

Reserved on 09.08.2018

Delivered on 14.08.2018

Court No. - 35

Case :- INCOME TAX APPEAL No. - 413 of 2011

Appellant :- Suresh Kumar Sheetlani

Respondent :- Income Tax Officer-1 (3)

Counsel for Appellant :- Swapnil Kumar

Counsel for Respondent :- C.S.C., Income Tax, Manish Goyal

Hon'ble Bharati Sapru, J.

Hon'ble Dinesh Kumar Singh, J.

[Per: Dinesh Kumar Singh, J.]

1. This appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") has been filed by the assessee against the order dated 17th June, 2011 passed by the Income Tax Appellate Tribunal, Agra Bench, Agra (hereinafter referred to as the "Tribunal") in ITA No.467/Agra/2009, Assessment Year (hereinafter referred to as "A.Y.") 1999-2000.

2. While admitting the appeal on 25th November, 2011, the following two questions of law were formulated:-

"(A) Whether the Income Tax Appellate Tribunal has erred in law and on the facts of the case in holding that the service of notice dated 28.3.2006 issued under Section 148 of the Act, on the last known address, which the department had collected from the

bank, whereas the last known address was available in the return filed by the petitioner, can be treated to be valid service?

(B) Whether the proceedings in pursuance to the notice under Section 148 can be initiated without affecting service, which in accordance with Section 282 of the Income Tax Act, even if it is presumed can be made on an address, which is collected by the department from the bank, whereas known address was available with the department on Saral Form-5 of the petitioner?"

3. The Assessing Officer (hereinafter referred to as "A.O.") issued notice dated 28th March, 2006 under Section 148 of the Act to the assessee at the address i.e. 109, North Idgah Colony, Agra available on the assessee's Bank Account No.10309 in Canara Bank (SSI Branch), Sanjay Place, Agra.

4. The said notice was issued after recording reasons that the assessee had obtained or credited an amount of Rs.5,28,183.00 and Rs.5,79,424.00 from M/s Essar Pee Advertising, Delhi who were providing entries to the beneficiaries by showing that the transactions made by them in purchase and sale of shares of certain companies and gifts from certain persons, which in fact never took place. The assessee was alleged to be one of the beneficiaries, figuring in

the list supplied by the Investigation Wing, Agra. Since the transactions of share trading were found to be bogus and, therefore, entire amount claimed to have been received by the assessee by bank draft was assessee's income from undisclosed sources. The assessee had escaped assessment within the meaning of Section 147 of the Act. A.O. also found that one more amount of Rs.5,15,300.30 was deposited and he issued show cause notice to the assessee under Section 143(3) read with Section 142(1) of the Act dated 23rd November, 2006 requiring the assessee to explain and prove this amount also as the said amount also appeared to be of the same nature.

5. The A.O also issued notice under Section 142(1) of the Act dated 8th November, 2006 to the assessee. In response to the notice, the authorized representative of the assessee appeared and filed reply, challenging service of notice under Section 148 of the Act and also requested for supply of the reasons recorded. The reasons were supplied to the authorized representative on 28th November, 2006.

6. The A.O. completed the assessment by making addition of Rs.16,22,907.00 plus 1% commission and expenses, totaling to Rs.17,91,720.00 on account of

amount of fictitious sale of shares, which had been held to be bogus and unexplained income of the assessee from undisclosed sources vide assessment order dated 5th December, 2006 under Sections 144 and 147 of the Act.

7. Aggrieved by the said order, the assessee had filed an appeal before the first appellate authority. The first appellant authority vide order dated 9th September, 2009 cancelled the said assessment order, declaring the same as invalid on the ground that the notice under Section 148 of the Act was never served upon the assessee.

8. The C.I.T.(A) held that notice under Section 148 of the Act was issued by I.T.O.-1(1), Agra on 28th March, 2006 to the assessee at 109, North Idgah Colony, Agra. The A.C.I.T., Circle-1, Agra transferred the case records to I.T.O.-1(1), Agra on 8th May, 2006. Subsequently, the case was assigned to ITO-1(3), Agra, who issued a requisition under Section 133(6) of the Act on 12th November, 2006 to M/s Essar Pee Advertising Company calling for various information in respect of the share transactions. The A.O. also issued a requisition under Section 133 (6) of the Act on 9th November, 2006 to the Manager, Canara Bank

(SSI Branch), Sanjay Place, Agra calling for the bank statement of the assessee for the period 1st April, 1998 to 31st March, 1999.

9. The A.O. issued a notice under Section 142(1) of the Act on 8th November, 2006. Thereafter, the A.O. issued a show-cause-notice dated 23rd November, 2006 under Section 143(3) read with Section 142(1) of the Act proposing therein to add the following deposits in the Bank Account No.10309, Canara Bank (SSI Branch), Sanjay Place Agra as the assessee's undisclosed income:

06.06.1998	Rs. 5,28,183.20
10.06.1998	Rs. 5,15,300.30
29.06.1998	Rs. 5,79,424.00

10. The A.O. also proposed to estimate the assessee's income at Rs.4,00,000.00 in addition to the above deposits in absence of furnishing return of income. In response thereto, the authorized representative of the assessee filed a letter dated 28th November, 2006 furnishing therewith a copy of the acknowledgment of the return filed in ward 2(2), Agra on 16th November, 2000 declaring therein income of Rs.1,52,580.00. The assessee also requested that reasons recorded for issue of notice under Section 148 and details, copies of

acknowledgment of notice under Section 148 said to have been served on the assessee should be provided.

11. The A.O. completed the assessment under Section 144 read with Section 147 of the Act on 5th December, 2006, observing that the assessee had failed to prove the genuineness of purchase and sale of shares and, accordingly, added the deposits in the bank account, detailed herein-above, as the assessee's unexplained income from undisclosed sources.

12. The assessee preferred an appeal and contended that notice under Section 148 of the Act issued by the A.C.I.T., Circle -1, Agra as also the I.T.O.-1(1), Agra was never served on him and the addition made under Section 68 of the Act were not tenable since the assessee did not maintain regular books of account and filed his return of income under Section 44AF of the Act being a retail trader of shoe soles.

13. On behalf of the Department, it was contended that notice under Section 148 was duly sent by speed post which was not returned back by the postal authority with the remarks "not found or not served or refused". The notice was served on the correct address. Therefore, the plea of non-service of notice could not be accepted in absence of change in address

having been informed to the postal authority. A letter dated 4th October, 2007 was addressed to the A.O. giving directions under Section 250(4) of the Act as under:-

“With reference to the above you are hereby directed as under:-

1. To depute your Inspector to ascertain the identity of the present owner and occupant of 109, North Idgah Colony, Agra from whom the said premises was purchased by him, the date of purchase, the date of taking possession with documentary evidence. The relationship of the owner and/or occupant with Shri Suresh Kumar Sitlani.

2. Furnish mode of service of assessment order, deemed notice, penalty notice etc. on Suresh Kumar Sitlani with evidence as per your record.

A report on the above lines should be submitted to this office by 11.10.2007. The case records are returned herewith to be re-sent along with the requisite report.”

14. The assessee took the specific plea that he had filed his return of income for the year under consideration i. e. 1999-2000 on the changed address i.e. 2, Rishi Marg, Shahganj, Agra. In support thereof, the assessee filed a photocopy of the return filed in Saral form on 31st March, 2000 before Ward 2(2), Agra. He further said that no change of the address

was made in the bank account as no correspondence was required to be made with the bank as the assessee was holding a Saving Account.

15. In compliance of the directions under Section 250(4) of the Act, vide letter dated 4th October, 2007 the A.O. furnished a report dated 27th May, 2009 which is reproduced herein-above:-

“1. The present owner/occupant of the premises at 109, North Idgah Colony are Shri Sanjay Batra & Shri Vijay Batra, both brothers.

2. As directed the inspector was deputed to make enquiries from the present owners but they refused to cooperate him stating that they are not relative of Shri Suresh Kumar Sheetlani from whose father Shri Nanak Ram they have purchased the property. A summon issued on 15.10.2007 to Shri Sanjay Batra was also not complied and as far as I remember counsel of Shri Sanjay Batra, Shri Narendra Singh had appeared without any vakalatnama or documents are informed that Shri Sanjay Batra has told him that he is being harassed. No copy of sale deed/copy of agreement etc. was supplied from which the date of sale/purchase may be ascertained.

3. The file related to the present case was received in this office on 08.11.2006 from ITO-1(1) as case was assigned u/s.120(1) amongst other time barring cases vide orders dated 07.11.2006 of the then Id.Jt.

CIT, Range-1, Agra and the case was time barring in the next month itself. Assessment was completed on 05.12.2006 u/s.144.

4. Records shows that notice u/s.142(1) dated 08.11.2006 along with questionnaire was sent on the address 109, North Idgah Colony, Agra and notice severer vide his report dated 11.11.2006 reported that on the address one Shri Batra is living and Shri Suresh Kumar Sheetalani bad shifted somewhere else 2 years ago. On 15.11.2006 inspector reported that Shri Suresh Kumar Sheetalani did not reside at 109, North Idgah Colony and on 20.11.2006 when he came to know that Shri Suresh Kumar is residing at 2, Rishi Marg, he reported and served the notice on 20.11.2006. A copy of intimation u/s. 14391) for A.Y.1999-2000 dt. 16.11.2000 of the ITO-2(2) available/ supplied shows the address of the assessee as 2, Rishi Marg, Shahganj, Agra.

5. The service of the assessment order, notice of demand and penalty notice etc. was made through speed post on 06.12.2006.

As regards the request of assessee by the photocopy dated 22.10.2007 for the supply of the copies vide para 3, as the file was received from ITO-1(1), Agra as stated above, the ITO-1(1) and Dy. CIT, Circle-1, Agra is being requested to make compliance.”

16. On the basis of the aforesaid report, the CIT (A) held that notice under Section 148 of the Act was not

served upon the assessee. The notice sent under Section 148 of the Act was sent at the wrong address and, therefore, the service of notice could not be deemed to have been effected on the assessee. The service of notice under Section 148(A) is *sine qua non* and in absence thereof, the assessment proceedings concluded under Section 147 of the Act were rendered invalid. The CIT (A) allowed the appeal and quashed the assessment order.

17. The Department being aggrieved by the order of the CIT (A) preferred appeal before the Tribunal.

18. The Tribunal vide impugned judgment and order has held that notice dated 28th March, 2006 under Section 148 was issued to the assessee on the address available with the Canara Bank (SSI Branch), Sanjay Place, Agra by speed post, which was not received back served or unserved from the assessee's side. The Tribunal held that the notice dated 28th March, 2006 had been sent to the assessee on the address available with the Department through speed post and the notice under Section 148 issued to the assessee by speed post had not been received by the Department unserved, it would be deemed to be valid service and, therefore, the Tribunal set-aside the order passed by the CIT(A)

and directed the CIT (A) to adjudicate the case on merit, after hearing the parties.

19. It is important to mention here that CIT(A), after considering the report submitted by the A.O. in response to the directions under Section 250(4) of the Act, had held that the assessee was not residing at 109, North Idgah Colony, Agra and he had left the address two years back. The assessee had filed his return at his new address i.e. 2, Rishi Marg, Shahganj, Agra. The Department had with it the new address of the assessee, but the notice was sent at old address on the ground that it was the address available with the Bank in respect of bank account of the assessee. The Tribunal has not dealt with the report of the A.O. submitted in response to the directions under Section 250(4) of the Act.

20. Considering the aforesaid aspect of the matter, when the Department had correct address of the assessee, sending notice at incorrect address and then presumption drawn of service of notice is wholly erroneous. We find that the presumption drawn by the Tribunal on the ground that since notice was not received back unserved, it would be deemed to be service of notice, cannot be sustained.

21. We, therefore, set-aside the impugned judgment and order passed by the Tribunal and allow the appeal.

22. The questions of law are answered in favour of the assessee and against the revenue.

Order Date :- 14th August, 2018

MVS Chauhan/-