IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA No.1455/2006

COMMISSIONER OF INCOME-TAX ...Appellant through Ms. P.L. Bansal with Mr. Vishnu Sharma, Advocates.

Versus

SHANKER LAL VED PRAKASH ...Respondent through Mr. C.S. Aggarwal, Sr. Adv. with Mr. Salil Aggarwal and Mr. Prakash Kumar, Advocates.

Date of Hearing : 2nd November, 2006

Date of Decision : 6th November, 2006

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether reporters of local papers may be allowed to see the Judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

VIKRAMAJIT SEN, J.

1. The following substantial question of law arises in the present Appeal:-

> Whether ITAT was correct in holding that the Assessing Officer had not satisfactorily discharged the burden of proof resting on him vis-a-vis the service of Notice under Section 143(2) of the Income-Tax Act, 1961 within the statutory period prescribed under the said provision?

2. We have heard arguments at great length on this sticky but significant question of law. This provision prescribes that no Notice shall be served on the Assessee after the expiry of twelve months from the end of the month in which the Return is filed. In the present case, the Assessee filed his Return declaring an income of Rs.41,98,800/- on 29.8.1997. The Assessment Order was eventually framed by the Assessing Officer (AO) on 23.2.2000 at Rs.58,36,860/-. Thus, notices served on the Appellant after 31.8.1998 would be devoid of legal efficacy by virtue of this proviso to the said sub-section. Undisputedly, the Notice issued by the AO was sent to the

Assessee on 25.8.1998 by Registered Post. The Assessee asserts that the Notice was served on him on 1.9.1998, i.e. the day immediately after the expiry of the period envisaged by the sub-section. The AO had asked the Assessee to produce documentary evidence that the Notice in question was indeed delivered only on 1.9.1998, but the Appellant failed to furnish any such evidence. This position has been admitted before us; it has been candidly stated that the Assessee had been "foolish" not to retain the envelope containing the said Notice. The Commissioner of Income-Tax (Appeals) [CIT(A)] had initially remanded the matter back to the AO to verify the actual date of service from the Postal Authorities. It appears that in response to the action taken by the AO pursuant to the Reminder, the Postal Authorities have stated that the records pertaining to the registered letters for the period August 1998 had been "weeded out".

3. Mr. Aggarwal, learned Senior Counsel for the Assessee, has vehemently contended that on an appreciation of the decision in *Commissioner of Income-Tax*

vs. ***Lunar Diamonds Ltd.***, [2006] 281 ITR 1 (Delhi) the Appeal filed by the Revenue must be dismissed forthwith. In that case, the ITAT had set aside the Assessment Order on the ground that Notice under Section 143(2) of the Income-Tax Act had been served upon the Assessee beyond the period of one year prescribed by law. The Division Bench expressed its doubts as to whether a Notice had at all been sent out to the Assessee since the envelope merely contained the name of the Assessee without its address; and that it was quite possible that the Notice may have been sent to the Assessee at some wrong or even incomplete address. After taking into consideration an Affidavit filed by the Assessee stating that it had not received the Notice, this Court concluded that the burden that lay upon the CIT to prove that the Notice was served upon the Assessee within the prescribed time period had not been satisfactorily discharged. Later, applying **Lunar Diamond** this Court had in ITA 1269/2006 entitled **The Commissioner of Income Tax vs. Vardhman Estates P. Ltd.** dismissed the Appeal on 25.9.2006. In that case, the

Notice was admittedly dispatched only one day before the expiry of the one year period.

4. In ***R.L. Narang*** *vs. Commissioner of Income-Tax,* New Delhi, [1982] 136 ITR 108, it was held by this Court that provisions of Section 27 of the General Clauses Act, 1897 are attracted wherever service by post is concerned. Section 27 of the General Clauses Act stipulates that wherever a Central Act authorises or requires any document to be served by post, then service shall be deemed to have been effected properly if a correctly addressed and stamped envelope containing the document is dispatched by Registered Post; and that it would be a further presumption that the document has been delivered in the ordinary course of post. It is, no doubt, true that the Bench was concerned about the mode of service rather than date of service; and that Notices/Reminders had been dispatched Under Postal Certificate (UPC) and not by Registered Post. However, the two presumptions contained in Section 27 of the General Clauses Act would apply universally to all cases. Mr. Aggarwal has drawn our

attention to the fact that ITA No. 640/2006 titled **Director of Income Tax vs. Gordhan Thaddani** had been summarily dismissed by us on 16.10.2006. However, in that case the ITAT had returned a finding of fact that the Department had failed to establish the service of any Notice under Section 143(2) on the Assessee within the prescribed period. Even though the dismissal of an Appeal under Section 268 cannot be construed as a precedent or Authority on a proposition of law the facts in **Thaddani's case** are totally dissimilar to the facts of the present case.

5. Mr. Aggarwal has relied on the observations of the Supreme Court in *Mehta Parikh and Co. vs. Commissioner of Income-Tax*, Bombay [1956] 30 ITR 181. Their Lordships had noted that beyond calculation of figures, no further scrutiny was made by the Income-Tax Officer or the Appellate Assistant Commissioner with regard to the entries in the Cash Book of the Appellants, the veracity of which was not challenged. No documents or vouchers in relation to the entries had been called for, nor had the presence of the three Affidavits of the Deponents been

taken into consideration, and the Deponents had not been cross-examined. Their Lordships had opined that in these circumstances it was not open to the Revenue to challenge the correctness of the Cash Book Vouchers or the statements made by those Deponents in their Affidavits. In the present context we are of the view that the observations of their Lordships are not relevant since we are concerned with a presumption of service under Section 27 of the General Clauses Act. Failure to serve a Notice under Section 143(2) would not render the Assessment as null and void but only irregular, as held by the Supreme Court in *Commissioner of Income-Tax vs. Jai Prakash Singh,* [1996] 219 ITR 737. Their Lordships had enunciated this principle without reference to the decision of the Bench of the Rajasthan High Court in *Commissioner of Income-Tax vs. Gyan Prakash Gupta,* [1987] 165 ITR 501 where it had been opined that an Assessment Order completed without service of Notice under Section 143(2) is not void *ab initio* and cannot be annulled.

6. There can be no gainsaying that the Revenue can rely on Section 143(2) only if it proves that the Notice issued by it was served on the Assessee before the expiry of one year from the end of the month in which the Return had been furnished by the Assessee which, in the present case, is 31.8.1998. Section 27 of the General Clauses Act specifies that service of such a Notice would be legally proper if the transmission is through Registered Post. It is significant to mention that the statute does not speak of an Acknowledgment Due Card. In **Narang's case**, it has been laid down that this presumption does not attach to communications dispatched under 'Certificate of Posting'; and in **Vardhman Estates,** we declined to grant our approval to mere dispatch by 'Speed Post' one day prior to the expiry of limitation as a mode of service. The second presumption in Section 27 of the General Clauses Act is that, unless the contrary is proved, a letter dispatched by Registered Post would be deemed to have been delivered in the ordinary course of post. In the present factual matrix, if the notice had been dispatched on the 29th, 30th or 31st August, in the ordinary course it would be presumed not to

have been delivered on the last date of that month. The Department often resorts to DASTI service and the above observation would obviously not apply in such situations. Even apart from Section 27 of the General Clauses Act, Section 114 of the Indian Evidence Act, 1872 (hereinafter referred to as 'Evidence Act') permits the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in relation to the facts of the particular case. The Notices under Section 143(2) were undisputedly dispatched on 25.8.1998; the Assessee has acquiesced to the statement that this envelope had reached Civil Lines Post Office on the next day itself. 25.8.1998 fell on a Tuesday. Despite the assertion that the envelope had reached the Civil Lines Post Office on 26.8.1998, it would be fair for the Court to presume that a local letter would reach the Addressee within three days, i.e. Friday 28.8.1998.

7. We will now briefly consider the Assessee's conduct. The Notice conveyed to the Assessee that a hearing had

been fixed by the AO on 31.8.1998. If the Notice had, in fact, been served on the Assessee on 1.9.1998, it is unnatural that no enquiries or correspondence would have been immediately made to the AO stating that the proposed proceedings had become time-barred. Reliance on the Assessee's letters dated 11.2.2000, 17.2.2000, 23.2.2000 and 19.6.2000 are of no avail because of the lapse of over one year. It would also be too sanguine to accept the explanation of the Assessee that the envelope containing the Notice dated 25.8.1998 had been "foolishly destroyed" by the Asseessee. Assessees avoid or refuse accepting inconvenient communications or procrastinate accepting the notices until it is convenient for them to accept these notices. Since we find it fair to presume that the letter dispatched on 25.8.1998 would have reached the hands of the Addressee/Assessee at least by 28.8.1998, the intervening dates of 29.8.1998 and 31.8.1998 need to be satisfactorily explained away by the Assessee and not the Department, as envisaged by Section 114 of the Evidence Act, if not Section 27 of the General Clauses Act. Before proceeding further it is noteworthy that the Postman

invariably makes endorsement on the envelope itself as to why he has been unsuccessful in delivering the letter to the Addressee on the relevant date.

8. It would be necessary to also deal with the significance or efficacy of the Affidavit filed by the Assessee in the present case, stating that the "notice issued u/s 143 (2) of the Income-Tax Act, 1961 on 25.8.1998 fixing the assessment proceedings, for Assessment Year 1997-98, on 31.8.1998 was served upon me on 1.9.1998". What the Affidavit does not state is that Notice was not tendered on the Addressee on any date prior to 1.9.1998. Mr. Aggarwal has vehemently relied on **Lunar Diamond** since the Affidavit filed by the Assessee in that case had been favourably accepted by the Court. What should not be lost sight of is the fact that the Assessee's stance in **Lunar Diamond** was that the Notice was not received at all. The Court had recorded its suspicion as to whether the Notice had at all been issued, keeping in perspective the absence of the complete address of the Assessee. It is well near impossible for a person to prove the negative beyond

making a categorical and unambiguous statement. The position changes altogether where a person asserts a fact since then the burden of proving the assertion shifts upon him. The Assessee's case is that the Notice was received by him on 1.9.1998. However, it is conveniently stated that the envelope, which was the best and complete evidence on the conundrum, has been destroyed or lost. Mr. Aggarwal has contended that the Assessee was not duty-bound to appear before the AO since the Notice was received beyond the period of limitation. This assumes that the Assessee was aware of the legal provisions on that date or soon thereafter presumably after taking legal advice. In both contingencies it would have been normal for him to address a communication to the AO forthwith or at least within a month to the effect that proposed proceedings had been rendered legally inefficacious. The Assessee could also have obtained a Certificate from the Postal Department since he was fully aware of the importance of the date of delivery. The Assessee has hopelessly failed to discharge the burden which shifted to him immediately on his

assertion that he had received the Notice on a particular date.

9. We have gone threadbare into the factual matrix because of the plenitude of cases which come before us on this delicate question. While there would be no justification for enlarging the period of limitation prescribed by the statute itself, we should also not lose sight of the fact that the disadvantage or discomfort of the Asseessee is only that he has to explain the correctness and veracity of the Return filed by him. A reasonable balance of burden of proof must, therefore, be maintained. In the facts of the present case, we are satisfied that because Notice was dispatched on 25.8.1998, and was duly addressed and stamped, the Department has succeeded in proving its service before 31.8.1998. On the other hand, the Assessee has failed to prove his statement that he received the Notice only on 1.9.1998. In this view of the matter, the question of law framed in paragraph 1 of this Judgment is answered in the negative.

10. Before concluding we think it necessary to issue certain directions that may help avoiding the situation that has arisen in the present case. We direct that Income-Tax Officers (ITOs)/AOs should take care to dispatch Notices at least a fortnight before the expiry of the date of limitation. These officers must also ensure the availability of Certification from the Postal Authorities of the date of delivery on which the envelopes/notices were served on the Addressee, and if there is an inordinate hiatus between the date of dispatch and the date of service the reasons for it, i.e. whether the Addressee had deliberately refused to accept or evaded service. If these steps are mandatorily adopted, and we are sure that will, it henceforward may not be open for the Department to shift the burden of showing when the Notice was served on to the Assessee.

11. With the above directions the impugned Judgment of the ITAT on the question of law framed in paragraph 1 is set aside and the Appeal is allowed.

12. The Registry is directed to ensure that a copy of this Judgment is delivered to the Chairman, Central Board of Direct Taxes (CBDT) for compliance with the directions contained in paragraph 10 of this Judgment.

13. A copy of this Judgment be given DASTI to learned counsel for the parties.

(VIKRAMAJIT SEN)
JUDGE

(S. MURALIDHAR)
JUDGE

November 6, 2006
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- Both RA - 94/07 -

[* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 1455/2006

COMMISSIONER OF INCOME TAX ..... Appellant
Through Ms. Prem Lata Bansal, Advocate

versus

M/S SHANKER LAL VED PRAKASH ..... Respondent
Through Mr. Prakash Kumar, Advocate

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE DR. JUSTICE S. MURALIDHAR

ORDER

% **09.03.2007**

Review App. 94/2007 in ITA No. 1455/2006.

This application seeks a review of the judgment dated 6.11.2006 passed by this Court in ITA No. 1455/2006. While allowing the appeal, this Court held that the Department had succeeded in showing that the notice under Section 143(2) of the Income Tax Act, 1961 (Act) had been served within the statutory period prescribed under the said provision.

It is contended on behalf of the assessee that the Income Tax Appellate Tribunal (ITAT) in its impugned order dated 16.2.2006 had not examined the merits of the case in view of its finding that the notice under Section 143(2) of the Act had not been served within the prescribed statutory period. In other words, the issue concerning the

disallowance of the claim of Foreign Travel Expenses of Rs.9,33,54 and the levy of interest under Section 234(B) of the Act, was not addressed by the ITAT. It is submitted that this Court should have, consequent to setting aside the impugned order dated 16.2.2006 of the ITAT, remanded the matter to it for a decision on merits.

Ms. Prem Lata Bansal, learned counsel for the Department does not dispute that such consequential directions should have been issued by this Court.

Accordingly, the judgment dated 6.11.2006 is modified in the following manner and para 11 of the judgment will now read as under:-

> "The question of law framed in paragraph 1, is answered in the negative i.e., against the assessee and in favour of the Revenue. The impugned judgment dated 16.2.2006 of the ITAT is set aside. The case is remanded to the ITAT with direction to it to dispose of on merits the grounds challenging the disallowance of the claim of Foreign Travel Expenses of Rs.9,33,542/- and the levy of interest under Section 234(B) of the Act. With the above directions, the appeal is allowed."

The review application stands disposed of accordingly.

VIKRAMAJIT SEN, J

S. MURALIDHAR, J

MARCH 09, 2007
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