$~10

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

% Date of Decision : 27th March, 2012.

\+ W.P.(C) 8068/2011

I.M.CONSTRUCTIONS PVT.LTD ..... Petitioner
Through Mr. Ajay Kumar Porwal, Adv.

versus

COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. N P Sahni, sr. standing counsel

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

SANJIV KHANNA,J: (ORAL)

I M Constructions Pvt. Ltd., the petitioner company has filed the present writ petition for quashing the notice dated 5.8.2011 under Section 142(1) of the Income Tax Act, 1961 ('Act', for short) in respect of assessment year 2004-05. The contention of the petitioner is that they have not been served with the notice under Section 148 of the Act dated 22.3.2011 and therefore, the proceedings pursuant to the notice under Section 142(1) dated 5.8.2011 are void *ab initio* and illegal. Ld. counsel for the petitioner submits that the notice under

Section 148 is required to be served in accordance with Section 282 of the Act and in case of non-service of notice, entire proceedings are of no consequence.

2. It is stated in the petition that the return for the assessment year 2004-05 was filed on 10th February, 2005, manually with the Income Tax Officer 11(3)and in the said return the address mentioned was E-72, Mohan Garden, Pipalwala Road, Uttam Nagar, New Delhi-30. The return is signed by Inder Mohan Sharma, s/o H C Shastri, Director of the petitioner company. The contention of the petitioner is that in February, 2006 they had written a letter enclosed as Annexure P2, informing the Assessing Officer about the change of address to X-1, Okhla Industrial Area, Phase-II, New Delhi-20. Along with the letter, they had also enclosed copy of the certificate issued by the Registrar of Companies recording change of the registered address. It is submitted that the petitioner has been filing returns for the subsequent assessment years stating the changed/new address i.e. X-1, Okhla Industrial Area, Phase-II, New Delhi-20.

3. Ld. counsel for the respondent/Revenue, on the other hand, has referred to the counter affidavit. It is submitted that notice under Section 148 of the Act was issued at the address mentioned in the return and was sent by speed post on 22.3.2011 by the Assessing Officer (see list of documents at page 53). The Assessing Officer

also relies upon the downloaded data available on the income tax website in which the address mentioned of the assessee was/is E-72, Mohan Garden, Pipalwala Road, Uttam Nagar, New Delhi-30. It is submitted that the petitioner should have ensured that the address is rectified and recorded in the PAN records. With regard to the letter dated 10th February, 2006, it is submitted that it is addressed to Income Tax Officer Ward 11(1), who is not the Assessing Officer of the petitioner and the Assessing Officer of the petitioner is the Income Tax Officer, Ward 11(3).

4. We do not appreciate and accept the stand of the Revenue that they are required to look and refer the income tax website and are not required to verify records and the subsequent returns to ensure that the notices are sent to correct addresses. The Assessing Officer in case of doubt should examine and verify whether new/changed address is mentioned in the returns filed for subsequent years. Further, if the assessee has informed change of address, this should be recorded and noted. However, in the present case no notice/letter was written to the Assessing Officer about change/new address.

5. Moreover, for several reasons, we are not inclined to accept the prayer in the writ petition. The petitioner has not disputed or denied the fact that the notice dated 22.3.2011 was issued to the petitioner at the address mentioned on the income tax return. This fact is also

mentioned in the letter dated 18.10.2011 written by the petitioner to the Assessing Officer. This shows that the petitioner was aware and knew that the Assessing Officer has issued the notice under Section 148 of the Act at the address mentioned in the return. A clear distinction between "issue" and "service" of the notice has been drawn by the Supreme Court in the case of ***R K Upadhyaya Vs. Shanabhai P. Patel*** (1987) 166 ITR 163. Issue of notice within the prescribed time is a mandatory requirement and service of notice is a procedural requirement before completing the assessment. In the said decision it has been held as under :

> "Section 34, conferred jurisdiction on the Income-tax Officer to reopen an assessment subject to service of notice within the prescribed period Therefore, service of notice within limitation was the foundation of jurisdiction. The same view has been taken by this court in *Jani* v. *Induprasad Devshanker Bhatt* [1969] 72 ITR 595 as also in *CIT* v. *Robert* [1963] 48 ITR 177 (SC). The High Court, in our opinion, went wrong in relying upon the ratio of *Banarsi Debi* v. *ITO* [1964] 53 ITR 100, in disposing of the case in hand. The scheme of the 1961 Act so far as notice for reassessment is concerned is quite different. What used to be contained in section 34 of the 1922 Act has been spread out into three sections, being sections 147, 148 and 149, in the 1961 Act. A clear distinction has been made out between "issue of notice" and "service of notice" under the 1,961

> Act. Section 149 prescribes the period of limitation. It categorically prescribes that no notice under section 148 shall be issued after the prescribed limitation has lapsed. Section 148(1) provides for service of notice as a condition precedent to making the order of assessment. Once a notice is issued within the period of limitation, jurisdiction becomes vested in the Income-tax Officer to proceed to reassess. The mandate of section 148(1) is that reassessment shall not be made until there has been service. The requirement of issue of notice is satisfied when a notice is actually issued. In this case, admittedly, the notice was issued within the prescribed period of limitation as March 31, 1970, was the last day of that period. Service under the new Act is not a condition precedent to conferment of jurisdiction on the Income-tax Officer to deal with the matter but it is a condition precedent to the making of the order of assessment. The High Court, in our opinion, lost sight of the distinction and under a wrong basis felt bound by the judgment in *Banarsi Debi* v. *ITO* [1964] 53 ITR 100. As the Income-tax Officer had issued notice within limitation, the appeal is allowed and the order of the High Court is vacated. The Income-tax Officer shall now proceed to complete the assessment after complying with the requirements of law. Since there has been no appearance on behalf of the respondents, we make no orders for costs."

6. The aforesaid paragraph also shows that the requirement stipulated in Section 149 of the Act is "issue of notice" and not "service of notice", which was the requirement under Section 34 of the Income Tax Act, 1922. For the sake of convenience, we are

reproducing Section 149 of the Act, which reads as under :

> "(1) No notice under section 148 shall be issued for the relevant assessment year, - (a) in a case where an assessment under sub-section (3) of section 143 or section 147 has been made for such assessment year, -
>
> (i) If four years have elapsed from the end of the relevant assessment year, unless the case falls under sub-clause (ii) or sub-clause (iii);
>
> (ii) If four years, but not more than seven years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year;
>
> (iii) If seven years, but not more than ten years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees one lakh or more for that year;
>
> (b) In any other case, - (i) If four years have elapsed from the end of the relevant assessment year, unless the case falls under sub-clause (ii) or sub-clause (iii);
>
> (ii) If four years, but not more than seven years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees twenty-five thousand or more for that year;

> (iii) If seven years, but not more than ten years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousands or more for that year.
>
> Explanation : In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section.
>
> (2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.
>
> (3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year."

7. In the present case, the assessment proceedings are still pending and have not culminated in passing of any order. In the meanwhile, the petitioner-assessee has come to know about the said assessment proceedings. In these circumstances, the assessee can be treated as "served" with the notice under Section 148 of the Act, which was earlier issued at the address mentioned in the return. The

assessee can now file the return of income pursuant to the said notice and thereafter the assessment proceedings can continue.

8. We may notice that the stand of the respondent-Revenue is that the notice issued at the address mentioned in the return was not received back unserved and therefore, the Assessing Officer had proceeded on the presumption that the notice was duly served. The said presumption as per the petitioner stands rebutted as the addressee had shifted or changed address. In view of what we have indicated and stated, non-receipt/non-service of the notice by post is inconsequential.

9. We record that the ld. counsel for the Revenue has submitted that they have made further enquiries with regard to occupants of E-72, Mohan Garden, Pipalwala Road, Uttam Nagar, New Delhi-30. The said property it is stated is in possession of one Lalit Kumar Sharma and his family and his mother Smt. Santosh Sharma is the owner. He states that Inder Mohan Sharma is known to them. We are not basing our decision the said aspect as enquiries have been conducted after filing of the counter affidavit and no additional affidavit has been placed on record.

10. In view of the findings recorded above, we do not see any merit in the contention that the proceedings should be quashed. The writ petition is accordingly disposed of with liberty to the petitioner

to file return by treating the notice under Section 148 of the Act as having been duly served. In the facts of the case there will be no order as to costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

MARCH 27, 2012
Vld/Bisht