
(2005) 03 DEL CK 0033

In the Delhi High Court

Case No : ITA 62 of 2005

Commissioner of Income Tax

APPELLANT

Vs

Lunar Diamonds Ltd.

RESPONDENT

Date of Decision : 03-03-2005

Acts Referred:

Citation : (2005) 197 CTR 312 : (2006) 281 ITR 1 : (2005) 146 TAXMAN 691

Hon'ble Judges : Swatanter Kumar, J; Madan B. Lokur, J

Bench : Division Bench

Advocate : Sanjeev Khanna, for the Appellant; Nemo, for the Respondent

Judgement

Madan B. Lokur, J.—The Appellant is aggrieved by an order dated 22nd July, 2004 passed by the Income Tax Appellate Tribunal, Delhi Bench (for short the Tribunal) in ITA No. 28/Del/99.

2. The Respondent/assessed filed its return of income for the assessment year 1995-96 on 29th November, 1995. A notice u/s 143(2) of the Income Tax Act, 1961 (the Act) was issued to the assessed on 29th November, 1996, apparently by registered post. The notice was received, if at all, after that date and in any case after 30th November, 1996.

3. According to the assessed, in terms of Section 143(2) of the Act, the notice ought to have been served on it within a period of one year and in any case before 30th November, 1996. Since that was not done, the proceedings initiated against the assessed were not in accordance with law.

4. Before the Assessing Officer, this issue was not directly raised but before the Commissioner of Income Tax (Appeal) [CIT (A)], it was contended by the assessed that it had not received any notice u/s 143(2) of the Act by registered post. An affidavit to this effect was filed by one J.S. Walia, DGM (Accounts) and in-charge of taxation matters of the assessed. It was also submitted that the alleged notice was not sent acknowledgment due. It was contended that the receipt issued by the post office did not bear the address of the assessed but

only its name. It was, Therefore, submitted that there was a possibility that the correct address of the assessed might not have been written on the envelope and, Therefore, the question of service of notice on the assessed did not arise. The contention of the assessed was accepted by the CIT (A) and it was held that there was no valid service of notice on the assessed and, Therefore, the assessment framed was invalid.

5. The Appellant took up the matter in appeal before the Tribunal which rejected the contentions urged by the Appellant. It was held that in the face of the affidavit filed on behalf of the assessed, the initial burden on the assessed to prove non-receipt of notice had been discharged and that the onus now lay upon the Appellant to prove that the notice u/s 143(2) of the Act had in fact been served upon the assessed by registered post. The Tribunal found that the Appellant had not been able to prove its case at all and, Therefore, there was no merit in the appeal.

6. The relevant provision with which we are concerned is the proviso to Section 143(2)(ii) of the Act and this reads as follows:-

143 (1) xxx xxx xxx xxx

(2) Where a return has been furnished u/s 139, or in response to a notice under sub-section (1) of Section 142, the Assessing Officer shall, -

(i) xxx xxx xxx xxx

(ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessed has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessed a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessed may rely in support of the return:

Provided that no notice under clause (ii) shall be served on the assessed after the expiry of twelve months from the end of the month in which the return is furnished.

7. Learned counsel for the Appellant contended that the words served and issued are synonymous and interchangeable. He submitted that the proviso to Section 143(2) used the word served, but what is meant was issued. It was submitted that under these circumstances, since the notice had been issued before the expiry of a period of one year, no error had been committed by the Assessing Officer in framing the assessment order. Reliance in this regard was placed by learned counsel or the Appellant on *Banarasi Devi Vs. Income Tax Officer, Calcutta*, .

8. A study of *Banarsi Debi* shows that the facts of that case are completely inapposite. In that case, u/s 34(1)(b) of the Indian Income Tax Act, 1922, a notice was required to be served on an assessed within eight years if the Income

Tax Officer had reason to believe that income had escaped assessment. Factually, although a notice had been issued to the assessed therein within a period of eight years, it was served upon him after the eight year period was over. A learned Single Judge of the Calcutta High Court agreed with the submissions made on behalf of the assessed and quashed the notice.

9. During the pendency of an appeal before the Division Bench, Section 34 of the Indian Income Tax Act was amended by Amending Act No. I of 1959. Section 4 of the Amending Act debarred the Court from questioning the validity of a notice issued u/s 34 of the Act on the ground that the time for issue of such notice had expired. The Division Bench, relying upon the amendment to Section 34 of the Act, decided against the assessed which led him to approach the Supreme Court.

10. In the Supreme Court it was contended that Section 4 of the Amending Act only saved a notice issued after the prescribed time but it did not apply to a situation where notice is issued within time but served out of time. On behalf of the Revenue, it was contended, in this context that the expression issued means served.

11. The Supreme Court went into the legislative history of Section 34 of the Indian Income Tax Act and held that the contention of the assessed could not be accepted because it would defeat the very purpose for which the amendment was carried out. While specifically dealing with the use of the word issued in Section 4 of the Amending Act, the Supreme Court noted that there is no prescription in Section 34 of the Indian Income Tax Act of a time limit for sending a notice. Therefore, it was obvious that the expression issued used in Section 4 of the Amending Act could not be used in the narrow sense of sent. Concluding the discussion on the subject, the Supreme Court noted that the intention of the legislature was to save the validity of a notice as well as a consequent assessment order from an attack on the ground that the notice was served beyond the prescribed period. That intention would be effectuated if a wider meaning is given to the expression issued. Consequently, the supreme Court held it possible that even though the notice was served beyond the prescribed time, it was saved by Section 4 of the Amending Act. It is quite clear from the above that the decision relied upon by learned counsel for the Appellant is not applicable to the facts of the present case.

12. It was then submitted that the Post Office in which the notice was dispatched is an agent of the assessed and, Therefore, when the notice is sent by registered post, it is deemed to be in the hands of the assessed (through its agent, the Post Office) on the date posted, which was before the expiry of the prescribed period. Reliance in this regard was placed upon *Prima Realty Vs. Union of India (UOI) and Others*, .

13. We are of the view that Prima Realty does not at all help learned counsel for the Appellant. In Prima Realty, some payment was required to be made. The payee did not indicate the mode of payment in spite of a letter received by it to

indicate the mode. In fact, the Appellant in that case did not even reply to the letter for suggesting the mode of payment. As per the practice, the Central Government sent the cheque by post. The Supreme Court held that it was reasonable for the concerned authority to have waited for the cheque to get personally collected by the payee till the last date and when the payee did not come to collect the cheque, to have dispatched it by post. The Supreme Court held that this amounted to tender of payment to the payee when the cheque was put in the course of transmission so that it was beyond the control of the sender from the time of its dispatch by post. It was in this context that it was observed that the Post Office will be the agent of the payee for the purposes of receiving payment.

14. It was finally submitted by learned counsel for the Appellant that it cannot be said that the assessment was null and void because notice was served upon the assessed beyond the prescribed period of one year. Reliance in this regard was placed upon COMMISSIONER OF Income Tax Vs. GYAN PRAKASH GUPTA., and Commissioner of Income Tax, Shilong Vs. Jai Prakash Singh, .

15. It is not necessary for us to go into this question at all because the Tribunal set aside the assessment without finding it to be null and void; the assessment order was merely set aside on the ground that notice u/s 143(2) of the Act had been served upon the assessed beyond the period of one year prescribed by the law.

16. We may also point out that there appears to be some doubt whether the notice was at all sent to the assessed because, as observed by the CIT (A), the receipt showing that an envelope was sent by registered post merely contained the name of the assessed without its address. Consequently, it is quite possible that the notice may have been sent to the assessed at some wrong or even some incomplete address. However, it is not necessary for us to go into this question at all because the assessed had filed an affidavit stating that it had not received the notice and the Tribunal rightly held that under these circumstances, the burden was upon the Appellant to prove that notice was served upon the assessed within the prescribed time. The Appellant had failed to prove its case in this regard.

17. We are of the view that the appeal does not raise any substantial question of law which requires our decision.

18. Dismissed.