
(2015) 02 AHC CK 0119
In the Allahabad High Court
Case No : IT Appeal No. 479 of 2012

Lal Chand Agarwal

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 18-02-2015

Acts Referred:

Income Tax Act, 1922 — Section 34

Income Tax Act, 1961 — Section 139, 142, 143, 143(3), 147

Citation : (2015) 275 CTR 547

Hon'ble Judges : Tarun Agarwala, J; Satish Chandra, J

Bench : Division Bench

Advocate : Rahul Agarwal, for the Appellant; Dhananjay Awasthi, Advocates for the Respondent

Judgement

Tarun Agarwala, J.—For the asst. yr. 1998-99, the appellant filed his return of income declaring an income of Rs. 2,46,100. It transpires that the assessing authority received information from the Addl. Director of IT (Investigation), Agra that one M/s. Ashok Gupta and Company, Delhi, had provided bogus entries of sale proceeds of shares and that one of the beneficiaries is the appellant. Based on this information, the assessing authority issued a notice dt. 24th March, 2005 under s. 148 of the IT, 1961 (hereinafter referred to as the Act) proposing to reinstitute reassessment proceedings. This notice sent by the process server was returned unserved on 26th March, 2005. Thereafter, the assessing authority recorded reasons to believe on 28th March, 2005 to the effect that an amount of Rs. 7,78,675 has been shown as bogus sale proceeds, which had escaped assessment for the asst. yr. 1998-99. Based on this reasons to believe so recorded, a notice dt. 28th March, 2005 was issued under s. 148 of the Act after taking appropriate approval from the Addl. CIT. This notice dt. 28th March, 2005 was sent by a process server and also by speed post, which came back undelivered with the remark that the appellant was not available and had gone out for medical treatment. Thereafter, another notice purporting to be a fresh notice dt. 17th June, 2005 was again issued under s. 148 of the Act, which was

received by the appellant on 29th June, 2005. The appellant appeared before the assessing authority and submitted that the original return filed on 3rd Oct., 1998 be treated as the return filed in compliance of the notice under s. 148 of the Act. The appellant also objected to the initiation of the proceedings contending that the notice dt. 17th June, 2005 was barred by time and that no fresh assessment could be framed under s. 147/148 of the Act. The assessing authority rejected the objection raised by the appellant and made an assessment order adding a sum of Rs. 7,78,675 on the total income and directed the appellant to pay the demand of tax and interest. The assessing authority held that where the notice was issued within the period of limitation but served upon the assessee beyond such period, the assessment was valid.

2. Aggrieved by the reassessment order, the appellant preferred an appeal before the CIT(A) questioning the veracity and validity of the initiation of proceedings under s. 148 of the Act. The CIT(A), after considering the matter, allowed the appeal and quashed the assessment order holding that the entire reassessment proceedings were carried out by the assessing authority after assuming jurisdiction on the basis of the second notice dt. 17th June, 2005. The CIT(A) held that the notice dt. 17th June, 2005 was barred by limitation and was invalid. Aggrieved by the order of the appellate authority, the Department preferred a second appeal before the Tribunal. There was a difference of opinion between the Members of the Tribunal. The JM concurred with the view of the CIT(A) and quashed the assessment proceedings while the AM disagreed with the appellate order and upheld the assessment proceedings. On account of the difference of opinion, the matter was referred to a Third Member. The Third Member concurred with the view of the AM and quashed the appellate order and allowed the appeal of the Department holding that a valid notice was issued on 28th March, 2005, on the basis of which reassessment proceedings were validly conducted. The assessee, being aggrieved by the order of the Tribunal, has filed the present appeal under s. 260A of the Act of 1961 framing the following substantial questions of law:

"(a) Whether, the Tribunal, Agra has erred in law, in the facts and circumstances of the case in upholding the reassessment proceedings on the basis of notice under s. 148 dt. 28th March, 2005, which admittedly remained un-served on the appellant while the entire proceedings were carried out by assuming jurisdiction on the basis of notice under section dt. 17th June, 2005, which admittedly was issued beyond the period of limitation?

(b) Whether, the Tribunal, Agra has erred in law in not noticing the effect of issue of second notice dt. 17th June, 2005 which tantamount to waiver of earlier notice dt. 28th March, 2005 and hence no assessment could be framed on the basis of unserved notice under s. 148 dt. 28th March, 2005?"

3. In this background, we have heard Sri Rahul Agarwal, the learned counsel for the appellant and Sri Dhananjay Awasthi, the learned counsel for the Department.

4. Before proceeding further it would be essential to consider a few provisions relating to the procedure for making a reassessment. For facility, the provisions of ss. 147, 148, 149 and 151 as it existed at the relevant moment of time are extracted hereunder :

"147. Income escaping assessment.-If the AO has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of ss. 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in ss. 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub-s. (3) of s. 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under s. 139 or in response to a notice issued under sub-s. (1) of s. 142 or s. 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

Explanation 1 : Production before the AO of account books or other evidence from which material evidence could with due diligence have been discovered by the AO will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2 : For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the AO that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return:

(c) where an assessment has been made, but-

(i) income chargeable to tax has been under assessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act: or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

148. Issue of notice where income has escaped assessment.--(1) Before making the assessment, reassessment or recomputation under s. 147, the AO 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 s. 139.

(2) The AO shall, before issuing any notice under this section, record his reasons for doing so.

149. Time-limit for notice.--(1) No notice under section shall be issued for the relevant assessment year,--

(a) in a case where an assessment under sub-s. (3) of s. 143 or s. 147 has been made for such assessment year,--

(i) if four years have elapsed from the end of the relevant assessment year, unless the case falls under cl. (ii) or cl. (iii);

(ii) if four years, but not more than seven years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to fifty thousand rupees or more for that year;

(iii) if seven years, but not more than ten years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees one lakh or more for that year;

(b) in any other case,--

(i) if four years, but more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year;

(ii) if four years, but not more than seven years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees twenty-five thousand or more for that year;

(iii) if seven years, but not more than ten years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has

escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year;

Explanation : In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Expln. 2 to s. 147 shall apply as they apply for the purposes of that section.

(2) The provisions of sub-s. (1) as to the issue of notice shall be subject to the provisions of s. 151.

(3) If the person on whom a notice under s. 148 is to be served is a person treated as the agent of a non-resident under s. 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year.

151. Sanction for issue of notice.--(1) In a case where an assessment under sub-s. (3) of s. 143 or s. 147 has been made for the relevant assessment year, no notice shall be issued under s. 148 by an AO, who is below the rank of Asstt. CIT or Dy. CIT, unless the Jt. CIT is satisfied on the reasons recorded by such AO that it is a fit case for the issue of such notice :

Provided that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief CIT or CIT is satisfied, on the reasons recorded by the AO aforesaid, that it is a fit case for the issue of such notice."

(2) In a case other than a case falling under sub-s. (1), no notice shall be issued under s. 148 by an AO, who is below the rank of Jt. CIT, after the expiry of four years from the end of the relevant assessment year, unless the Jt. CIT is satisfied, on the reasons recorded by such AO, that it is a fit case for the issue of such notice."

5. Under s. 148(2) of the Act the AO has to record the reasons for arriving at a opinion that the income has escaped assessment. The AO is thereafter required to obtain a sanction under s. 151 of the Act for issuance of a notice under s. 148 of the Act. Thereafter a notice issued under s. 148 is required to be served on the assessee. Sec. 149(1)(b) prescribes that no notice under s. 148 shall be issued if four years have elapsed from the end of the relevant assessment year or six years have elapsed from the end of the relevant assessment year where income chargeable to tax, which has escaped assessment amounts or is likely to amount to Rs. 1 lakh or more for that year. As per s. 148(1) of the Act, before making assessment or reassessment under s. 147, the AO shall serve a notice requiring the assessee 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 the Act. This issuance of notice is further subject to the time-limit provided under s. 149 of the Act. Consequently, the issuance of

notice is a substantive provision and service of the notice is a procedural one. The initiation of reassessment proceeding commences on a notice issued under s. 148 of the Act. The service of notice contemplated under s. 148 of the Act is merely a condition precedent for making a valid assessment.

6. In *R.K. Upadhyaya Vs. Shanabhai P. Patel*, AIR 1987 SC 1378 : (1987) 62 CTR 17 : (1987) 32 ELT 255 : (1987) 166 ITR 163 : (1987) 2 JT 287 : (1987) 1 SCALE 1007 : (1987) 3 SCC 96 : (1987) 3 SCR 42 : (1987) 2 UJ 260 , the controversy was that a notice under s. 148 was issued on 31st March, 1970 i.e. the last date of limitation, which notice was served on the assessee on 3rd April, 1970, after the expiry of limitation. The High Court held that since the notice was served after the expiry of the period, the assessment order was invalid and had accordingly quashed the notice for reassessment issued under s. 147 of the IT Act, 1961. The Supreme Court held that the scheme of 1961 Act insofar as the notice for reassessment was concerned was quite different than that contained under s. 34 of the IT Act, 1922. The Supreme Court held that a clear distinction has been made between "issue of notice" and "service of notice" under the Act. The Supreme Court held that once a notice is issued within the period of limitation, the ITO gets the jurisdiction to proceed to reassess and make the assessment order. The mandate of s. 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/The Supreme Court further held that the requirement of issue of notice is satisfied when a notice is actually issued and that service under the Act, 1961 is not a condition precedent to conferment of jurisdiction on the ITO to deal with the matter but it is only a condition precedent to the making of the order of assessment. The Supreme Court held :

"Sec. 34 conferred jurisdiction on the ITO to reopen an assessment subject to service of notice within the prescribed period. Therefore, service of notice within limitation was the foundation of jurisdiction. The same view has been taken by this Court in *J.P. Jani, Income Tax Officer, Circle IV, Ward G, Ahmedabad and Another Vs. Induprasad Devshanker Bhatt*, AIR 1969 SC 778 : (1969) 72 ITR 595 : (1969) 1 SCR 714 as also in *COMMISSIONER OF Income Tax, BOMBAY CITY I Vs. ROBERT J. SAS AND OTHERS. S. SEETHAI ACHI : INTERVENER.*, (1963) 48 ITR 177 . The High Court in our opinion went wrong in relying upon the ratio of *Banarasi Devi Vs. Income Tax Officer, Calcutta*, AIR 1964 SC 1742 : (1964) 53 ITR 100 : (1964) 7 SCR 539 in disposing of the case in hand. The scheme of the 1961 Act so far as notice for reassessment is concerned is quite different. What used to be contained in s. 34 of the 1922 Act has been spread out into three sections, being ss. 147, 148 and 149 in the 1961 Act. A clear distinction has been made out between "issue of notice" and "service of notice" under the 1961 Act. Sec. 149 prescribes the period of limitation. It categorically prescribes that no notice under s. 149 shall be issued after the prescribed limitation has lapsed. Sec. 148(1) provides for service of notice as a condition precedent to making the order of assessment. Once a notice is issued within the

period of limitation, jurisdiction becomes vested in the ITO to proceed to reassess. The mandate of s. 148(1) is that reassessment shall not be made until there has been service. The requirement of issue of notice is satisfied when a notice is actually issued. In this case, admittedly, the notice was issued within the prescribed period of limitation as 31st- March, 1970, was the last day of that period. Service under the new Act is not a condition precedent to conferment of jurisdiction in the ITO to deal with the matter but it is a condition precedent to making of the order of assessment. The High Court in our opinion lost sight of the distinction and under a wrong basis felt bound by the judgment in Banarsi Debt and Am. v. HO (supra). As the ITO had issued notice within limitation, the appeal is allowed and the order of the High Court is vacated. The ITO shall now proceed to complete the assessment after complying with the requirements of law. Since there has been no appearance on behalf of the respondents, we make no orders for costs."

7. The controversy in the instant appeal is, whether a valid notice has been issued by the AO, which has been issued within the period of limitation and which notice has been served upon the assessee. In order to proceed further, it would be best to recapitulate the facts in hand.

8. The record indicates that a notice under s. 148 of the Act was originally issued by the AO on 24th March, 2005 which was returned unserved by the process server with the report dt. 26th March, 2005 intimating that the assessee has gone out for medical treatment. The same notice was again given to the notice server, which again came back unserved with the report dt. 31st March, 2005 that the assessee had gone out for the medical treatment. Subsequently, the AO recorded the reasons to believe under s. 148(2) on 28th March, 2005 and obtained a sanction from the competent authority under s. 151 of the Act and thereafter a fresh notice under s. 148 of the Act was issued on 28th March, 2005, which was sent through a process server as well as by speed-post. Both the notices came back unserved with the remark dt. 31st March, 2005 that the assessee had gone out for medical treatment. Thereafter, another notice dt. 17th June, 2005 was again issued under s. 148 of the Act, which was served upon the assessee on 29th June, 2005.

9. In the light of the aforesaid facts, it is clear that the AO assumed jurisdiction under s. 148 of the Act by issuance of the notice dt. 24th March, 2005. This assumption of jurisdiction by the AO was illegal and invalid for the simple reason that the AO was required to record the reasons to believe and obtain a sanction from the competent authority before issuing notice under s. 148 of the Act, which in the instant case had not been done till that date. Therefore, the AO could not assume the jurisdiction under s. 148 of the Act on 24th March, 2005.

10. A fresh notice under s. 148 of the Act was issued on 28th March, 2005 after recording reasons and after obtaining sanction from the competent authority. The last date for issuance of notice under s. 148 of the Act was admittedly 31st March, 2005. Consequently, a valid notice was issued by the AO under s. 148 of

the Act on 28th March, 2005. The AO assumes jurisdiction, under s. 148 of the Act, the moment a notice dt. 28th March, 2005 was issued as per the decision of the Supreme Court in R.K. Upadhyaya (supra).

11. The scheme of the 1961 Act indicates that the notice, which has been issued under s. 148 of the Act was required to be served upon the assessee under s. 148 of the Act, which is a condition precedent for making an order of assessment. The mandate of s. 148(1) of the Act is, that a reassessment order shall not be made until there has been a service of the notice.

12. In the light of the aforesaid, we find that the valid notice dt. 28th March, 2005 was issued under s. 148 of the Act, which gave jurisdiction to the AO to proceed to reassess the income but the said notice dt. 28th March, 2005 came back unserved on 31st March, 2005. Consequently, no reassessment could be made by the AO under s. 148 of the Act on the basis of the notice dt. 28th March, 2005.

13. Another notice dt. 17th June, 2005 was issued by the AO under s. 148 of the Act, which was served upon the assessee on 29th June, 2005 and, on the basis of this notice, reassessment order was passed under s. 143(3) r/w s. 147 of the Act. In our opinion the issuance of a fresh notice dt. 17th June, 2005 was an invalid notice as it was issued after the period of limitation contemplated under s. 149 of the Act. The AO could not assume jurisdiction and make a reassessment on the basis of an invalid notice. The service of this invalid notice dt. 17th June, 2005, upon the assessee is immaterial.

14. The AM of the Tribunal has misdirected himself in holding that the notice dt. 28th March, 2005 was actually served upon the assessee on 29th June, 2005 and that date written in the notice as 17th June, 2005 was an error, which was a curable defect in view of s. 292B of the Act. According to the AM, the notice dt. 17th June, 2005 was only a continuation of the notice dt. 28th March, 2005, which was duly served upon the assessee after the period of limitation on 17th June, 2005. In our opinion, the aforesaid presumption is patently erroneous based on surmises and conjectures and against the material on record for the reasons stated hereinunder.

15. In our opinion, three separate notices were issued namely, the notice under s. 148 of the Act dt. 24th March, 2005, 28th March, 2005 and 17th June, 2005. The AO in the assessment order himself indicated that "another notice" under s. 148 of the Act was issued on 28th March, 2005. The use of the word "another" is important and a meaning has to be given to it. Before the first appellate authority, a remand report was called from the AO under s. 250(4) of the Act. The AO in its report submitted that originally a notice under s. 148 of the Act was issued on 24th March, 2005, which was returned unserved; thereafter, another notice under s. 148 of the Act was issued on 28th March, 2005 by speed-post as well as by a process server, which also came back unserved. The AO further, recorded "later on the then AO for the reasons best known to him issued another

notice dt. 17th June, 2005, which was received by the assessee on 29th June, 2005."

16. The remand report of the AO makes it apparently clear that three different notices under s. 148 of the Act were issued on 24th March, 2005, 28th March, 2005 and 17th June, 2005. The first notice dt. 24th March, 2005 was an invalid notice because no reasons to believe were recorded nor sanction order was obtained by the AO. The second notice dt. 28th March, 2005 was a valid notice but came back unserved and this notice was dropped and no further action was taken on this notice. The third notice, which was issued on 17th June, 2005 was issued after the period of limitation and, consequently, was an invalid notice. The AO assumes jurisdiction under s. 148 of the Act only upon issuance of a valid notice. Since the notice dt. 17th June, 2005 was an invalid notice, the assessment order cannot be sustained. Reliance by the Tribunal that the notice dt. 17th June, 2005 was in fact a notice dt. 28th March, 2005, which was a curable defect under s. 292B is totally misplaced. Sec. 292B has no application in the instant case. The notice dt. 17th June, 2005 could not be treated as a notice dt. 28th March, 2005 or a notice in continuation of the notice dt. 28th March, 2005.

17. In *Madan Lal Agarwal Vs. Commissioner of Income Tax*, (1983) 32 CTR 179 : (1983) 144 ITR 745 : (1983) 13 TAXMAN 120 , a Division Bench of this Court held that issuance of a valid notice is a condition precedent for validity of an assessment order under s. 147 of the Act.

18. Similarly, in *Commissioner of Income Tax Vs. Shital Prasad Kharag Prasad*, (2005) 196 CTR 162 : (2006) 280 ITR 541 , another Division Bench of this Court held that the authority does not acquire jurisdiction in the absence of a valid notice being served and held that issuance of a valid notice under s. 148 of the Act is a condition precedent to the validity of an assessment order passed under s. 147 of the Act. The Division Bench held that if the notice is invalid, the assessment order would be illegal and without jurisdiction.

19. In *Commissioner of Income Tax Vs. Mani Kakar*, (2009) 178 TAXMAN 315 , the Delhi High Court held that proceeding under s. 147 of the Act cannot be initiated without the service of notice as provided under s. 148 of the Act and that a service of notice is a precondition for framing an order under s. 147 of the Act. Similar view was reiterated by the Delhi High Court in *Commissioner of Income Tax Vs. Harish J. Punjabi*, (2008) 297 ITR 424 : (2008) 166 TAXMAN 245 .

20. The decision of the Supreme Court in *Commissioner of Income Tax, Shilong Vs. Jai Prakash Singh*, (1996) 3 AD 118 : AIR 1996 SC 1303 : (1996) 132 CTR 262 : (1996) 219 ITR 737 : (1996) 3 JT 356 : (1996) 2 SCALE 832 : (1996) 3 SCC 525 : (1996) 3 SCR 377 : (1996) 85 TAXMAN 407 has no application to the facts of the present case. In the light of the aforesaid, the majority view of the order of the Tribunal cannot be sustained and is quashed. The assessment order

passed by the AO under ss. 147 and 148 of the Act is quashed. The questions of law are answered in favour of the assessee and against the Revenue.