R-23

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

\+ ITA 202/2010

BSV ENTERPRISES ..... Appellant
Through Mr. Ashok Bhasin, Sr. Adv.
with Mr. Bhagwan Sharma,
Ms. Anuradha Anand and
Mr. Sunklan Porwal, Advs.

versus

COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Sanjeev Sabharwal, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

ORDER

% **21.11.2011**

B.S.V. Enterprises, a partnership firm, has filed the present appeal under Section 260A of the Income Tax Act, 1961 (the Act, for short) assailing the order dated 5th August, 2009 passed by the Income Tax Appellate Tribunal (for short, the tribunal). The appeal relates to assessment year 2004-05.

2. By order dated 19th May, 2011, the following two substantial questions of law were framed:-

> "(i) Whether the Tribunal erred in holding that notice under Section 143(2) was validly served by way of affixture in accordance with law and that too within limitation period?
> (ii) Whether the Tribunal erred inlaw in

holding that profit on sale of property was assessable under the head "business" and not under the head "capital gain"?

3. During the course of hearing, learned counsel for the appellant states that he is pressing only question No.(i) and is not pressing for answer/decision on question No.(ii). Accordingly, we have only examined question No.(i) and answered the same.

4. The partnership firm, in the present case, consisted of three lady partners, namely, Shashi Bala Jain, Veena Jain and Babita Jain. On 31st March, 2005, the partnership firm had filed their return of income declaring income of Rs.63,36,058/- for the assessment year 2004-05. The Assessing Officer noticed that the appellant-assessee had purchased land measuring 4889 square yards at Gurgaon for Rs.1,03,00,000/- and had declared capital gains of Rs.60,27,712/- and income from other sources at Rs.3,08,346/-. Vide assessment order dated 28th December, 2006, the sale consideration received by the appellant-assessee, which was shown under the head "capital gain" was treated as income from "business" and the total income was computed at Rs.1,02,05,507/-.

5. In the appeal filed by the assessee, a plea was taken that notice under Section 143(2) was not served within 12 months of filing of the return i.e. on or before 31st March, 2006 as return was filed on 31st

March, 2005. The CIT(Appeals) called for a remand report and he that the assessee was served by affixation within the statutory period and, therefore, decision of Delhi High Court in the case of ***CIT Vs. Lunar Diamonds Ltd.*** *(2006) 281 ITR 1 (Del.)* was not applicable.

6. The assessee preferred second appeal before the tribunal, but has not succeeded. The tribunal in the impugned order dated 5th August, 2009, has recorded:-

> "8. We have heard the rival contentions and perused the material available on record. The assessee had participated in the proceedings before the Assessing Officer. It never raised any objection with regard to the service of the notice. As far as the opportunity of hearing is concerned, no prejudice is caused to the assessee. In most of the judgments referred by the assessee, the proceedings were taken against the defendant/respondent by the court ex parte. No doubt, if notice under sec. 143(2) of the Act was not served within 12 months from the date of the filing of the return then a valuable right would accrue in favour of the assessee and that right would denude the Assessing Officer to pass a scrutiny assessment under sec. 143(3) of the Act. In the present case, the assessee has not grievance about the grant of opportunity or defending the questionnaire issued by the Assessing Officer during the assessment proceedings. Its grievance is that the alleged notice served upon the assessee through Inspector suffers procedural defects and, therefore, it should be construed that no notice was served upon the assessee and consequently assessment order be quashed because this notice gives the powers to Assessing Officer to pass order under sec. 143(3) of the Act. But we do not find any force in this contention of the assessee

because assessee had made a brazen attempt to mislead the authority so that a proper served should be affected upon the assessee within the time. It has first tried on the ground that it wrote a letter for change of address but this letter did not bear signature and seal of any authority exhibiting the receipt of the letter. This can further be fortified by the fact that in all other correspondences assessee has mentioned its old address as official addresss. This was not only with the Income-tax Department but while purchasing the stamp paper for power of attorney, it has disclosed that very old address as referred by the CIT(Appeals). In 2007, in the return, for assessment year 2000-01, again it mentioned the old address as official address. Learned CIT(Appeals) narrated so many other circumstance. The Assessing Officer is the adjudicators of the dispute as well as a party to the litigation. He instructed the process served to effect the service upon the assessee. He could have consider the argument of the assessee had this exercise was attempted on the last date of the limitation. The notice was first issued through speed post on 23.3.2006 when it returned back only then substituted mode of service was sought. The affixture was made in the presence of an Inspector of the Department as is evident from the report of the Assessing Officer extracted supra and report received by CIT(Appeals) on page 9 of the order. The case laws relied upon by the assessee are quite distinguishable on facts, therefore, on taking into consideration the detailed findings of the learned CIT(Appeals) on this issue running into 15 pages, we do not see any merit in these two grounds of appeal. They are rejected."

7. The first contention raised by the appellant is that vide letter dated 19th May, 2005, the appellant firm had informed the Assessing Officer, Ward No.39(2) about change of address and had given

particulars of the new address. The respondent-Revenue has dispute this letter and have denied that they had received this letter. Copy of the said letter has not been placed on record along with the appeal paper book. The tribunal in the impugned order has specifically recorded that they were not inclined to accept the receipt and service of the letter on the ground that it does not bear signature and seal of any authority. Learned counsel for the respondent-Revenue was asked to produce the original records. We have examined the original records and find that the original of the said letter is not available on record. If the letter dated 19th May, 2005 had been placed on record, we may have asked the respondent-Revenue to examine the Dak Receipt Register. Similarly, the appellant-assessee could have made the said request before the tribunal and asked for verification from the Dak Receipt Register. In view of the aforesaid position, we cannot rely upon and take into consideration this letter dated 19th May, 2005

8. Learned counsel for the appellant-assessee has submitted that service by affixture was not proper and is contrary to Order V Rule 17 of the Code of Civil Procedure, 1908 as the Assessing Officer had proceeded in great haste and hurry. We have examined the facts and do not find any merit in the said contention. The case was taken up for scrutiny and notice under Section 143(2) dated 23rd March, 2006 was

issued by speed post. The notice was received back 'unserved' wit two observations/notings of the postal authorities. It was reported that on one occasion shop was found closed and on the second occasion intimation was given. This is clear from the abbreviations 'SC' and 'I-D' recorded by the postal authorities on the envelope. These facts are recorded in the remand report, which was submitted by the Assessing Officer before the CIT (Appeals) and have been quoted by him in his order.

9. Thereafter, another notice dated 28th March, 2006 under Section 143(2) was issued and attempt was made to serve the same through Process Server. J.D. Pandey, the Process Server went to the address mentioned by the appellant-assessee in their return of income and had submitted a report recording that in spite of repeated visits, no one from the firm was found and on enquiry, the new address and details of the firm could not be ascertained. Thereafter, notice was affixed at the shop. In the report it is stated that he had affixed the said notice in the presence of Ashok Sharma, Inspector. Ashok Sharma had also verified the said report and stated that notice under Section 143(2) of the Act was served on the assessee by affixing the same by the Process Server, Mr. J.D. Pandey in his presence. This service by affixation is within the statutory limitation period. It is not possible to agree with the

contention of the appellant-assessee that the Assessing Officer shoul have taken further steps before accepting service by affixation, as it is a case of the appellant-assessee that they had shifted from the said address and the shop was closed. We fail to understand what other steps could have been taken by the Assessing Officer except sending the notice by speed post and then through process server. It appears that subsequently the Assessing Officer came to know about the new address of the appellant-assessee and attempts were made and the appellant-assessee was served. This will not dilute and make the service by affixture illegal or void. In this connection, we may reproduce the following observations of this Court in the case of ***Sahara Deposits & Investments (I) Ltd. through the Official Liquidator Vs. Karan Singh,*** 63(1996)DLT377:

> "10. When the service by affixation is effected under Rule 20, it is not necessary that the affixation must be made in the presence of witnesses. When the affixation is made under Rule 17, affixation may be made in the presence of the witnesses if available. Even under Rule 17 presence of witnesses is not mandatory, as the use of the words "if any" suggests. Presence of witnesses is not mandatory contemplated by Rule 17. In short, the absence of witnesses at the time of affixation would not by itself annul the affixation or invalidate the service. Rule 19 vests a discretion in the Court. The Court may feel satisfied by the verification on affidavit made by the process server or examine him so as to satisfy itself as to the regularity and reliability of the service if the Court may feel itself not satisfied by

> the verification by affidavit of the serving officer. It may direct the service afresh and in such manner and with such directions as it may deem fit. Discretion in the matter of treating the service by affixation as good and valid, as is conferred by Rules 19 of the Order 5 of the CPC is also found conferred on the Company Court by Rules 32 and 36 of the Companies Court Rules, 1959. If at the time of hearing of the petition, the Judge may form an opinion that the respondent has not been served or has not been properly served, the hearing of the petition may be adjourned and directions may be made for effecting the service afresh and in such manner and with such directions as the Court may deem fit to make."

10. Accordingly, the substantial question of law is answered against the appellant-assessee and in favour of the respondent-Revenue. The appeal is dismissed without any order as to costs.

SANJIV KHANNA, J.

R.V. EASWAR, J.

NOVEMBER 21, 2011
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