

Duli Chand Luxmi Narain Vs. Acit

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Dec-17-2003

Reported in : (2004)89ITD426(Delhi)

Judge : K Prasad, P Parashar

Appellant : Duli Chand Luxmi Narain

Respondent : Acit

Judgement :

1. These appeals have been filed by the assessee against the common order of learned CIT(A) dated 2-1-1998 for A.Y. 1981-82, 1983-84 and 198-88. Since common issues are involved for adjudication in these appeals, the same were heard together and are being disposed of by a common order for the sake of convenience.

2. Shri K.L. Guglani, Advocate, appeared on behalf of the assessee whereas Smt. Vandana Verma, Sr. D.R. represented the Department.

3. We are treating ITA No. 1532/Del/98 as leading appeal and propose to adjudicate the grounds taken by the assessee in this appeal first.

Since the grounds are identical in other two appeals, our findings on the grounds in this appeal shall also apply to remaining two appeals.

4. Ground No. 1: The relevant facts concerning the issue of notice issued under Section 147/148 are as under: The assessee firm consisted of two partners, namely, Smt. Lali Devi and her son Shri Laxmi Narain.

4.1. A search and seizure operation was conducted on the business premises of the firm on 26-10-1988. After search the firm was dissolved on 31-3-1989. A deed of dissolution was executed on 12-4-1989. It is alleged that intimation of dissolution was also given to AO Under Section 176(3) vide letter dated 12-4-1989.

4.2. The AO issued notice Under Section 148 against the firm. This notice was served upon one Mahesh Kumar son of the retired partner Shri Laxmi Narain on 9-7-1991. The assessee filed return on 21-10-1991.

4.3. Original assessment was completed on 17-3-1994. Against this order the assessee preferred appeal before the learned CIT(A), Rohtak, who vide order dated 28-2-1995 set aside the order and restored the matter back to the AO for framing the assessment after considering the grounds of the assessee which, inter alia, was that no service of notice Under Section 147/148 was effected upon the assessee. The AO, in compliance to the direction of the learned CIT(A) framed the assessment order on 31-1-1997 for A.Y. 1981-82.

4.4. The assessee again agitated the issue before the learned CIT(A) regarding validity of service of notice Under Section 147/148. It was submitted before him that the notice was served on Mahesh Kumar who was neither employee or partner of the firm. His attention was drawn to letter dated 15-1-1991 addressed to the A.O. by Shri Mahesh Kumar wherein it was stated that the notice should be handed over to the partner of the firm and not to him as he is not authorized to receive the notice. In behalf of the assessee reliance was also placed on certain decisions in support of the argument that in absence of valid service of notice on proper person, the assumption of jurisdiction Under Section 147 was illegal and assessment is to be quashed. The learned CIT(A) has made reference to this submission and also to the case laws in respect of the same in para 6.3 of his order. He has also made the following observations: "6(v) The law regarding issuance and service of notice under Section 148 of the Act has been settled by

the Supreme Court in the decision reported at 166 ITR page 163 R.K. Upadhyaya v. Shanabhai P. Patel.

The Act categorically prescribes that no notice under Section 148 shall be issued after the period of limitation and that is the condition precedent to making the orders of assessment. Once a notice is issued within the period of limitation, the jurisdiction becomes vested in the AO to proceed to reassess. However, the mandate of Section 148(1) of the Act is that reassessment shall not be made until there has been service. Service under the Act is not a condition precedent to conferment of jurisdiction on the Assessing Officer to deal with the matter but it is a condition precedent to the making of the order of assessment. This legal position shall be kept in view while reframing the assessment." 4.5. Thereafter the learned CIT(A) has set aside the assessment by observing as under: "In the result, the assessments impugned in these four appeals are set aside with the above directions." 4.6. The assessee has challenged this direction. According to learned counsel of the assessee Shri Guglani, since the assessment framed without service of notice was bad ab initio, the learned CIT(A) was not justified in setting aside the assessment. He should have quashed the same. In support of his submission, the learned counsel contended before us that notice Under Section 148 issued to a firm must be served in accordance with the provisions of Section 282 i.e. on any partner or duly authorized person. According to him, in the case of dissolved firm, in view of the provisions contained Under Section 283(2), the notice must be served on any of its partners before dissolution of the firm. He also submitted that notice upon son of partner cannot be treated to be a valid service of notice. In support of this argument, he placed reliance on the following decisions: 4.7. The learned counsel also submitted that unless the notice is served on the proper person in the manner prescribed under Section 282, the service cannot be deemed sufficient and AO has no jurisdiction to reassess the escaped income. In this regard the learned counsel made reference to the following decisions: P.N. Sasikumar v. CIT 4.8. The learned counsel challenged the direction of learned CIT(A) in setting aside the assessment. According to him, the issue, concerning the matter of jurisdiction, due to non-compliance of mandatory provision of Section 148, renders the entire proceedings as illegal and therefore the assessment should be quashed. In this regard he made reference to the following

decisions: Kanji Mal and Sons v. CIT Inventors Industrial Corporation Ltd. v. CIT (1992) 194 ITR 548 (Bom.); and 4.9. The learned D.R., on the other hand, submitted that the assessee had filed return in compliance to the notice and therefore and irregularity, if any, in the service of notice stood cured. She also made reference to Rule 15 of the CPC and submitted that service on adult member of the family of the assessee is to be deemed as sufficient service. She supported the order of learned CIT(A) and also placed reliance on the order AO.4.10. We have carefully considered the entire matter. The provisions contained Under Section 283 of the I.T. Act deal with the procedure or effecting service on the dissolved firm. Sub-clause (2) of Section 283 runs as under: "Where a firm or other association of persons is dissolved, notices under this Act in respect of the income of the firm or association may be served on any person who was a partner (not being a minor) or member of the association, as the case may be, immediately before its dissolution." 4.11. In view of the above provision, it is clear that notice of service is to be effected upon any person who was a partner before the dissolution of the firm. This provision does not postulate service on the son or any family member of the partner. It is a settled rule of construction that while interpreting particular provision nothing can be added which is not incorporated. Therefore, before the words "any person who was a partner" the words "son or adult member of", cannot be added before partner. It is also settled view that if a particular mode is provided for effecting service, the service has to be effected according to that mode only and not otherwise.

4.12. The issue relating to validity of the service was considered in the case of Kanhaya Lal Surinder Kumar v. AO 72 TTJ (Delhi) 787. In that case also service was effected on son of one of the partners of erstwhile firm. The Bench accepted the argument of the assessee and quashed the assessment order by observing as under: "In the case of the assessee the notice has been served subsequent to the dissolution of the firm. There are separate provisions relating to the dissolution of firm as given in Section 283. On perusing the provisions of Sections 282 and 283 of the Act, it would be clear that while in the case of Section 282 the party on which notices are to be served is either any member of the firm or the manager, in case of dissolution of firm, the term used is 'partner' (not being a minor). Apparently, in case of dissolved firm, it is the partner, who alone can effectively

represent against any action contemplated by the Department. Coming to the assessee's case, while properly addressing the notice, it has been mentioned that the same is to be through K and D. It is undisputed that notice has been served on R who was neither a partner of the dissolved firm nor was a member in the aforesaid firm. Nowhere it has been shown that he acted as an agent of the dissolved firm. It would be relevant to mention that the assessee also did not respond to the aforesaid notice. It was only in response to notices issued under Section 142, served on D that the assessee asked for inspection of the records and raised an objection in regard to the validity of that proceedings under Section 147. In view of the facts and the legal position, as notice under Section 148 was not served on the, the proceedings under Section 147 cannot be held to be validly initiated. Therefore they are quashed." 4.13. The issue was also considered in the case of Narwana Motor Transport Co. v. ITO (1982) 13 TTJ (CHD) 67. In the case also the Tribunal observed that after dissolution, a notice in respect of the firm had to be served only on a former partner of the firm and on no other person. Service of notice was held invalid and assessment was quashed in the case also.

4.14. In the case of Thangam Textiles v. First ITO 90 ITR 412 (Mad.) the Hon'ble Madras High Court held that notice under Section 283(2) had to be issued only to such of those persons who were partners immediately before the dissolution of the firm. The Hon'ble Court observed that the phrase 'immediately before' in Section 283(2) means 'preceding the date of dissolution' and has no reference to the year of assessment and therefore, where the notice under Section 148 was served on an erstwhile partner who had retired long ago and was not a partner immediately before the dissolution of the firm, the reassessment proceedings would be invalid.

4.15. The issue regarding service of notices came for the consideration in the case of CIT v. Baxiram Rodmal (1934) 2 ITR 438 (Nag) and thereafter in the case of CIT v. Dey Bros. (1935) 3 ITR 213. The Hon'ble Mysore High Court in the case of C.N.Natraj v. Fifth ITO (1965) 56 ITR 250, following the two decisions mentioned above, held that the service of notice should be in accordance with the provisions of the Act and unless the provision relating to mode of service are strictly complied with the reassessment proceedings would be without jurisdiction. In the case of Thangam Textiles v. first ITO (1973) 90 ITR 412 the Hon'ble Madras High Court

observed that a valid notice was a condition precedent for the initiation of proceedings Under Section 147(b) and that the notice should be served in proper manner. The Hon'ble Supreme Court of India in the case of Narayana Chetty v. ITO 35 ITR 388 held that the service of requisite notice on the assessee is a condition precedent to the validity of any reassessment Under Section 34 of the Income-tax Act and if a valid notice was not issued as required, the proceedings taken by the ITO in pursuance of an invalid notice and consequent orders of reassessment passed by him would be void and inoperative. P.N. Sashi Kumar and Ors. v. CIT 170 ITR 80 has also considered the issue relating to service of notice Under Section 148 and the consequential of invalid service. The Hon'ble Court has observed as under: "It is settled law that the issue of a notice Under Section 148 of I.T. Act, 1961 is a condition precedent to the validity of any assessment order to be passed Under Section 147 of the Act. It is also settled law that if no such notice is issued or if the notice issued is invalid, not in accordance with law or is not served on proper person in accordance with law, the assessment would be illegal and without jurisdiction. The notice should specify the correct assessment year and should be issued to a particular assessee.

4.17. In view of the above, it is clear that if proper notice is not issued Under Section 148 and is not served upon proper person, then the assessment or reassessment made will be without any valid and legal foundation. In the instant case the Department has not been able to prove service of a valid notice upon the assessee and, therefore, the assessments made without proper service of notice Under Section 148 cannot be treated to be legal assessments.

4.18. We have also considered similar issue while deciding ITA Nos.

1537 to 1540/Del/98 in assessee's own case for A.Y. 1985-86 and 1987-88 to 1989-90 in the case of assessee itself, wherein service of notice was not found to be valid and the assessments were held to be invalid.

4.19. On the basis of the facts narrated above and in view of the legal position stated in the above paras it is clear that the notice Under Section 148 was not effected properly and in consonance with the provisions contained in Section 283(2) of the Act and therefore the assumption of jurisdiction by the AO cannot be

treated to be a proper assumption justified in law.

4.20. In AIR 1976 SC 1899 the Hon'ble Supreme Court has held that if the order of the initial authority is void, an order of the appellate authority cannot make it valid.

4.22. In view of this position, the service of the notice Under Section 148 is not a legal service and consequently the assessment order cannot have legal legs to stand. The same is to be quashed. In our view the learned CIT(A) was not justified in setting aside the matter again and again in not adjudicating the issue properly particularly when he has himself made observations regarding the validity of service Under Section 148 which have been reproduced above. Thus, the findings and direction of learned CIT(A) cannot be justified in law. We, therefore, set aside the same and hold that the assessment order made by the AO without making valid service of notice cannot survive. The same has to be quashed. In view of above, ground No. 1 is allowed in favour of the assessee and against the Department.

"without prejudice to the above the appellate authority erred in law and in fact in not deleting the interest charged Under Section 139(8) & 215/217 in the facts & circumstances of the case." 5.1. The learned CIT(A) has not adjudicated this ground. Otherwise also, since we have quashed the assessment, the question of levy of interest Under Section 139(8) and 215/217 does not arise. This ground is allowed accordingly.

6. Ground No. 3 is general in nature and requires no specific adjudication.

7. In the result, all the three appeals preferred by the assessee stand allowed.

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