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

\+ **I.T.A. No.1604/2010 & ITA No. 1778/2010**

1. I.T.A. No.1604/2010

% Date of Decision: 25.03.2011

Reserved on : 04.03.2011

THE COMMISSIONER OF INCOME TAX – VI ... APPELLANT

Through: Ms.Prem Lata Bansal, Sr. Advocate with Mr.Deepak Anand, Advocate

Versus

THREE DEE EXIM PVT. LTD. ...RESPONDENT

Through: Dr.Rakesh Gupta with Dr.Raj K. Agarwal, Ms.Poonam Ahuja, Ms.Rani Kiyala and Mr.Johnson Bara, Advocates.

AND

2. ITA No. 1778/2010

Reserved on : 18.03.2011

THE COMMISSIONER OF INCOME TAX – VI ... APPELLANT

Through: Ms.Prem Lata Bansal, Sr. Advocate with Mr.Deepak Anand, Advocate

Versus

THREE DEE EXIM PVT. LTD. ...RESPONDENT

Through: Dr.Rakesh Gupta with Dr.Raj K. Agarwal, Ms.Poonam Ahuja, Ms.Rani Kiyala and Mr.Johnson Bara, Advocates.

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

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

M.L. MEHTA, J.
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1. These appeals are filed against the common order dated 25th September, 2009 of the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") whereby cross-objections filed by the assessee for the assessment year 1999-2000 were allowed and consequently appeal of the Income Tax Officer, Ward 16(2), New Delhi (for short "the Revenue") was dismissed. Vide this common order both the appeals are being disposed.

2. The issue raised in the present appeal centered around a narrow compass. With the consent of the counsel for parties, we heard the matter finally and propose to dispose of the appeal on the following substantial question of law:

1. Whether ITAT was correct in law and on facts annulling the assessment framed by the AO under Section 147/143(3) of the Act?

2. Whether ITAT was correct in law in holding that since notice under Section 148 had not been served upon the assessee and therefore, assessment framed by the AO was bad in law?

3. The facts in brief are that the respondent/assessee filed return for the assessment year 1999-2000 declaring its income at Rs.4,91,550/-, which was assessed under Section 143 of the Income Tax Act (for short "the Act"). Thereafter information was received from DIT (Inv) that the assessee had received accommodation entries from M/s.Parivartan Financial Services Pvt. Ltd. and Victoria Advertising Pvt. Ltd. On this information, a notice dated 27.03.2006 under Section 148 of the Act was issued by the Assessing Officer (AO) at the address at which the return of the said year was filed by the assessee. A notice under Section 142(1) dated 28.02.2006 followed by another notice dated 6th November, 2006 was issued to the assessee. In response to this notice, counsel for the assessee appeared before the AO on 14th November, 2006 and sought adjournment. On that date, the counsel was given a photocopy of the notice dated 27th March, 2006 issued under Section 148 of the Act.

Vide letter dated 11th December, 2006, assessee stated that the return originally filed by it may be treated as return filed in response to notice under Section 148 of the Act. The AO proceeded with the assessment proceedings. Certain queries were raised to which assessee filed details. Thereafter assessment order was framed by the AO at the income of Rs.2,11,67,640/- making various additions.

4. The order of the AO was challenged in appeal before the Commissioner, Income Tax (Appellate) [CIT(A)] on as many as eleven grounds. One of the grounds on which the impugned order was passed and which is challenged before us was with regard to want of service of notice under Section 148 of the Act on the assessee before finalization of the assessment for the assessment year 1999-2000. The CIT(A) repelled this contention of the assessee with the following reasoning:

> "It is true that the Assessing Officer has sent the notice dated 27.03.2006 at the address of 3/81 basement, Ramesh Nagar, New Delhi. It is also true that the assessee has been filing its return for A.Y.2004-05, 2005-06 and 2006-07 at another address i.e. 5/2, Punjabi Bagh Extn., New Delhi-110015. The Assessing Officer had also sent one notice under Section 271(1)(c) for AY 2001-02 on 14.02.20056 at the above said address of Punjabi

Bagh only. However, the perusal of the assessment order reveals that the notice dated 27.03.2006 was dispatched by registered post which has been supported with the copy of postal receipt sent by Assessing Officer along with the remand report. The contention of AR is also that the postal receipt should be backed with the evidence of dispatch at RPAD and in absence of the same service is not in accordance with law. He has relied upon the judgment of Hon'ble Delhi High Court in the case of CIT v. Hotline International Pvt. Ltd. 161 Taxman 104 (Del) holding that under order V, Rule 19A of the Code of Civil Procedure, the notice sent by registered post should have been sent along with acknowledgment due and in absence of the same service was not valid. I am not able to convince myself with the arguments of the Counsel for at least three reasons. One, this notice has not been received back. It is settled law that when the notice is sent by the registered post, it is presumed to be served. Second, it is further perused from the assessment order that in any case photo copy of the notice under Section 148 was served upon the AR of the appellant who appeared during the course of the assessment proceedings before the Assessing Officer on 24.11.2006. Therefore, the grievance of the assessee regarding non service of the notice no more survives. Three, it can be further sent that the AR of the assessee has been participating in the assessment proceedings from time to time. Queries were given by AO and details were filed by him. In any case it cannot be said that there was been violation of principles of natural justice. Therefore, the ground of the appellant on this issue is dismissed."

5. The Revenue filed appeal against the order of CIT(A) and assessee also filed cross-objections before the Tribunal. The

Tribunal allowed the cross-objections of the assessee and dismissed the appeal of the Revenue on the following reasoning:

> "5. .....Therefore, it could not be said that there had been violation of principles of natural justice. In the case before us it is not a question opportunity of being allowed to the assessee but it relates assumption of jurisdiction u/s 147 of the Act. Providing of opportunity of being head comes next to assumption of jurisdiction to reassess the income. From the above facts, it is clear that the assessee was not served in the notice under Section 148 of the Act. The notice was sent at the address other than the present address of the assessee. Therefore, the service of notice under Section 148 of the Act does not exist and hence the assessing officer, in the absence of proper notice under Section 148 could not have assumed jurisdiction to reassess the income of the assessee. Accordingly, in our considered opinion, the assessment made is bad in law."

6. From the impugned order of the Tribunal, it is seen that while allowing the cross-objections of the assessee, the Tribunal annulled the assessment holding it bad in law on account of want of service of notice under Section 148 of the Act. The Tribunal did not choose to examine the findings of the CIT(A) on remaining grounds.

7. The question for our determination is to see if the assessment was bad in law as held by the Tribunal. The Tribunal has arrived

at this finding on the ground that no valid notice under Section 148 of the Act was served upon the assessee before making assessment by Assessing Officer. This will require interpretation of Section 148 of the Act. Relevant part of this Section read as under:-

> "148. **Issue of notice where income has escaped assessment.**
>
> (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.

8. Referring to the provisions of sub-Section (1) of Section 148 of the Act, learned counsel for the assessee has vehemently argued that the issue of notice before assessment was a pre-condition under the sub-Section (1) and since admittedly no notice was issued at the correct address of the assessee, notice issued at

the wrong address could not be said to be a valid service in the eyes of law and as such the assessment based on such a notice was bad in law. In this context, he has relied upon the judgments of ***R.K. Upadhyaya v. Shanabhai P. Patel***, 166 ITR 163 (SC), ***CIT v. Mintu Kalia,*** 253 ITR 334 (Gau), ***Commissioner of Income Tax v. Thayaballi Mulla Jeevaji Kapasi (Decd.)***, 66 ITR 147 (SC), ***CIT v. Harish J Punjabi*** 297 ITR 424 (Del), ***CIT v. Rajesh Kumar Sharma*** 311 ITR 235 (Del), ***P. N. Sasikumar v. CIT*** 170 ITR 80 (Ker), ***CIT v. Mani Kakar*** 18 DTR 145 and an order of this court in ***CIT v. Eshaan Holding P. Ltd.*** ITA No. 1171 of 2008 dated 31-08-2009.

9. In the case of ***R.K. Upadhyaya*** (supra) it was held by the Supreme Court that since the Assessing Officer had issued notice of re-assessment under Section 147 by registered post on 31st March, 1970, which notice was received by the assessee on 3rd April, 1970, nevertheless, the notice was not barred by limitation and retained its legality. A distinction was drawn between "issue of notice" and "service of notice" on the following observations:-

> "...A clear distinction has been made out between "the issue of notice" and "service of notice" under the 1961 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) proves 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]53ITR100(SC) . 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 requirement of law. Since there has been no appearance on behalf of the respondents, we make no orders for costs."

10. In the case of ***Mintu Kalita*** (supra) following ***R.K. Upadhyaya*** (supra) it was held that service of notice under Section 148 for the purpose of initiating proceedings for reassessment is not a mere procedural requirement, but it is a condition precedent to the initiation of proceedings for reassessment. To the same

effect was the finding in the case of ***Thayaballi Mulla Jeevaji*** (supra). In the case of ***Harish J. Punjabi*** (supra) no notice under Section 148 was sent or served upon the assessee, through any manner whatsoever and that being so assessment was held to be void.

11. The facts of the case of ***Rajesh Kumar Sharma (supra)*** are somewhat similar to the instant case inasmuch as in that case also notice under Section 148 was issued at the old address of the assessee. The assessee had also appeared before the AO in response to notice under Section 142(1) of the Act, but, the assessee had filed his return under protest making it abundantly clear that he has not received the notice under Section 148. However, in the present case, the notice under Section 148 was issued to the assessee at the address as given by it in the return of the relevant year. The counsel for the assessee had also appeared before the AO on 14th November, 2006 in response to notice under Section 142(1) of the Act and was given copy of the notice under Section 148 of the Act. Then the assessee had also written letter within a few days thereafter, i.e., on 11th December, 2006 stating that the return as originally filed under Section 143 of the Act be treated as return in pursuance to

notice under Section 148 of the Act. Not only this, various queries were also raised to which detailed replies were filed by the assessee. It was only thereafter that the assessment was framed. That being the position in the present case, the case of Rajesh Kumar Sharma (*supra*) is distinguishable from the present case.

12. The reliance has also been placed on the order of this Bench in ***CIT v. Eshaan Holding***, ITA No.1171/2008 decided on 31st August, 2009. In this case also, notice was said to have been served at the old address, whereas the assessee had filed return for the subsequent years at the new address. In this case, it was also held that before issuing the notice under Section 148 of the Act, it was expected of the AO to see if there was any change of address because valid service of notice is jurisdictional matter and this a condition precedent for a valid reassessment. The facts of the said case are also distinguishable from the present case inasmuch as in this case the assessee had written a letter to the AO denying the service of notice under Section 148 of the Act and the entire proceedings were of the same assessment year. As noted above, in the present case, the counsel for the

assessee had appeared and was given copy of the notice under Section 148 and a few days thereafter a letter was received from the assessee stating that the original return be treated as return in response to notice under Section 148 of the Act. Further in the present case, the assessment year was 1999-2000 for which notice was issued at the given address, whereas new address was given by assessee in the return of AY 2004-2005 & 2005-2006. Above all, another factor which weighed with the Court Eshaan Holding (*supra*) was the tax effect of that case being about Rs.4.00 lakhs and not thus appealable.

13. The learned counsel also relied upon the case of ***Haryana Acrylic Manufacturing Co. v. Commissioner of Income Tax & Anr.*** (2009) 308 ITR 38. The facts of this case are not applicable to the present case. This case came to be considered by the Division Bench of this Court in another case titled ***Mayawati v. CIT & Ors.*** (2010) 321 ITR 349, wherein, issues were substantially the same as before us in the present case. Before adverting to the facts and issues in that case, it may be noted as to what the Division Bench had noted about the factual

matrix of the case of ***Haryana Acrylic*** (supra). The Court observed as under:-

> "Various issues had arisen in that case, none of which, in our opinion, are of any relevance to the determination of the questions which fall for determination by us. In Haryana Acrylic it had, inter alia, been opined that for Section 147 to become operational it is essential that it should be alleged that escapement of income is a consequence of the assessee having failed to fully and truly disclose all material facts necessary for the comprehensive completion of the assessment. What had transpired in that case was that whilst the initiation of the proceedings by the AO for approval of the Commissioner of Income Tax mentioned the failure on the part of the Assessee to disclose fully and truly all material facts relating to the alleged accommodation entries, the "reasons" disclosed to the Assessee on its request merely mentioned those accommodation entries as being the foundation for the belief that income to the extent of Rupees 5,00,000/- had escaped assessment. The distinction between these two situations has been perspicuously emphasised and adumbrated. The finding was that a reason to believe, without the essential concomitant of it being a result of the failure of the assessee to fully and truly disclose all material facts, would render the reassessment under Sections 147/148 unsustainable. In order to overcome this difficulty, it has been argued on behalf of the Revenue that since the AO had duly recorded the failure on the part of the assessee to fully and truly disclose all material facts this notation should be acted upon and the reasons conveyed to the assessee which were predicated on the Commissioner's noting, should be ignored. The contention of the Revenue was that the assessee had been made aware of the opinion of the AO in the Counter Affidavit of the Revenue filed on 5.11.2007. It was in that context that it was observed

> in Haryana Acrylic that six years had elapsed by that time. GKN Driveshafts (India) Limited v. Income Tax Officer (2003) 1 SCC 72 was applied to emphasise the fact that the reasons should have been furnished within a reasonable time. It was clarified that "where the notice has been issued within the said period of six years, but the reasons have not been furnished within that period, in our view, any proceedings pursuant thereto would be hit by the bar of limitation inasmuch as the issuance of the notice and the communication and furnishing of reasons go hand-in-hand. The expression "within a reasonable period of time" as used by the Supreme Court in GKN Driveshafts (supra) cannot be stretched to such an extent that it extends even beyond the six years stipulated in Section 149". The factual matrix in Haryana Acrylic is inapplicable to the sequence of events before us...

14. In the case of ***Mayawati*** (supra) this Court referred to various decisions of different High Courts and noticed that in the context of Section 143(2) of the Income Tax Act, it has been held that the word “issuance of notice” and “service of notice” are not synonymous and interchangeable, and accordingly, the notice under this section would lose all its legal efficacy if it had not been actually served on the assessee within the scheduled and stipulated time. In this dialectic, a fortiori, since the word ‘served’ is conspicuous by its absence in Section 149, and the legislature has deliberately used the word ‘issue’, actual service

within the period of four and six years specified in the section, would not be critical. It was further held as under:-

> 5. On a plain reading of these Sections it is palpably plain that Section 148 of the IT Act enjoins that the AO must serve on the assessee a notice requiring him to furnish a return of his income, in respect of which he/she is assessable under this Act during the previous year corresponding to the relevant assessment year. Firstly, the notice contemplated by this Section relates to the furnishing of a return and not to the decision to initiate proceedings under Section 147 of the IT Act; secondly, the period of thirty days (omitted by the Finance Act, 1996) is with regard to the furnishing of the return.
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> 6. In stark contrast, Section 149 of the IT Act speaks only of the issuance of a notice under the preceding Section within a prescribed period. Section 149 of the IT Act does not mandate that such a notice must also be served on the assessee within the prescribed period. Speaking for the Division Bench of this Court, I had occasion to observe in CIT v. Shanker Lal Ved Prakash (2007) 212 CTR (Del) 47: (2008) 300 ITR 243(Delhi) the decision in CIT v. Jai Prakash Singh (1996) 132 CTR SC 262: 219 ITR 737 (SC) to the effect that failure to serve a notice under Section 143(2) would not render the assessment as null and void but only as irregular. The decision of the Rajasthan High Court in CIT v. Gyan Prakash Gupta (1986) 54 CTR (Raj) 69: (1987) 165 ITR 501 (Raj) opining that an assessment order completed without service of notice under Section 143(2) is not void ab initio and cannot be annulled was noted. Furthermore, from a reading of that judgment, it is evident that it had not been seriously contended that the notice under Section 149 of the IT Act must also be served within the period set-down in that Section since the discussion centered upon Section 27 of the

> General Clauses Act, 1897 which specifies that service of such a notice would be presumed to be legally proper as it would be deemed to have been delivered in the ordinary course at the correct address. It had, inter alia, been expressed that: "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 disadvantage or discomfort of the assessee 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 also, therefore, be maintained. In the facts and circumstances of the present case, we are satisfied that because notice was dispatched on August 25, 1998 and was duly addressed and stamped, the Department has succeeded in proving its service before August 31, 1998. On the other hand, the assessee has failed to prove a statement that he received the notice only on 1.9.1998. Where a statute postulates the issuance of a notice and not its service, a fortiori the presumption of fiction of service must be drawn on the lines indicated in Section 27 of the General Clauses Act, 1897.

15. We are in complete agreement with the reasoning of the Division Bench in the aforesaid case of Mayawati (*supra*) that what is contemplated under Section 149 is the "issuance of notice" under Section 148 and not the service thereof on the assessee and further that the "service of notice" under Section 148 is only required before the assessment, reassessment or re-computation.

16. Learned counsel also relied upon the case of ***Kanubhai M. Patel (HUF) v. Hiren Bhatt or his Successors to Office & Others***, (2010) 43 DTR (Guj) 329 to substantiate that the notice issued six years after the expiry of assessment year was barred by limitation and assessment made thereon was void *ab initio*. In this case, a notice issued under Section 148 of the Act was apparently held to be issued after the expiry of six years and in that way of the matter, the notice was held to be bad in law. It was in this background that it was held that there was no need of filing of objection by the assessee against the reopening of the assessment under Section 147 of the Act as no useful purpose was to be served by asking the petitioner to undertake the said exercise. So, that case is also absolutely distinguishable from the present case.

17. Learned counsel for the assessee also relied upon the cases of ***Fateh Chand Agarwal v. CWT***, 97 ITR 701 (Orissa); ***B. Johar Forest Works v. CIT***, 107 ITR 409 (J&K) and ***R.L. Narang v. CIT***, 136 ITR 108 (Del). All these cases relate to service of notice on persons, not authorised by of the assessee. That being not the position in the present case, these cases are not applicable.

18. In view of our discussions as above, we are of the view that service of notice, a contemplated pre-condition before assessment would be a question of fact depending upon the facts and circumstances of each case. In the present case, not only that no objection was raised with regard to non-issue of notice dated 27.03.2006, the assessee vide its letter dated 11th December, 2006 adopted the return as originally filed as the return in response to the said notice under Section 148. It was only thereafter that the AO proceeded with the reassessment proceedings. During the assessment proceedings, certain queries were raised to which the assessee gave detailed response. Even during the reassessment proceedings no objection was raised of any kind with regard to defect or irregularity in the notice. In a given situation, as in the present case when the assessee appears before the Assessing Officer and is given copy thereof before assessment and also makes correspondence and participates in the assessment proceedings, notice issued at old address available on record may constitute service of notice. In such circumstances, the service of copy of notice also would be service of notice within the ambit of Section 148(1) of the Act.

19. Learned counsel for the Revenue also submitted that the Tribunal has ignored the provisions of Section 292BB of the Act which lays down that where an assessee has appeared in any proceedings or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time and the assessee shall be precluded from taking any objection in any proceedings or inquiry under the Act that notice was not served upon him or was served in an improper manner. In this regard, it may be stated that this provision came to be inserted by the Finance Act, 2008 with effect from 1st April, 2008 and is not applicable to the assessment year in question. However, this provision also substantiates our finding that in the given circumstances as in the present case, service of notice before assessment could be inferred. The participation by the assessee in the assessment proceedings on receipt of the copy of the notice can be deemed to be service of notice within the ambit of Section 148(1) of the Act. That is what is the legislative intent of "service of notice" on assessee under this section that no

assessment under Section 147 can be finalized before the assessee has sufficient notice thereof.

20. Thus, we are of the view that the Tribunal was not correct on facts and law to annul the assessment framed by the Assessing Officer. Consequently, we answer the questions in affirmative in favour of the Revenue and against the assessee. Since the Tribunal has not dealt with the findings of the CIT(A) on the remaining ten questions, the matter is remanded back to the Tribunal to decide the appeals afresh keeping in view our above findings with regards to the notice under Section 148 of the Act.

M.L. MEHTA
(JUDGE)

A.K. SIKRI
(JUDGE)

MARCH 25, 2011
Dev/