
(1993) 04 J&K CK 0007
In the Jammu And Kashmir High Court
Case No : C.O.A. (ITR) No. 6 of 1981

Dina Nath

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 08-04-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 6, Order 5 Rule 20
Income Tax Act, 1961 — Section 143, 282

Citation : (1993) 204 ITR 667

Hon'ble Judges : S.M. Razvi, J; R.P. Sethi, J

Bench : Division Bench

Advocate : H.L. Bhagotra, for the Appellant; T.S. Thakur, for the Respondent

Judgement

R.P. Sethi, J.—One Som Nath was served with a notice in terms of Section 143(2) of the Income Tax Act, 1961, on March 31, 1979, for

and on behalf of the petitioner. The date of hearing was fixed and the assessment order (annexure 'A') was passed on the same day holding the

petitioner herein responsible to the addition of Rs. 35,839 in the Income Tax return filed by him for the year 1976-77. The petitioner preferred an

appeal before the Commissioner of Income Tax (Appeals) stating therein that he was not liable for the addition as determined by the Income Tax

Officer as no assets were transferred by him to his wife or minor children and the provisions of Section 64(vi) could not be invoked. The point

raised by the petitioner was found to be correct but it was observed that Section 64(iii) was applicable in his case and a sum of Rs. 35,839 was

required to be added to his income under the said sub-section. It was further submitted that as no valid notice in terms of Section 143(2) was

served upon the assessee, the order passed by the Income Tax Officer was liable

to be set aside. The Appellate Commissioner dismissed the appeal of the assessee which forced him to approach the Income Tax Appellate Tribunal who, Vide their order dated December 20, 1980, also dismissed his appeal but in terms of order dated July 20, 1991, referred the following question for the opinion of this court :

Whether, on the facts and in the circumstances of the case, the service of notice u/s 143(2) was valid ?

2. We have heard learned counsel for the parties and perused the record.

3. Mr. Thakur, learned counsel appearing for the Revenue, has submitted that the reference being misconceived was liable to be rejected without

giving any opinion as, according to him, the point raised by the assessee was based upon a pure question of fact. It has, however, been contended

on behalf of the assessee that as the service of notice was not effected in accordance with the provisions of law as incorporated in Section 143(2)

of the Income Tax Act (hereinafter referred to as ""the Act""), the whole of the proceedings initiated thereafter are liable to be quashed.

4. The admitted facts of the case are : that, on the last day when the assessment was to be made, a notice was served upon one Som Nath, who is

neither a member of the family of the assessee nor his duly authorised agent having specifically been authorised to accept the notice on behalf of the

assessee. It is also established that Som Nath had been accepting the notice earlier for and on behalf of the assessee and prosecuting the cases on

his behalf before the Income Tax authorities. In order to appreciate the rival contentions of learned counsel for the parties, a reference is required

to be made to the provisions of Sub-section (2) of Section 143 of the Act, which provides :

143. Assessment.--. . . .

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

considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not

underpaid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to

produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return :

Provided that no notice under this sub-section shall be served on the assessee after the expiry of the financial year in which the return is furnished

or the expiry of six months from the end of the month in which the return is furnished, whichever is later.

5. A notice is required to be served upon the assessee in terms of the aforesaid provision requiring him to attend the office or produce any

evidence on which the assessee relied in support of his return where the Assessing Officer considers it necessary or expedient to ensure that the

assessee has not understated the income or not computed excessive loss or has not underpaid the Income Tax. Notice was required to be served

in terms of Section 282 of the Act which provides that a notice or requisition under the Act may be served upon the person therein named either

by post or as if it were a summons issued by a court under the Code of Civil Procedure. A notice can be addressed in the case of a person not

being an individual to the person who manages or controls his affairs. Service of summons is regulated by the provisions of Order V, Civil

Procedure Code. Under Rule 9 of Order V, summons can be served upon the defendant if he resides within the jurisdiction of the court issuing

summons or upon his agent residing within that jurisdiction provided such an agent is empowered to accept the service of the summons. Where, in

any proceedings, the person summoned cannot be found and has no agent empowered to accept the service of the summons, the same may be

served on any adult male member of the family who is residing with him. Under Rule 18, the serving officer is obliged in all cases in which summons

have been served to endorse or annex or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the

manner in which the summonses were served and the name and address of the person, identifying the person served and witnessing the delivery or

tender of the summons. Substituted service is authorised under the circumstances and in the manner specified under Order V, Rule 20, Civil

Procedure Code. The object of issuing the notice of summons is to intimate the concerned to appear and answer the queries or the questions

sought to be clarified by any court or authority. As serious consequences are likely to follow, a notice or summons must necessarily be issued and

served in the form and the manner prescribed by law. The authority issuing the notice cannot be permitted to substitute its own procedure for the

service of the notice. Relying upon *Y. Narayana Chetty and Another Vs. The Income Tax Officer, Nellore and Others*, a Division Bench of the

Mysore High Court in *C.N. Nataraj Vs. Fifth Income Tax Officer, City Circle II, Bangalore*, held that a notice under the Income Tax Act for

initiating reassessment proceedings was not a mere procedural requirement but a condition precedent to the validity of any reassessment made

under the Act. In that case, one Nagappa was assessed to Income Tax and that assessment was set aside by the High Court whereafter the

Income Tax Officer issued notice to the sons of the assessee u/s 148 of the Act. Notices were issued in the individual names of the sons of the

assessee, some of them being minors. The notices issued were, however, served upon the clerk of the assessee. The Income Tax Officer held the

sons of the assessee to be not assessable but he held the assessee to be liable to pay tax on the income in question and assessed him for the same.

It was argued on behalf of the assessee that the notice served on the clerk not being in conformity with the provisions contained in Section 282 of

the Act, no further action could be taken in pursuance of those notices. While disposing of the plea regarding the non-service of the notice in that

case, the court held (at page 251) :

But before examining the points formulated Sri K. Srinivasan, it is necessary to mention that, while issuing notices u/s 148, the Income Tax Officer

is not acting judicially or quasi-judicially and, consequently, no writ of certiorari or prohibition can be issued. But it is well-settled that this court has

power to issue in a fit case an order prohibiting the executive authority from acting without jurisdiction, particularly where such an act subjects or is

likely to subject any citizen to lengthy proceedings and unnecessary harassment : See the decision of the Supreme Court in *Calcutta Discount*

Company Limited Vs. Income Tax Officer, Companies District, I and Another, :

There is no doubt that a notice prescribed u/s 148 of the Act for initiating reassessment proceedings is not a mere procedural requirement ; the

service of the prescribed notice on the assessee is a condition precedent to the validity of any reassessment made u/s 147. If no notice is issued or

if the notice issued is shown to be invalid, then the proceedings taken by the Income Tax Officer without a notice or in pursuance of an invalid

notice would be illegal and void. . . .

6. A Division Bench of this court in the case of B. Johar Forest Co. v. CIT [1973] J & K LR 412, held that even the acquisition of knowledge in

regard to the issuance of notice under the Act cannot be considered to be equivalent to or a substitute for the service of the notice on the assessee.

The notice or requisition must be served in one of the modes mentioned in the Section before an assessee can be considered to be in default. In

that case, one D.B. Thappa was held to be the manager of the assessee-firm during the relevant period and service of notice on him was held to be

not a service on the assessee.

7. The onus of proving the service of a notice is upon the Revenue as was held in FATECHAND AGARWAL Vs. COMMISSIONER OF

WEALTH-TAX., . In the facts and circumstances of that case, it was held by the Orissa High Court (at page 702) :

'The short question for consideration is whether Basudeb had any authority to receive the notice on behalf of the petitioner on May 19, 1966. It is

the duty of the Department to establish that service was made either on the assessee himself or on somebody duly authorised by him to receive

such notice. The petitioner has been throughout contending that though Basudeb is a partner in one of the firms in which the petitioner is a partner

he had no authority to receive the assessment order on his behalf. The mere fact that subsequently Basudeb passed on the assessment order to him

on May 22, 1966, whereupon he acted to file the appeal in time does not establish that Basudeb was his agent to receive the assessment order on

May 19, 1966. In the absence of any proof that Basudeb had such authority, the conclusion is irresistible that Basudeb had no authority to receive

the assessment order on behalf of the petitioner. The petitioner cannot, therefore, suffer on account of the laches of Basudeb in not handing over

the assessment order to the petitioner earlier than May 22, 1966. ...

8. The ""agent"" contemplated under Order V, Civil Procedure Code, upon whom a notice can be served for and on behalf of the defendant is such

person who has been fully authorised in that behalf in terms of Order III, Rule 6, Civil Procedure Code. Under Sub-rule (2) of Rule 6, ""such

appointment may be special or general and shall be made by an instrument in writing signed by the principal and such instrument or, if the

appointment is general, a certified copy thereof shall be filed in court."" A

combined reading of Order III, Rule 6, and Order V, Rule 9, Civil

Procedure Code, leaves no doubt that the empowering of an agent can be made only in the manner detailed in Order III, Rule 6, and verbal

authority is not enough. We are fortified in our view by a decision of the Calcutta High Court in the case of Tripura Modern Bank Ltd. Vs. Bansen

and Co., . Similarly, the Allahabad High Court in the case of Addl. Commissioner of Income Tax Vs. Prem Kumar Rastogi, , held that a person

who is not an authorised agent of the assessee or an agent or manager personally carrying on the assessee's business or an adult member of his

family but who has merely accepted notice in the past on his behalf cannot be deemed or treated to be an authorised agent of the assessee and

service on him for the assessee is not valid. Learned counsel for the Revenue has relied upon COMMISSIONER OF WEALTH-TAX, WEST

BENGAL-II Vs. MRS. ILLA PAL CHOUDHURY AND OTHERS., , which, however, cannot be made a basis to reject the plea of the

assessee, because in that case, it was not an issue whether the accountant of the assessee was a duly authorised agent or not and, on facts, it was

found that the accountant of the assessee was authorised by the assessee to represent him in connection with the wealth-tax assessment

proceedings but was not authorised to accept notices. However, after the service of notice, the assessee duly filed returns in answer to the notices

and the reassessment orders were passed. No objection was raised regarding the authority of the accountant to accept service of the notice. It was

found that (headnote): ""there was proper service, and that, even on the footing that there was no proper service, the assessee having filed the

returns without objections had waived any irregularities in service. ... No point was taken that the assessee was not properly or validly served. In

the original grounds taken before the Appellate Assistant Commissioner also this point was not taken. Taking the cumulative effect of all these

factors together, it appeared that there was sufficient evidence to establish that P had been duly authorised to accept service of notices on behalf of

the assessee."" Similarly, in MITHOO LAL TEK CHAND Vs. COMMISSIONER OF Income Tax, U. P., , it was found on facts that there was

service of notice on the members of the assessee-family though the acknowledgment receipt was signed by the munim, and that the said munim

was the authorised agent to receive notices on behalf of the assessee.

9. It, therefore, follows that (1) notices under the Act are required to be served upon the assessee in accordance with the provisions of Section

282 of the Act ; (2) in the case of an individual, a notice or requisition is required to be served on the person named therein in the manner

prescribed under Order V, CPC ; (3) the notice or requisition must be served personally upon the individual or upon his agent duly authorised in

terms of Order III, Rule 6, Civil Procedure Code; (4) the notice may be served either personally or by post; (5) if the person named in the notice

is not available, service may be made on any male member of the family of the person named in the notice ; and/or (6) by substituted means in

terms of Order V, Rule 20, Civil Procedure Code.

10. In the instant case, it is established that the notice served upon Shri Som Nath on March 31, 1979, intimating him the date fixed on the same

day and the coercive orders of addition in the return filed by the assessee, were passed on the same day. Shri Som Nath was not a duly authorised

agent of the assessee for the purposes of accepting service of the notice and no time was given to the said Som Nath even to intimate the service of

the so-called notice upon the assessee. No adverse orders could be passed against the assessee on the basis of the notice allegedly served upon

the said Som Nath. The Appellate Tribunal was, therefore, not justified in dismissing the appeal of the assessee.

11. For the reasons detailed hereinabove, the reference is answered in the negative.