh Chand Agarwalhas purchasedthe above named Cold Storage vide registeredPurchase Deed dated 29.10.1999for a total consideration of Rs.51,00,000/-Copy of the Purchase Deed of Land & Building and Receipt of Sale issued by Seller against Plant & Machinery are enclosed herewith and separatelymarked as ('Annexure-'A'& 'B') to this Affidavit.*

3. *That the 'Deponent' affirms that the Cold Storage so purchased by the 'Deponent' was hitherto held by M/s Dass Cold Storage (P) Limited as its Unit who hadacquired it vide Registered Deed dated 05.07.1996 from Uttar Pradesh Financial Corporation which after their purchase gotnamed as K.P Cold Storage.*

4. *That the 'Deponent' confirms thatinitially the Cold Storage was named as M/s Seema Cold Storage (P) Limited. The facts stated above are verifiable from the Assessment order dated 31.03.2003passed under section 143(3) of the Act for Assessment Year 2000-01 by the Assistant Commissioner of Income Tax, Central Circle, Agra wherein such fact is fully mentioned therein. Xerox copy of the Assessment order is enclosed herewith and marked as ('Annexure-'C') to this Affidavit.*

5. *That vide Order dated 24.03.2005 passed by Hon'ble Allahabad High Courtin Writ Petition Number No. 7481 of 1995 (Subhash Chandra Goyal Vs. U.P.F.C & Others) and where the 'Deponent' along with his father werearrayed as Respondent Number 5 & 6 respectively, the Hon'ble High Court cancelled the Sale Deed dated 05.07.1996 executed by the 'UPFC' in favour of M/s Dass Cold Storage (P) Limited and in consequence thereof the Hon'ble Allahabad High Court inter alia held Respondent No. 5 & 6 being the 'Deponent' and his father who acquired the Cold Storage from M/s Dass Cold Storage (P) Limited to be not entitled to retain the possession of the Cold Storage. Xerox copy of*

the Judgment by the Hon'ble Allahabad High Court is enclosed herewith and marked as ('Annexure-'D') to this Affidavit.

6. *The 'Deponent' confirms that above mentioned facts stood acknowledged by the 'UPFC' who in response to an application filed under the Right to Information Act vide Letter dated 09.02.2011 has confirmed to the facts stated in Para 1 to 5 of this Affidavit. Xerox copy of the Information as provided under the RTI Act is enclosed herewith and marked as ('Annexure-'E') to this Affidavit.*

7. *That vide Judgment dated 19.07.2011 the Hon'ble Allahabad High Court in Company Petition Number 29 of 1995 titled as M/s Seema Ice & Cold Storage (P) Ltd Vs Bank of Baroda & Others directed that the Official Liquidator to take over the actual physical possession of the moveable and immovable assets of the Company and it was specifically directed by the Hon'ble High Court that in no case S/Shri. Mahesh Chand Agarwal (Father of the Deponent & Partner in M/s K.P Cold Storage) and Rajesh Agarwal (Deponent') shall remain in possession of the Property of the Company. Copy of the Hon'ble High Court order dated 19.07.2011 is enclosed herewithand marked as ('Annexure-'F') to this Affidavit.*

8. *That in compliance to the directions of the Hon'ble Allahabad High Court the 'UPFC' took over the possession of the Assets of the Company i.e Land & Building, Plant*

&Machinery and further sealed and locked the doors of Machine Rooms, Chambers and Main Gate of the Cold Storage at Village Ujrai, Khandauli, Agra. The process of taking possession and sealing of the Cold Storage Building along with its main gate is reduced in writing in document titled as 'Minutes' dated 11.05.2012. Copy of the Minutes along with a typed copy thereof is enclosed herewith and respectively marked as Annexure- 'G'&'H' to the Affidavit.

9. *Thus, in pursuance of the Hon'ble Supreme Court order and the Hon'ble High Court orderthe 'Deponent' was removed from possession over the Cold Storage building situated at Village Ujrai, Khandauli, Agra on 11.05.2012.*

10. *Since 11.05.2012 the 'Deponent' though tried to gain possession of the Cold Storage by putting a bid in re-auction by the 'UPFC' on 31.07.2014 but remained unsuccessful. Copy of the Tender Form filed in the office of the official Liquidator attached to the Hon'ble Allahabad High Court is enclosed herewith and marked as Annexure 'I' to this Affidavit.*

11. *That from the series of the development that had taken place and as mentioned above in short the 'Deponent' confirms that since 11.05.2012 the 'Deponent'has no setup in any shape in the Cold Storage or any part thereof and has no employee posted in Cold Storage named as K.P Cold Storage Village Ujrai, Khandauli, Agra.*

12. *Later on, the 'Deponent' since left with no opportunity to regain possession over the Cold Storage named as K.P Cold Storage which had its office at UjraiKhandoli, Hathras Road, Agra decided to sought change in the address of the Firm in records of the Department and therefore, Supplementary Deed was executed with effect from 01.02.16 mentioning the fact that on account of non-operation of Cold Storage at Ujrai, Hathras Road, Khandauli, Agra which resulted into few postal non delivery or post being returned undelivered the Partners have decided to change the address of the Registered office to Chamber No.7, Manu Video Complex, Opposite Central Excise & Customs office, WazirPura Road, Agra.Copy of the Supplementary Deed is enclosed herewithand marked as 'Annexure-'J' to this Affidavit.*

13. *The 'Deponent' confirms that similar change got effected in Bank Account of the 'Firm' and in evidence thereof Bank Statement is filed herewith. Copy of the Bank statement is enclosed herewithand marked as Annexure-'K' to this Affidavit.*

14. *The Deponent' confirms that accompanied with the Supplementary Deed as referred above, an Application was filed on 05.03.2016 with the Income Tax PAN service Unit managed by 'NSDL' making request for the change in Address. Copy of the Acknowledgementas issued is enclosed herewithand marked as Annexure-'L' to this Affidavit.*

15. *That the 'Deponent' confirms that in pursuance of the Application so made seeking change of address in PAN the address of the Firm got changed and which stood communicated to the 'Deponent' vide Letter bearing barcode of 16.03.2016 issued by Income Tax PAN Service Unit. Copy of the Letteras issued is enclosed herewithand marked as Annexure-M' to this Affidavit.*

16. *That consequent to the above change the Jurisdiction of the Firm also changed from Range-4, Agra to Range-1, Agra and more specifically to ACIT, Circle-1(1),Agra as is evident from the e-filing portal of the Income Tax Department in print out obtained mentioning Site Last updated 01.04.2016. Copy of the Jurisdiction detail available on Income Tax Department web-site is enclosed herewithand marked as Annexure-'N' to this Affidavit.*

17. *The 'Deponent' therefore, affirms that on the date of 31.03.2016 on which the alleged Notice under section 148 is said to have been issued by the Assistant Commissioner of Income Tax 2(1)(1), Agra the jurisdiction over the case vested with Assistant Commissioner of Income Tax, Circle 1(1)(1), Agra as the jurisdiction over such area lies in Range-1, Agra. This fact was communicated to the Income Tax Officer 2(1)(2), Agra under cover of Letter dated 25.11.2016 enclosing therewith the Jurisdiction detail available on Income Tax Department web-site. Copy of such Letter is enclosed herewithand marked as Annexure-'O' to this Affidavit.*

18. The 'Deponent' affirms that no notice under section 148 for A.Y. 2009-10 was ever served upon the 'Deponent' at his residence B-23, Kamla Nagar, Agra throughaffixture as claimed by the Department.

19. That the 'Deponent' also affirms that no notice purported to have been issued under section 148 of the Act and claimed to have been sent by Speed Post on 31.03.2016 at the old address of K.P Cold Storage, Ujrai, Kandoli, Hathras Road, Agra was presented for service to the addressee .

The Deponent verifies as under:

That contents of Para 1 to 16 are true and correct and is based on documentary evidences for such belief. Contents of Para 17 are based on legal advice received. Contents of Para 18 to 19 are based on my personal knowledge which I believe to be true. No part of this Affidavit is false. So help me God.

Verified this on 11 day of February 2019 at Agra in the State of U.P"

Sd. *Sd.*

Witness *Deponent*

55. The learned Sr. D.R has denied the above position stated in Affidavit by his Synopsis submitting that no such change was intimated to the Investigation wing where statement of the assessee was recorded on 11.02.2016. He submitted that assessee has not disposed of the cold

storage but has discontinued its operation. He also submitted that Mr. Chetan Singh to whom possession of the Cold Storage was given was occupying cold storage on behalf of the assessee Firm or its Partner Shri. Rajesh Agarwal and no reliance can be placed to the change effected in address of the Firm without getting it registered in the records of Registrar of Firms and Register maintained by the Registrar as required vide section 61 and 62 of the Indian Partnership Act.

56. In rejoinder it was replied that to the investigation wing no such change was intimated as no such question was put forward in the questions posed to the assessee. It was also submitted that from the reading of the minutes it is abundantly clear that Chetan Singh was the security supervisor of M/s Industrial Security & Investigation Services (P) Ltd. an independent agency which by no means can be connected to the assessee. With regard to the learned DR's objection that change was not intimated to the Registrar of Firms, it was submitted that such a condition only applies to Firms which are registered with the Registrar of Firms and assessee Firm being unregistered Firm is under no legal obligation to intimate such a change to the Registrar. It was submitted that change was intimated and effected in Bank and Income Tax PAN Data base.

57. We are of the opinion that there is no dispute to the facts stated on oath verifiable with credible evidences that much prior to the date of issuance of notice on 31.03.2016 assessee was removed from possession of the cold storage building at Ujrai, Khandoli, Hathras Road, Agra in compliance to the orders passed the Hon'ble Allahabad High Court as referred above. There is also no dispute to the fact thatK.P Cold Storage which had its office at UjraiKhandoli, Hathras Road, Agra got the address of the Firm changed and such change was reduced into writing in the document named as supplementary deed which was executed with effect from 01.02.16 mentioning a very material fact which also has direct bearing over the case in hand that on account of non-operation of Cold Storage at Ujrai, Hathras Road, Khandauli, Agra which resulted into few postal non delivery or post being returned undelivered the Partners have decided to change the address of the Registered office to Chamber No.7, Manu Video Complex, Opposite Central Excise & Customs office, WazirPura Road, Agra. Evidence brought on records demonstrates that similar change got effected in Bank Account of the Firm and in evidence thereof Bank Statement was filed. Further it is not disputed that an Application was filed on 05.03.2016 enclosing therewith supplementary deed with the Income Tax PAN service Unit managed by 'NSDL' making request for the change in Address and in pursuance of

the said Application change of address in PAN the address of the Firm got changed and which stood communicated to the assessee vide Letter bearing barcode of 16.03.2016 issued by Income Tax PAN Service Unit. That consequent to the above change the Jurisdiction of the Firm also stood changed from Range-4, Agra to Range-1, Agra and more specifically to learned ACIT, Circle-1(1),Agra as is evident from the e-filing portal of the Income Tax Department evidenced by print out obtained from web-site mentioning site last updated 01.04.2016. The above evidences are sufficient enough to prove that prior to 31.03.2016 the Income Tax department has the changed address on their system/records and therefore notice was wrongly addressed and such notice is no notice in the eye of law.

58. Reliance has been placed to a recent Judgment passed by the Hon'ble Delhi High Court in the case of Veena Devi KarnaniVs ITO 2019 (1) TMI 596 wherein the Hon'ble Delhi High Court vide Judgement dated 14.09.2018 The assessee has relied upon a screenshot of the PAN database at the stage when the petition was filed to say that the Revenue always had the wherewithal to access the correct address, PAN number and all other relevant details including the e-mail ID as well as the bank account. The omissions of the Assessing officer deserve,

therefore, to be not only adversely noticed but appropriately reflected in his or her confidential reports and appropriate proceedings initiated by the Revenue authorities, which is so directed. The concerned Commissioner, Principal Commissioner or other superior authorities, as the case may be, are directed to file a report in this regard within eight weeks from today. - reassessment notice as well as the order under section 144/147, and the consequential action, i. e., attachment of the assessee's accounts are hereby quashed.

59. Reliance in this regard was rightly placed to the Judgments of the Jurisdictional High Court in the cases of Suresh Kumar SheetlaniVs ITO 1(3), Agra (2018) 96 taxmann.com 401 (Allahabad) (APB 139 to 143)while reversing the order passed by the ITAT, Agra Bench held that when department had correct address of assessee furnished in return of income, sending notice at incorrect address available with bank and then drawing presumption of service of notice on ground that notice was not received back unserved, could not be sustained [Paras 19 and 20]

60. After careful consideration of the provisions of section 148 of the Act, which prescribes the service of a valid notice under section 148 on the assessee before making the assessment, reassessment or re-computation under section 147 of the Act, we are of the opinion that a

valid service of a valid notice under section 148 of the Act, is not a mere procedural requirement, but is a condition precedent to the validity of any assessment, reassessment or re-computation to be made under section 147 of the Act and it is so because of the use of words "shall serve on the assessee" and also the requirement to the effect "before making the assessment, reassessment or re-computation under section 147" in the section itself- meaning thereby that if no notice under section 148 is issued or if the notice so issued is shown to be invalid, or the service of notice so issued, is shown to be invalid, the learned Assessing officer cannot proceed with the subsequent proceedings for making assessment, reassessment or re-computation under section 147 of the Act. In other words, if the learned Assessing officer, in such circumstances, proceeds with the subsequent proceedings, the same will be illegal and void. This proposition of law has been held by the Hon'ble Court in the cases of Y. NarayanaChetty v. ITO (1959) 35 ITR 388 , 392 (SC), CIT v. ThayaballiMullaJeevajiKapasi (1967) 66 ITR 147 (SC), CIT v. KurbanHussainIbrahimjiMithiborwala (1971) 82 ITR 821 (SC) by the Hon'ble High Courts in MadanLalAgarwal v. CIT (1983) 144 ITR 7451 (All.), Vijay Kumar Jain v. CIT (1975) 99 ITR 349, 353 (Punj. &Har.), CIT v. Ishwar Singh & Sons (1981) 131 ITR 480 (All.) to mention few and many more.

61. Under the aforesaid provisions of section 148 of the Act, unless, the notice is served on the proper person in the manner prescribed under section 282, the service is insufficient and the Assessing officer does not have jurisdiction to re-assess the escaped income. This proposition of law is supported by the decisions of Hon'ble Madras High Court in the case ofThangam Textiles v. First ITO (1973) 90 ITR 412 by decision of Hon'ble Mysore High Court in the cases of Lakshmibai v. ITO (1972) 86 ITR 804 and C.T. Rajagopal v. State of Mysore (1972) 86 ITR 814 and by the decision of Hon'ble Bombay High Court in the case of S.K. Manekia v. CST (1977) 39 STC 426 (Bom.) and in the case of CST v. ShrimalSakharchand (1984) 57 STC 224, 235 (Bom.).

62. Respectfully following the various decisions referred to in aforesaid para, we, after having held the service of notice under section 148 to be no service in the eye of law, are of the opinion that all subsequent proceedings including the ex parte assessment framed on 21.12.2016 in assessee's case are illegal and *void ab initio*.

63. Since, we have held assessment order to be illegal and *void-ab-initio.* therefore, there was no need to hear the parties in respect of other grounds raised in the memo of appeal pertaining to legality of

assessment on legal and factual grounds. Those grounds are thus not adjudicated upon.

64. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 22/03/2019

Sd/-	**Sd/-**
(SUDHANSHU SRIVASTAVA)	**(DR. MITHA LAL MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated:22/03/2019
A.K.V./DOC

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

Assistant Registrar