IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "A", LUCKNOW

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI. A. K. GARODIA, ACCOUNTANT MEMBER

ITA No.893 & 894/LKW/2014
Assessment Year:2010-11

Income Tax Officer 3(3) Lucknow	v.	Shri. Rajesh Agarwal 1/47, Sitapur Road Lucknow
		TAN/PAN:ADLPA6042N
(Appellant)		(Respondent)

Appellant by:	Smt. Swati Ratna, D.R.		
Respondent by:	Shri. Rakesh Garg, Advocate		
Date of hearing:	22	06	2015
Date of pronouncement:	03	07	2015

O R D E R

PER SUNIL KUMAR YADAV:

These appeals are preferred by the Revenue against the respective orders of the ld. CIT(A).

2. Appeal in I.T.A. No. 893/LKW/2014 is filed by the Revenue against the deletion of addition of Rs.19,07,379/- after holding the assessment to be null and void on account of non-service of notice under section 143(2) of the Income-tax Act, 1961 (hereinafter called in short "the Act").

3. Appeal in I.T.A. No. 894/LKW/2014 is filed by the Revenue against the deletion of penalty levied under section 271(1)(c) of the Act on account of non-sustenance of the assessment order.

4. During the course of hearing of the appeals, the ld. counsel for the assessee has invited our attention that no notice under section 143(2) of the Act was served upon the assessee within the period of limitation. In

support of his contention, the ld. counsel for the assessee has invited our attention to the order of the ld. CIT(A) in which it has been recorded that first notice under section 143(2) of the Act has been issued on 30.9.2011 at 15.19 hours by speed post vide receipt No.EU904285223IN. It is also noticed that on the office copy of the notice under section 143(2) it is written that notice has been served by affixture. The person who has affixed the notice is Income-tax Inspector and the notice was affixed in presence of the Notice Server. The date is mentioned as 30.9.2011 but no time is mentioned thereon. The ld. counsel for the assessee has further contended that the ld. CIT(A) has examined the issue with regard to the validity of service of notice under section 143(2) of the Act within the period of limitation and has held that the notice has been issued on 30.9.2011 at 15.19 hours. The probability of serving the said notice by midnight on the same day is very remote. With regard to the service of notice by affixture, the ld. CIT(A) has observed that under order V, Rule 17 of the Code of Civil Procedure, 1908, the affixation can be done only when the assessee or his agent refuses to sign the acknowledgement or could not be found. In the instant case, the assessee has neither refused to sign the acknowledgement nor was any effort made by the Assessing Officer to locate and serve the notice upon him. The ld. CIT(A) has further observed that since there is no material on record to establish that the conditions contemplated by order V, Rule 17 and 20 existed in the case of the assessee, the notice served by affixture is not a valid service. He accordingly held that notice under section 143(2) of the Act was not served upon the assessee within the prescribed period, therefore, the assessment order was annulled.

5. Aggrieved, the Revenue has preferred an appeal before the Tribunal and the ld. D.R. has placed reliance upon the order of the Assessing Officer whereas the ld. counsel for the assessee has contended that onus is upon the Revenue to establish that notice under section 143(2) of the Act was

served upon the assessee within the prescribed period. Order V, Rule 20 of the Code of Civil Procedure for service of notice can only be invoked when it is established that the assessee is not available and the service in the ordinary course is not possible upon the assessee. But in the instant case, according to the Assessing Officer, first time notice was issued through affixture as well as by speed post. Therefore, it cannot be held that notice under section 143(2) of the Act was timely served upon the assessee.

6. Having carefully examined the orders of the lower authorities in the light of the rival submissions, we find that undisputedly notice of hearing under section 143(2) of the Act was issued on the last day of limitation/prescribed period for issuance of notice under section 143(2) of the Act i.e. on 30.9.2011 at 15.19 hours by speed post. Therefore, the ld. CIT(A) has rightly held that probability of service of the said notice by midnight on the same day is very remote. However, onus is upon the Revenue to place evidence on record with regard to the service of notice under section 143(2) of the Act within the period of limitation.

7. So far as service of notice by affixture is concerned, we find that under order V, Rule 17 read with Rule 20 of the Code of Civil Procedure, the mode of service by way of substituted service can only be invoked when service upon the respondent or assessee is not possible in the ordinary course. Therefore, it means that the mode of substituted service can only be adopted when notice was issued by ordinary means i.e. by post or process server and service is not being affected. But in the instant case, according to the Assessing Officer, notice by affixture was issued at the threshold along with ordinary notice by post. It appears that notice by affixture was issued only with an intention to create evidence with regard to the service of notice under section 143(2) of the Act upon the assessee. This is a case of clear negligence of the Assessing Officer. He should have initiated action within the prescribed period and should not have waited till

last day of limitation. This type of practice by the Assessing Officer should be curtailed by the Senior Officers of the Department by issuing warning or taking action against the guilty officer, as it effects the collection of revenue of the nation. By issuing a notice by affixture, the assessment cannot be made to be valid on account of issuance of notice under section 143(2) of the Act in time. Undisputedly there is no evidence on record with regard to the service of notice under section 143(2) of the Act on the assessee within the prescribed period. As apparent, the notice was issued by speed post on the last day of limitation i.e. 30.9.2011 at 15.19 hours, as such there is no possibility of its service on the same day. We accordingly find ourselves in agreement with the order of the ld. CIT(A) who has rightly held the assessment to be illegal and void ab initio.

8. Since the assessment has been annulled in the quantum appeal, penalty under section 271(1)(c) of the Act is not sustainable in the eyes of law and we accordingly agree with the findings of the ld. CIT(A) who has rightly deleted the penalty.

9. In the result, appeals of the Revenue are dismissed.

Order was pronounced in the open court on the date mentioned on the captioned page.

Sd/-	Sd/-
[A. K. GARODIA]	[SUNIL KUMAR YADAV]
ACCOUNTANT MEMBER	JUDICIAL MEMBER

DATED: 3rd July, 2015
JJ:2206

Copy forwarded to:

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

Assistant Registrar