HIGH COURT OF DELHI : NEW DELHI

\+ ITA No. 62 of 2005

Judgement reserved on: February 16, 2005

% Judgement delivered on: March 3rd, 2005

Commissioner of Income Tax, Delhi ...Appellant

! Through Mr. Sanjeev Khanna, Adv.

Versus

$ M/s Lunar Diamonds Ltd.
D-15/4, Okhla Industrial Area Phase-I
New Delhi ...Respondent

^ Through Nemo

Coram:

* **HON'BLE MR. JUSTICE SWATANTER KUMAR**
HON'BLE MR. JUSTICE MADAN B. LOKUR

1. Whether the Reporters of local papers may be allowed to see the judgement? Yes

2. To be referred to Reporter or not? Not necessary

3. Whether the judgement should be reported in the Digest? Not necessary

* 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.228/Del/99.

2. The Respondent/assessee filed its return of income for the assessment year 1995-96 on 29th November, 1995. A notice under Section 143(2) of the Income Tax Act, 1961 (the Act) was issued to the assessee 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 assessee, 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 assessee 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 assessee that it had not received any notice under Section 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 assessee. 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 assessee but only its name. It was, therefore, submitted that there was a possibility that the correct address of the assessee might not have been written on the envelope and, therefore, the question of service of notice on the assessee did not arise. The contention of the assessee was accepted by the CIT (A) and it was held that there was no valid service of notice on the assessee 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 assessee, the initial burden on the assessee to prove non-receipt of notice had been discharged and that the onus now lay upon the Appellant to prove that the notice under Section 143(2) of the Act had in fact been served upon the assessee 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 under section 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 assessee has not understated the income or has not computed excessive loss or has not under-paid 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, any evidence on which the assessee may rely in support of the return:

Provided that no notice under clause (ii) shall be served on the assessee 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 for the Appellant on ***Banarsi Debi & Anr. vs.***

The Income-tax Officer, District IV, Calcutta and others, AIR 1964 SC 1742.

8. A study of ***Banarsi Debi*** shows that the facts of that case are completely inapposite. In that case, under Section 34 (1) (b) of the Indian Income Tax Act, 1922, a notice was required to be served on an assessee 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 assessee 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 assessee 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 under Section 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 assessee 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 assessee 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 assessee and, therefore, when the notice is sent by registered post, it is deemed to be in the hands of the assessee (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 and others, (1997) 223 ITR 655***.

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 assessee beyond the prescribed period of one year. Reliance in this regard was placed upon ***Commissioner of Income-tax vs. Gyan Prakash Gupta, (1987) 165 ITR 501*** and ***Commissioner of Income-tax vs. Jai Prakash Singh, (1996) 219 ITR 737.***

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 under Section 143 (2) of the Act had been served upon the assessee 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 assessee because, as observed by the CIT (A), the receipt showing that an envelope was sent by registered post merely contained the name of the assessee without its address. Consequently, it is quite possible that the notice may have been sent to the assessee at some wrong or even some incomplete address. However, it is not necessary for us to go into this question at all because the assessee 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 assessee 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.

(Madan B. Lokur)
Judge

March 3rd, 2005
ncg/kapil

(Swatanter Kumar)
Judge

Certified that the corrected copy of the judgment has been transmitted in the main Server.

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