

IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA No. 1438 of 2006

03.04.2007

Judgment reserved on: 15th March, 2007

Judgment delivered on: 3rd April, 2007

COMMISSIONER OF INCOME TAX

Delhi-IV, New Delhi Appellant

Through Ms. P.L. Bansal, Advocate.

Vs.

M/S HOTLINE INTERNATIONAL PVT. LTD

241, Okhla Indl. Estate Phase-III,
New Delhi-110020 Respondent

Through Mr. Ajay Vohra with

Ms. Kavita Jha, Advocates.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may Yes be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported Yes in the Digest?

V.B. GUPTA, J.

The present appeal under Section 260 A of the Income Tax Act, 1961 (for short as 'Act') has been filed by the Revenue against the impugned order dated 31st March, 2006 passed by the Income Tax Appellate Tribunal (for short as 'Tribunal') in ITA No. 2019/Del/2004 for the assessment year 1985-1986 vide

which the appeal of the Assessee was allowed.

2. The brief facts of the case are that the Assessee filed a return declaring loss of Rs. 47,493/- on 29th March, 1996, which was accepted by an order under Section 143(3) of the Act dated 16th January, 1998.

3. An information was received from Deputy Director (Investigation), Gurgaon that during the investigation proceedings in the case of Raj Kumar Bhatia, statement of Shri M. Goenka, Proprietor of M/s. M. Goenka and Company was recorded under Section 131 of the Act on 28.01.2000. In his statement, Shri M. Goenka stated that he used to issue bogus bills of sale and purchase of the shares. He further stated that the transaction of sale of shares of M/s Ashoka Commercial Pvt. Ltd. made by the present Assessee was a bogus one. On the basis of this information, the Assessing Officer issued notice under Section 148 of the Act after taking approval from the Commissioner of Income Tax. This notice was sent through Inspector along with notice server. Inspector found that the factory was closed up to 31st March, 2002 due to Holi festival holidays as per the information by the security guard.

4. The security guard refused to receive the notice and ultimately the notice was served by affixation. A notice dated 28 March, 2002 was also sent by registered post on 28th March, 2002 but same remained un-complied with.

5. Subsequently, notice under Section 143(2) of the Act dated 4th June, 2002 was sent in response to which Chartered Accountant of the assessee company appeared and raised the point that the action under Section 148 of the Act could not be initiated after 31st March, 2000.

6. The Assessing Officer informed the Assessee that notice under Section 148 of the Act dated 28th March, 2002 was served by registered post as well as by affixture and he was also shown the Inspector's report and the proof of registered post. After satisfying with the proof, the Chartered Accountant of the Assessee company participated in the proceeding.

7. After due opportunities, the Assessing Officer framed the assessment at an income of Rs. 38,43,937/-.

8. Aggrieved by this order, Assessee filed an appeal before the Commissioner of Income Tax (Appeal) before whom the Assessee did not press the ground regarding service of the notice and therefore it was stated as withdrawn.

Commissioner of Income Tax (Appeal) dismissed the appeal filed by the Assessee on merits.

9. Aggrieved against the order of the Commissioner of Income Tax (Appeals), the Assessee filed an appeal before the Tribunal on various grounds. However, during the hearing, the Assessee took an additional ground of appeal that the entire re-assessment proceedings culminating in the order dated 30th January, 2003 was bad in law as no notice under Section 148 of the Act had at all been served upon the Assessee prior to the commencement or completion of the re-assessment proceedings.

10. The Tribunal held that no proper service of notice issued under Section 148 of the Act was effected by the Assessing Officer on the Assessee and therefore the re-assessment proceedings, resulting into the order dated 30th January, 2003 are bad in law and accordingly it quashed the order passed by Assessing Officer under Section 147 of the Act.

11. It has been argued by the learned counsel for the Revenue that in the present case notice under Section 148 of the Act was sent to the Assessee by registered post on 30th March, 2002 and the receipt of the sending the notice by registered post has been placed on record. Further, as per Order V Rule 17 of the Code of Civil Procedure, it was a valid affixture as the security guard refused to accept the notice and the Principal Officer or agent of the Assessee company was not found at the site and there was no other person on whom the service could be made. In the present case the security guard refused to accept the notice and this fact has not been denied by the Assessee and lastly, the Chartered Accountant to the Assessee participated in the assessment proceedings and thus the Assessee waived his right to challenge the service. It is not the case that Assessee was not heard before completing the re-assessment proceedings.

12. On the other hand, it has been argued by the learned counsel for Assessee that due to non service of the notice on the Assessee the re-assessment proceedings culminating in the order dated 30th January, 2003, purported to be passed under Section 148 of the Act are bad in law. It is also contended that admittedly no notice was tendered either to the Assessee or his agent nor the same was refused by either of them.

13. The short question which arises for consideration in this case is as to whether notice under Section 148 of the Act has been duly served upon the Assessee prior to the commencement or completion of the re-assessment proceedings or not.

14. The relevant portion of Section 148(1) of the Act, reads as under:-
Issue of notice where income has escaped assessment.

“148.(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer 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 section 139.”

15. Section 282 of the Act provides as to how the notice under the Act is to be served. The relevant provision of this Section reads as under:-
Service of notice generally.

“282.(1) A notice or requisition under this Act may be served on the person therein named either by post or as if it were a summons issued by a court under the Code of Civil Procedure, 1908 (5 of 1908).”

16. So, according to it, any notice under the Income Tax Act has to be served on the person named therein either by post or as if it were a summons issued by court under the Code of Civil Procedure.

17. Order V Rule 12 of the Code of Civil Procedure 1908 provides that wherever it is practicable, service shall be made on defendant in person or on his agent. The relevant provision reads as under:-

“R.12. Service to be on defendant in person when practicable, or on his agent “
Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.”

18. Order V Rule 17 of the Code of Civil Procedure lays down the procedure when defendant refuses to accept service, or cannot be found and it reads as under:-

“R.17. Procedure when defendant refuses to accept service, or cannot be found -
Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant (who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time), and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the

serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.”

19. Order V Rule 19A provides for simultaneous issue of summons for service by post in addition to personal service. It reads as under:-

“R. 19A. Simultaneous issue of summons for service by post in addition to personal service.-(1) The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgment due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case, the Court considers it unnecessary.

(2) When an acknowledgment purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant.

Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgment due, the declaration referred to in this sub-rule be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of the issue of summons.”

20. Now, who are the recognized agents of the parties, the same has been defined in Order 3 Rule 2 of the Code of Civil Procedure, which reads as under:-

“R. 2. Recognised agents.-The recognised agents of parties by whom such appearances, applications and acts may be made or done are-

(a) persons holding power-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties.

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.”

21. Here, as per the case of the Revenue, notice under Section 148 was taken personally by the inspector at the given address of the Assessee and the same was also sent by registered post. The report of the inspector with regard to the service of notice under Section 148 has been reproduced by the Tribunal in its impugned order which reads as under:-

“As directed, I visited M/s. Hotline International (P)Ltd., 241, Okhla Indl. Estate, Phase III, New Delhi today, i.e., on 28.3.02 along with Shri Zahid Hussain, Notice Server, to serve the notice u/s 148 of the I.T. Act, 1961 for the asstt. year 1995-96. There we met the Security Guard on the gate who informed us that there are Holi festival holidays in the company upto 31.3.02 and refused to receive the notice despite our repeated requests. We further requested him to give us telephone No. of any of the Directors/Managers of the company to enable us to get him directed to receive the notice, which also he did not give. We were left with no alternative but to serve the notice by affixing it on the gate in the presence of Mr. Ram Chander, a labourer, working in the adjoining factory. This may be taken as service of notice by affixure.

Sd/- sd/--28/3/02

Inspector, Ward 12(4), Zahid Hussain New Delhi-1.

N.S”

22. As per Order V Rule 12 of the Code of Civil Procedure referred to above, wherever it is practicable, the service has to be effected on defendant in person or on his agent. Admittedly, in the present case, notice under Section 148 of the Act was not tendered to the Assessee nor the same was refused at all by the Assessee. It is an admitted case of the Revenue that when the officials of the Income Tax Department went to serve the notice under Section 148 for the assessment year 1995-1996, the security guard informed them that the company was closed for Holi Festival Holidays. The security guard by no stretch of imagination can be said to be the agent of the Assessee and admittedly no notice was tendered either to the Assessee or his agent nor the same was refused either by the Assessee or his agent.

23. Under Order V Rule 17 of the Code of Civil Procedure, the affixation can be done only when the Assessee or his agent refuses to sign the acknowledgment or could not be found. Here, in the present case, no effort was made by the Income Tax Department to serve the notice upon the Assessee, since

the company of the Assessee was closed due to Holi Festival Holidays, and admittedly no effort was made by the Serving Officer to locate the Assessee.

24. Even otherwise, as per Order V Rule 19 A of the Code of Civil Procedure, the notice sent by registered post ought to have been sent along with acknowledgment due but admittedly it was not sent along with acknowledgment due.

25. So, from the entire material available on record we have no hesitation in holding that there has been no valid service of notice under Section 148 of the Act upon the Assessee as the same was neither tendered to the Assessee or his agent, nor the same was refused by either of them.

26. Since there has been no proper service of notice on the Assessee, we hold that the re-assessment proceedings, resulting in the order dated 30th January, 2003, are bad in law.

27. The above being the position, no fault can be found with the view taken by the Tribunal. Thus, the order of the Tribunal does not give rise to a question of law, much less a substantial question of law, to fall within the limited purview of Section 260-A of the Act, which is confined to entertaining only such appeals against the order which involves a substantial question of law.

28. Accordingly, we find no reason to differ with the finding given by the Tribunal which is a finding of fact and as such there is no force in the present appeal.

29. Accordingly, the present appeal filed by the Revenue is, hereby, dismissed.

(V. B. GUPTA)

JUDGE

(MADAN B. LOKUR)

JUDGE

April 3, 2007