IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

ITA No.7 of 2010
Date of decision 8.2.2010

Commissioner of Income Tax 1, Ludhiana ... Appellant

Versus

Sh. Naveen Chander ... Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR
HON'BLE MR. JUSTICE JITENDRA CHAUHAN

Present: Mr. Vivek Sethi ,Advocate for the appellant

1.To be referred to the Reporter or not ?
2.Whether the judgement should be reported in the Digest ?

M.M.KUMAR, J.

The Revenue has approached this Court by invoking the provisions of Section 260A of the Income Tax Act,1961 (for brevity 'the Act') challenging order dated 24.2.2009 passed by the Income Tax Appellate Tribunal, Chandigarh (for brevity 'the Tribunal') in IT(SS)A No.28/CHANDI/ 2004 for the block period 1.4.1989 to 24.6.1999. The Revenue has claimed that following substantive questions of law would arise for determination of this Court:

> "i) Whether on the facts and in law, the Hon'ble Income Tax Appellate Tribunal was justified in ignoring the fact that vide order sheet entry dated 19.5.2003, the assessee had duly noted the fact that notice u/s 158 BD was initially issued by registered post, which was received back and lateron the same was served by affixture on 23.7.2001 and service by affixture was not objected to by the assessee at the time of assessment. The

Hon'ble ITAT in its order has misquoted the fact that the AO noted in para 4.1 of his order the objection of assessee regarding improper service of notice which is not correct;

ii)Whether on the facts and in law, the Hon'ble Income Tax Appellate Tribunal was justified in holding the service of notice u/s 158 BD made by affixture (which was not objected to by the assessee at the time of assessment) as invalid and consequently holding the assessment proceedings resulting in the order dated 27.6.2003 bad in law; and

iii)Whether on the facts and in law, the Hon'ble Income Tax Appellate Tribunal was justified in not adjudicating the grounds raised by the Revenue on merits of the case "?

The basic controversy raised is as to whether the assessee-respondent was served under Section 158 BD of the Act at his last known address on 23.7.2001 by way of affixture. The Tribunal considered the aforesaid issue as a 'fundamental' controversy because it was necessary to establish that such a notice was served to confer jurisdiction. The Tribunal placed reliance on the provisions of Order V Rule 17 of the Code of Civil Procedure, 1908 (for brevity 'the Code') and has concluded on principle that where notice of service is claimed to have been served by affixation under Order V Rules 17, 18 and 19 of the Code then it becomes necessary to examine whether such service has been made in accordance with the procedure, as it is mandatory. The first requirement is to ensure that the place is properly identified and secondly the report is authenticated by independent persons to avoid any attempt by the Process Server to prepare the report sitting in his office. The Tribunal has referred to the report dated

23.7.2001 issued by the Process Server. According to the report of the Inspector/ Notice Server dated 23.7.2001 the notice was affixed on the main door of Shop No. 33, Anajmandi, Mullanpur. There was no evidence of any local person having been associated with in identifying the place of business of the assessee- respondent and the report is not witnessed by any person at all. It has been found to be flagrant violation of Rule 17 of Order V of the Code which lays down a procedure to serve notice by affixture. The conclusion is recorded in paras 13 and 14 of the order which reads thus:

> " 13. So, however, in the report of the Inspector/ Notice Server, who claimed to have affixed the notice, there is no evidence of any independent local person having been associated with the identification of the place of business of the assessee. Infact such report is not witnessed by any person at all. Evidently, it is in clear violation of the mandate of Rule 17 of Order V of the Civil Procedure Code, which lays down the procedure to serve notice by affixture. It mandates that the serving officer shall affix the notice on the outer door or some other conspicuous part of the house in which the person ordinarily resides or carries on business or personally works for gain and shall thereafter report that he has so affixed the copy, the circumstances under which did so and, the name and address of the person by whom the house was identified and in whose presence the copy was affixed. The impugned report of the Inspector/ Notice Server is benefit (bereft ?) of any such lawful requirements enshrined in the Code of Civil Procedure. Infact it would not be out of place to observe that there is no

assertion even by the Inspector/ Notice Server that they had personally checked the business place of the assessee and were in a position to identify the same. For all the above reasons, an inference which cannot escape, is that there has been no valid service of notice issued u/s 158 BD upon the assessee.

14. Before concluding, we observe that having regard to the report of the Inspector- Notice Server dated 27.3.2001, the requirements of the Code of Civil Procedure have not been fulfilled and, therefore, in view of the aforesaid discussion and the case laws referred to, we are of the view that there has been no valid service of notice issued u/s 158 BD on the assessee. Since there has been no proper service of notice on the assessee, it has to be held that the impugned assessment proceedings resulting in the order dated 27.6.2003 are bad in law. The same is hereby set aside. The Assessing Officer can issue afresh notice, if so authorized under the law."

It is thus obvious that finding with regard to service of notice to confer jurisdiction is absent.

The only argument raised by Mr. Vivek Sethi, learned counsel for the revenue- appellant is that there are signatures of the assessee in the order sheet entry dated 19.5.2003 which acknowledges the fact that he had duly noted the notice under Section 158 BD of the Act. However, on close scrutiny, we find that the claim made by the Revenue in the grounds of appeal and in the questions of law that there is order sheet entry dated 19.5.2003 showing that the assessee had noted the factum of notice under Section 158 BD of the Act is without any substance. The Tribunal had taken

the view that registered AD letter was received back unserved and thereafter service was sought to be affected by affixation which was required to be done in accordance with the procedure laid down by Order V Rule 20 of the Code. These are necessarily findings of fact coupled with the finding on law that requirement of Order V Rule 20 of the Code were not complied with. Therefore, we find that no question of law much less a substantive question of law would arise for determination of this Court. Accordingly, the appeal fails and the same is dismissed.

(M.M.Kumar)
Judge

(Jitendra Chauhan)
Judge

8.2.2010

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