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

\+ **ITA NO.849/2008**

% **Date of Decision** : 21st November, 2011.

Commissioner of Income Tax .... Appellant
Through: Mr. Kiran Babu, Sr. standing counsel.

VERSUS

Samir Kumar Aditya .....Respondent
Through Ms. Amita Gupta, Adv.

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

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest?

SANJIV KHANNA,J: (ORAL)

The present appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) is at the instance of the Revenue and is directed against the order dated 30.11.2007 passed by the Income Tax Appellate Tribunal (tribunal, for short) in the case of Samir Kumar Aditya, the respondent-assessee and relates to assessment year 2000-01.

2. By order dated 18.1.2011 the following substantial question of law was framed :

> "(i) Whether the Income Tax Appellate Tribunal is correct and justified in law in annulling the assessment order framed by the Assessing Officer under Section 143(3) of the Act holding that there was no valid notice under Section 143(2) of the Act within the statutory period despite the fact that the assessee had participated in the assessment proceedings under Section 143(3) of the Act and thereby has waived issue of service by affixture and thereby acceded to the position that in effect there was service of notice and hence, the law of limitation enshrined under Section 143(3) of the Act would not come to his aid?"

3. The respondent-assessee had filed his return of income on 31.10.2000 disclosing income of Rs.3,54,905/-. By a note dated 30.10.2001, the Assessing Officer sought permission to take up the case for scrutiny and after administrative approval, notice under Section 143(2) dated 31.10.2001 was issued.

4. Section 143(2) of the Act at the relevant time was as under :

> "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 assessed has not understated the income or has not computed excessive

> loss or has not under-paid the tax in any manner, serve on the assessed 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 assessed may rely in support of the return:
>
> Provided that no notice under clause (ii) shall be served on the assessed after the expiry of twelve months from the end of the month in which the return is furnished."

5. It is clear from the aforesaid Section that notice was required to be "served" within a period of 12 months from the date of filing of the return i.e. in the present case on or before 31st October, 2002. The word "served" used in the said Section has come up for consideration and interpreted by this Court in ***CIT Vs. Lunar Diamonds Ltd.*** (2006) 281 ITR 1 (Del.). It was held that "served" means actual service and not issue of notice.

Similar view has been taken in ***CIT Vs. Pawan Gupta*** (2009) 318 ITR 322(Del).

6. The question, therefore, is whether the respondent-assessee was served on or before 31st October, 2002 with the notice under Section 143(2). The tribunal has decided the said issue in favour of the respondent, inter alia, recording as under :

> "2.9 Applying the ratio laid down in the aforesaid case the facts of the present case, we notice that the entire process of issuing the notice and effective service is claimed to have been done on 31/10/2001. The affidavit of the Inspector is silent about the reasons why he was resorting to service of notice by affixture. Another interesting aspect, which we notice is that in

> the order-sheet entry of the assessing officer on 31/10/2001 he has recorded the fact that No.1, Mandir Marg, Saiduljab, was the new address of the assessee. Strangely, on 31/10/2001 at 6.20 PM when notice was sent by Speed Post, the address of the assessee, namely B-3/12, Vasant Vihar, has been mentioned therein. This circumstance throws doubt on the veracity of the claim of the Revenue that a service was effected by affixture on 31/10/2001 at the new address of the assessee. Be that as it may, on the facts and circumstances of the present case, we are of the view that there was no valid service of notice under section 143(2) of the Act within the statutory time as laid down in the proviso thereto. In the circumstances the assessment framed is liable to be treated as null and void. The order of assessment is, therefore, annulled."

7. Notice dated 31.10.2001 was addressed at B-3/12, Vasant Vihar, New Delhi, which was the address mentioned by the respondent in his return of income for the year in question. Copy of the said notice has been placed on record as Annexure A. On the backside of the said notice, process server namely Shashi Rai, Inspector had recorded that respondent was not available at the said address. Name of Uppal Builders, a tenant, was mentioned. The process server had further recorded that "We have gone to one Saiduljab and affixed the notice there". The appellant filed on record the report of service, which was signed by Inspector Shashi Rai and Manohar, Tax Assistant. In the said report Shashi Rai had stated that that the notice issued to the respondent has been affixed by her at No.1, Mandir Marg, Saiduljab, as he could not be served. Manohar had verified/affirmed that the notice was affixed by Shashi Rai in his presence.

8. What is noticeable from the aforesaid is that Inspector had gone to the address mentioned by the respondent-assessee in the return but found that the respondent had shifted to another address. She thereafter, along with the Tax Assistant went to the new address, which was made available to her and had affixed notice at the new address, as the respondent assessee was not available. Thus, the process server had tried her level best to serve the respondent-assessee and therefore had gone from the old address to the new address. The respondent-assessee has not disputed or denied the fact that he was residing at the time in question at No.1, Mandir Marg, Saiduljab, New Delhi and had shifted from the address mentioned in the return. The fact that notice was also sent by speed post at 6.20 PM at the address mentioned in the return, does not show or establish that the service report is false. The said assumption is based on surmises.

9. Ld. counsel for the respondent-assessee has submitted that the aforesaid service by affixture at the new address should not be treated as invalid service. She has relied on ***CIT Vs. Hotline International P. Ltd.*** (2008) 296 ITR 333 (Del.), ***CIT Vs. Yamu Industries Ltd.*** (2008) 306 ITR 309 (Del.), ***Ravi Datt Vs. Chuni Lal*** ILR (2004) 1 Del. 470 and decision of the Supreme Court in ***Yakub Abdul Razak Memon Vs. Competent Authority*** (1997) 11 SCC 421.

10. In ***Yakub Abdul Razak Memon Vs. Competent Authority*** (supra) notice had been served by affixture without any attempt by the process server to serve the notice by ordinary process i.e. by tendering the notice to the person, to whom it was intended or through his agent as required by Section 22 of the Smugglers and Foreign Exchange Manipulators

(Forfeiture Of Property) Act, 1976. It was held that there was no valid service. It may be observed that in the said case, the appellant before the Supreme Court had preferred an appeal against the ex-parte order but the same was dismissed by the tribunal on the ground that the appeal was barred by limitation. The factual position in the present case is different.

11. In ***Ravi Datt's*** case (supra) an ex-parte decree has been passed and an application was moved for setting aside. The court noticed that the wife of the defendant had allegedly refused to accept the summon and summon was affixed. The court noticed that the wife of the defendant was an illiterate lady and only one attempt was made to serve the defendant by ordinary process. In these circumstances, the court had made observations with reference to the Order V Rule 17 and the service by affixation should not be made on the very first attempt, if it is refused. The said observations have to be read in view of the facts of the said case, which have been mentioned above.

12. In ***Hotline International P. Ltd.*** (supra) attempt was made to serve the notice at the factory premises, which were closed because of holidays. Only a security guard was posted at the gate. The notice was affixed but no effort was made to serve the principal officers or the directors of the company. In these circumstances, it was held that there was no proper service.

13. On the question of service under Order V Rule 17 of the Code of Civil Procedure, 1908 we may reproduce the observations of a division bench of this court in ***Sahara Deposits & Investments (I) Ltd.*** 63 (1996) DLT 377 (DB), wherein it has been held as under :

> "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 mandatorily 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."

14. What is clear from the facts stated above that the process server with the tax assistant went to the property which was mentioned in the

notice but as the respondent-assessee could not be found at the said address, they took steps and went to the new address which was made available. The respondent-assessee does not dispute that he was residing at the said address. There the notice was served by affixation. The assessee thereafter in the assessment proceedings had appeared and filed various documents and details. The said documents are available on the file.

15. After the assessment order was passed under Section 143(3), the respondent filed an appeal. In the ground of appeal no specific ground regarding service of notice under Section 143(2) on or before 31.10.2001 was taken. The said ground was taken belatedly by way of an additional ground.

16. The tribunal in the impugned order has commented and stated that in the affidavit/service report submitted by the Inspector, the date of the notice was mentioned as 30.10.2001. This is clearly a clerical or typographical error as the date on the notice is 31.10.2001 and it is clearly reflected in Annexure A. It is not the case of either party that the notice was issued on 30.10.2001. Of course, there cannot be any doubt that department should have taken precaution and should have issued notice well in advance, as they knew that the limitation period for service would expire on 31.10.2001. Had care been taken this entire exercise and appeal would have been avoided.

17. In view of the facts stated above question of law is answered in favour of the Revenue and against the respondent. The matter is remitted back to the tribunal to decide on merits. In view of the facts stated above there will be no order as to costs.

SANJIV KHANNA,J

R.V.EASWAR, J

NOVEMBER 21, 2011
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