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**Civil Misc. Writ Petition (Tax) No.165 of 2010**

M/S Rps Associates ..... Petitioner

Vs.

The Director Of Income Tax (Investigation) And Others ….. Respondents

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**Hon'ble Tarun Agarwala, J.**
**Hon'ble Surya Prakash Kesarwani, J.**

**(Per: Tarun Agarwala, J.)**

The petitioner is a partnership firm and came into existence on 18th August, 2003 and, therefore, the first assessment year was 2004-05. The petitioner is engaged in the business of development of real estate. The principal place of business as indicated in the returns was situate at E-41, Ashok Vihar, Phase I, New Delhi. Subsequently, the office was shifted on 18th October, 2007 at A-193, Ist Floor, Okhla Industrial Area, Phase I, New Delhi. Due intimation was given to the income tax authorities on 18th October, 2007 and acknowledgement was received by the petitioner on 14th November, 2007 through National Securities Depository Ltd. (NSDL) which is an agency outsourced by the income tax authorities for the purpose of processing the pan cards, change of address, etc.

A search and seizure operation took place on 15th February, 2008 under Section 132(1) of the Act at the business premises of the petitioner's firm at A-193, Ist Floor, Okhla Industrial Area, Phase I, New Delhi. Number of documents and cash was seized and a panchanama was prepared. It transpires that the Commissioner of Income Tax, Delhi-VIII issued an order dated 23rd September, 2008 under Section 127 of the Act transferring the case from the Assistant Commissioner of Income Tax, Circle 23(1), New Delhi to the Assistant Commissioner of Income Tax, Central, Circle Meerut. The petitioner contended that he was unaware of this order and came to know for the first time on 31st August, 2009 when he received a notice under Section 153A of the Act issued by the Assistant Commissioner of Income Tax, Meerut intimating the petitioner that the income tax return for the assessment year 2008-09 has not been filed and directed the petitioner to show cause as to why action under Section 271F of the Act should not be initiated. The petitioner appeared and filed his objections contending that the Assistant Commissioner of Income Tax, Meerut had no jurisdiction to proceed with the case and that the order of the Commissioner of Income Tax, New Delhi dated 23rd September, 2008 was patently illegal, inasmuch as it was passed in violation of the principles of natural justice. It was contended that no notice or opportunity of hearing was provided by the Commissioner of Income Tax, New Delhi before transferring the jurisdiction to the Commissioner of Income Tax, Meerut and, therefore, the said order is void. Inspite of such objection being filed, the Assistant Commissioner of Income Tax, Meerut issued a notice under Section 143(2) of the Act directing the petitioner to attend the proceedings for completion of the assessment for the assessment year 2008-09.

The Assistant Commissioner of Income Tax, Meerut issued a notice dated 25th November, 2009 directing the petitioner to submit various information in connection with the assessment proceedings under Section 153A of the Act. As many as 43 queries were raised and query no.43 directed the petitioner to produce the complete books of accounts including subsidiary books of accounts and bills and vouchers and fixed 4th December, 2009 for hearing. The petitioner has contended in paragraph 39 that no hearing took place on 4th December, 2009 as the Assistant Commissioner of Income Tax, Meerut was preoccupied with other official engagements and, therefore, the books of accounts could not be examined. Thereafter, it is contended that the Assistant Commissioner of Income Tax, Meerut issued a show cause notice dated 7th December, 2009 directing the petitioner to show cause as to why an order for conducting a special audit under Section 142(2A) of the Act be not passed since the authority was of the opinion that there was inaccuracy in the accounts and complexity arising therefrom. The petitioner filed his objection and, thereafter, the authority passed an order dated 18th December, 2009 directing that the accounts should be audited under Section 142(2A) of the Act for the assessment years 2002-03 to 2008-09 by M/s Tandon Seth and Company, Chartered Accountants, Kanpur. The petitioner also contended that the Commissioner of Income Tax, New Delhi issued a corrigendum dated 26th October, 2009 correcting an error in its order dated 23rd September, 2008. The petitioner contended that even this order was passed ex-parte without issuing any notice and without giving an opportunity of hearing.

With these facts, the petitioner filed the present writ petition praying for the quashing of the order dated 23rd September, 2008 passed by the Commissioner of Income Tax, New Delhi and the corrigendum dated 26th October, 2009 transferring the proceedings under Section 127 of the Act to the Assistant Commissioner of Income Tax, Meerut. The petitioner has also prayed for the quashing of the notice under Section 153A of the Act dated 30th October, 2009 issued by the Assistant Commissioner of Income Tax, Meerut for the assessment years 2002-03 to 2007-08 and for quashing the order dated 18th December, 2009 issued by the Assistant Commissioner of Income Tax, Meerut directing special audit to be conducted under Section 142(2A) of the Act for the assessment years 2002-03 to 2008-09 by M/s Tandon Seth and Company, Chartered Accounts of Kanpur.

In this backdrop, we have heard Sri Ashish Bansal, the learned counsel for the petitioner and Sri Krishna Agrawal, the learned counsel for the income tax department.

The learned counsel for the petitioner contended that the order of the Commissioner of Income Tax, New Delhi passed under Section 127 of the Act transferring the jurisdiction to Assistant Commissioner of Income Tax, Meerut was wholly illegal and in violation of the principles of natural justice. It was urged that no notice or opportunity of hearing was given. Assertions have been made in paragraph 14, 17, 18 and 28 of the writ petition and it has also been specifically asserted in the objection filed by the petitioner before the authority vide their letter dated 1st October, 2009, Annexure 15 to the writ petition. The learned counsel further asserted that the Assistant Commissioner of Income Tax, Meerut had no jurisdiction to issue a notice under Section 153A of the Act for initiating the assessment proceedings for the assessment year 2002-03 to 2008-09 and, therefore, the said notice dated 30th October, 2009 should be quashed. The learned counsel further contended that the notice dated 7th December, 2009 and, subsequently, the order dated 18th December, 2009 directing to conduct a special audit under Section 142(2A) of the Act was wholly illegal and that no reasons have been specified either in the notice or in the order to show as to how the accounts maintained by the petitioner were complex requiring special audit to be conducted under Section 142(2A) of the Act.

On the other hand, the learned counsel for the department contended that notice under Section 127 of the Act was issued to the assessee and since no objection was filed nor the petitioner appeared, consequently, an order was passed transferring the jurisdiction to Meerut. It was therefore, contended that notice and opportunity of hearing was given, which the petitioner did not avail and that the principles of natural justice was complied with. It was also contended that the Assistant Commissioner of Income Tax, Meerut had the jurisdiction to complete the assessment proceedings and was competent to issue the order under Section 142(2A) of the Act after considering that the nature of the transactions and vouchers seized holding that the accounts were of such complexity that it required a special audit under Section 142(2A) of the Act. The learned counsel submitted that the orders are perfectly valid and that the writ petition was liable to be dismissed.

Having given our thoughtful consideration, we find from a perusal of paragraph 8 of the counter affidavit that for the assessment year 2008-09, the petitioner's case was selected for scrutiny through computer aided selection scheme and notice was generated by the computer since the PAN of the petitioner was still lying with the Assistant Commissioner of Income Tax, Circle 22(1), New Delhi, inasmuch as the PAN of the petitioner had not migrated to the new Assessing

Officer of Okhla and, therefore, the Assistant Commissioner of Income Tax, Circle 22(1), New Delhi retained the jurisdiction. It was further submitted that before passing the order under Section 127 of the Act, the Commissioner of Income Tax-VIII, New Delhi issued a notice dated 28th August, 2008, which was sent by registered post on 29th August, 2008. Since no reply was received till 23rd September, 2008, an order dated 23rd September, 2008 was passed transferring the jurisdiction to Assistant Commissioner of Income Tax, Meerut.

In paragraph 10 of the counter affidavit a vague reply has been given that before issuing the corrigendum, a notice was issued to the petitioner and since no reply was received, a corrigendum was passed. No proof of issuance of notice has been filed.

In our opinion, the assertion made in paragraph 8 and 10 of the counter affidavit is not only vague, and cannot be believed. Service of notice is required to be made in the manner specified under Section 282 of the Act. One of the methods of service is as per the procedure prescribed under the Code of Civil Procedure. Order V of the Code of Civil Procedure requires that summons is required to be served at the place of business or residence of the person to whom summons have to be served. In the instant case, it has not been disputed that the petitioner's principle place of business shifted from Ashok Vihar to New Okhla, New Delhi on 18th October, 2007. Due intimation was given to the income tax authorities through their agency NSDL and change of address was acknowledged by this agency vide their letter dated 14th November, 2007. Further, the department knew about the change of address, inasmuch as, a search was carried out at the new address under Section 132 of the Act on 15th February, 2008. Therefore, it does not sounds logical nor reasonable for the Commissioner of Income Tax, New Delhi to issue notice dated 28th August, 2008 at the old address of the petitioner at Ashok Vihar. The notice, if any, should have been sent to the principal place of business, which had shifted to New Okhla where the search under Section 132 of the Act was carried out by the department.

We also find that there is nothing to indicate by the department that the petitioner was still carrying on his business from the old place at Ashok Vihar or that the said place was still in existence and was under the control of the petitioner. We also find that no proof has been filed by the department to show that notice dated 28th August, 2008 sent by registered post was actually received by the petitioner. A notice sent by registered post raises presumption of service but this presumption is rebuttal. In the instant case, the petitioner has denied receiving any such notice. Once receipt of notice is denied by the petitioner, the onus shifts back on the department. In fact, we find that the department has conveniently sworn paragraph 8 of the counter affidavit on the basis of legal advice and has not sworn it on the basis of personal knowledge or on the basis of record. Thus, such assertions made in paragraph 8 cannot be relied upon. Similarly, no proof has been filed by the department to assert that before issuing the corrigendum dated 26th October, 2009 the petitioner was put to notice. Neither copy of notice nor proof of sending the said notice by registered post has been filed. The reply given in paragraph 10 is patently vague and unreliable.

In the light of the aforesaid, this Court is of the opinion that the impugned order dated 23rd September, 2008 passed by the Commissioner of Income Tax-VIII, New Delhi transferring the case to the Assistant Commissioner of Income Tax, Meerut was patently illegal and in gross violation of the principles of natural justice. It was imperative for the authority to give notice and an opportunity of hearing to the petitioner before transferring the case under Section 127 of the Act, which in the instant case has not been done. Therefore, the impugned order dated 23rd September, 2008 as well as the corrigendum dated 26th October, 2009 issued by the Commissioner of Income Tax-VIII, New Delhi under Section 127 of the Act cannot be sustained.

In the light of the aforesaid, all consequential proceedings initiated by the Assistant Commissioner of Income Tax, Meerut by issuance of notice dated 30th October, 2009 and the notice dated 7th December, 2009 and the consequential order dated 18th December, 2009 directing to conduct a special audit under Section 142(2A) of the Act being without jurisdiction also cannot be sustained.

One of the contention raised by the petitioner is that the order passed by the Assistant Commissioner of Income Tax, Meerut dated 18th December, 2009 under Section 142(2A) of the Act was passed mechanically without application of mind and without giving any reason appears to be correct. In this regard, we find that the said authority issued a notice dated 25th November, 2009 directing the petitioner to produce the books of accounts including subsidiary books of accounts, bill, vouchers, etc. on 4th December, 2009. In paragraph 39 of the writ petition, the petitioner specifically averred that he appeared before the authority on 4th December, 2009 along with books of accounts but no hearing took place as the Officer was preoccupied with some official work. This fact has not been denied in paragraph 32 of the counter affidavit. In fact, the respondents have categorically contended that the books of accounts was not produced and that the impugned order under Section 142(2A) of the Act was passed on the basis of the documents found during the course of search, which indicated the complexity of the accounts. We are of the opinion that an order dated under Section 142(2A) of the Act entails civil consequences and, an order is required to be passed upon an application of mind and with due care. Complexity of the accounts can only be judged upon a perusal of the books of accounts and after inviting explanation from the assessee. If the books of accounts are not perused, the question of complexity cannot be judged. We are of the opinion that an order under Section 142(2A) cannot be passed on the basis of the seized material unless the assessee failed to produce books of accounts, which in the instant case has not happened, inasmuch as no hearing took place on 4th December, 2009 on the date when the petitioner was required to produce the books of accounts.

We are, therefore, of the opinion that the order dated 18th December, 2009 was passed mechanically and without any application of mind. We are also of the opinion that the impugned order does not contain any reasons. In our opinion, it is necessary and essential for the authority to give reasons indicating the complexity of the accounts and the need to get the accounts audited under Section 142(2A) of the Act. We also find that an identical order was issued to another assessee which order was quashed by this High Court on the ground that no reasons had been given.

For the reasons stated aforesaid, the order dated 23rd September, 2008 passed by the Commissioner of Income Tax, Delhi-VIII, New Delhi and the corrigendum issued by the said authority on 26th October, 2009 are quashed as a consequence thereof notices issued under Section 153A of the Act dated 30th October, 2009 issued by the Assistant Commissioner of Income Tax, Meerut as well as the notice dated 7th December, 2009 and the order dated 18th December, 2009 issued by the said authority under Section 142(2A) of the Act are quashed.

The writ petition is allowed.

It would be open to the competent authority to pass a fresh order in accordance with law in the light of the observations made above, if the law permits the department to do so.

**Date:**23.9.2015

Bhaskar

**(Surya Prakash Kesarwani, J.)** **(Tarun Agarwala, J.)**