IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.03.2021

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THE HONOURABLE **MR.JUSTICE C.SARAVANAN**

W.P.No.34091 of 2017
and W.M.P.Nos.37844 of 2017 & 4675 of 2018

A.P.Suryaprakasam .. Petitioner

vs.

The Income Tax Officer,
Office of the Income Tax Officer,
Non-Corporate Ward- 12(4) Chennai
223-C Wing, II Floor,
BSNL Building, No.16, Greams Road,
Chennai 600 006. .. Respondent

Prayer.: Writ petition is filed under Article 227 of the Constitution of India, praying for issuance of a writ of Certiorarified Mandamus to call for the records pertaining to the enquiry being conducted by the respondent to reopen the assessment of the financial year 2010-2011 pertaining to the petitioner Permanent Account No.AASP6877R/NCW-12(4)/17-18 as mentioned by the respondent in his letter dated 08.12.2017 and to quash the same.

For petitioner : M/s.N.Santhosh Nagarajan

For Respondent : M/s.Hema Murali Krishnan
Senior Standing Counsel

ORDER

The dispute in the present case pertains for the assessment year 2010-2011. The petitioner has challenged the impugned communication dated 08.12.2017 informing the petitioner that an opportunity of being heard was given to the petitioner on 20.12.2017 at 4.00 p.m. and that the petitioner may peruse the relevant records and ensure compliance with regard to the reasons for issuance of notice under Section 148 of the Income Tax Act.

2. The petitioner himself is present as party in person and has questioned the jurisdiction of the respondent reopening the assessment beyond the period of limitation under Section 149 of the Act.

3. The respondent on the other hand has filed a typed set of documents wherein a copy of the notice dated 31.03.2017 is enclosed which was purportedly issued to the petitioner under Section 148 of the

Income Tax Act, along with extract from dispatch register maintained by the respondent Income Tax Officer to demonstrate that the said notice was dispatched to the petitioner on 31.03.2017 and therefore the petitioner cannot state that the exercise power under Section 148 of the Income Tax Ac, 1961, was without jurisdiction for the purpose of reopening the assessment under Section 147 of the aforesaid Act.

4. According to the petitioner, the petitioner was served with the notice under Section 148 of the Income Tax Act dated 31.03.2017 for the Assessment Year 2010-2011 much after the expiry of the limitation though the said notice was purportedly dispatched to the petitioner on 31.03.2017.

5. The petitioner has questioned the correctness of the above stand of the Income Tax Department stating that indeed no notice was issued to the petitioner within the limitation prescribed under Section 149 of the Income Tax Act and therefore the proceedings seeking to reopen the assessment year 2010-2011 under Section 148 of the Income tax Act read with Section 149 of the Act was without jurisdiction.

6. The petitioner submits that the petitioner has given a reply dated 30.11.2017 and had called upon the respondent to furnish the details of the notice sent to the petitioner. The respondent had informed that the notice was served through E-mail to the petitioner's address vide DDCA@gmail.com.

7. It is submitted that the aforesaid e-mail i.d was the e-mail address given in the income tax returns filed for the Assessment Year 2016-2017 wherein the postal address as C4 Lakshmi, 179, Llyods Road, Chennai-14.

8. It is submitted that though the postal address is correct at the time when the Income Tax Return filed by the petitioner, the petitioner was having the residence at Iyem Perumal Street, Royapettah, Chennai 14 during the assessment year 2010-2011.

9. It is submitted that the alleged notice issued to the petitioner's tax consultant who filed returns for the Assessment Year 2016-2017 was not received by the petitioner and not it was that of the petitioner. Notice to

tax consultant who filed return for the subsequent year is not sufficient. In any event, it was not communicated to the petitioner in time. There is no proof of such dispatch.

10. The petitioner also relied on an unreported decision of the Delhi High Court in **Income Tax vs Chetan Gupta,** I.T.A.No.72 of 2014, vide its order dated 15.09.2015 held as under :

> “Merely because other notices sent to the 'Assessee group' were received by the employees of Kiran Cinema it does not automatically lead to the inference that the Assessee's place of business was also Kiran Cinema. In any event, there could not be an inference that Mr. Ved Prakash was duly empowered by the Assessee to receive notices on his behalf. In the very first notice dated 28th March 2008 the endorsement made by Mr. Ved Prakash shows him describing himself as "Accountant, Kiran Cinema, Sector-22, Chandigarh" and nothing more. ”

11. Reliance was also placed an unreported decision of the Hon'ble Supreme Court in **CIT vs. Laxman Das Khandelwal** in Civil Appeal Nos.6261 and 6262 of 2019 rendered in the context of such 292BB of Income Tax Act, 1961. The Court held as under:-

> " For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself."

12. He further submits that the decision of the Delhi High Court in Court in **Income Tax vs Chetan Gupta,** I.T.A.No.72 of 2014, summarised the conclusion as follows: -

> "(i) Under Section 148 of the Act, the issue of notice to the Assessee and service of such notice upon the Assessee are jurisdictional requirements that must be mandatorily complied with. They are not mere procedural requirements.
>
> (ii) For the AO to exercise jurisdiction to reopen an assessment, notice under Section 148 (1) has to be mandatorily issued to the Assessee. Further the AO cannot complete the reassessment without service of the notice so issued upon the Assessee in accordance with Section 282(1) of the Act read with Order V Rule 12 CPC and Order III Rule 6 CPC.
>
> (iii) Although there is change in the scheme of Sections 147, 148 and 149 of the Act from the corresponding Section 34 of the 1922 Act, the legal requirement of service of notice upon the Assessee in terms of Section 148 read with Section 282(1) and Section 153(2) of the Act is a jurisdictional pre-condition to finalizing the reassessment.
>
> (iv) The onus is on the Revenue to show that proper service of notice has been effected under Section 148of the Act on the Assessee or an agent duly empowered by him to accept

notices on his behalf. In the present case, the Revenue has failed to discharge that onus.

(v) The mere fact that an Assessee or some other person on his behalf not duly authorised participated in the reassessment proceedings after coming to know of it will not constitute a waiver of the requirement of effecting proper service of notice on the Assessee under Section 148 of the Act.

(vi) Reassessment proceedings finalised by an AO without effecting proper service of notice on the Assessee under Section 148(1) of the Act are invalid and liable to be quashed.

(vi) Section 292 BB is prospective. In any event the Assessee in the present case, having raised an objection regarding the failure by the Revenue to effect service of notice upon him, the main part of Section 292 BB is not attracted."

13. There the Court by its order dated 16.07.2019 held that under Section 282 (2) of the Income Tax Act, 1961 and Rule 127 of the Income Tax Act Rules, if delivery of notice could not be made at the address of the assessee available in PAN data base, by virtue of the further proviso to sub-rule (2) of Rule 127, the communication could be delivered at the address as is available with the banking company.

14. The learned counsel for the respondent revenue relies upon the

decision of this Court in **Abab Offshore Ltd., vs. Deputy Commissioner of Income Tax, Corporate Circle 1(1), Chennai,** (2017) 78 taxmann.com 37(Madras) wherein this Court has recognised the communicating notice to assessee was accepted by the Income Tax Department and therefore submits that the impugned proceedings seeking for reopening the assessment year 2010-2011 was well within the time.

15. It is further submitted that similar arguments as is in the present case was also taken by the assessee before the Division Bench of this Court in W.A.No.790 of 2020 which was rejected by this Court on 21.09.2020 by asking the assessee to prefer an appeal against the assessment year within a period of 30 days from the date of communication of the order.

16. I have heard the petitioner party-in-person and the learned counsel for the respondent. This is the case where the petitioner has challenged jurisdiction of the respondent reopening the assessment for the assessment year 2010-2011 by issuing notice dated 31.03.2011.

17. Under Section 148 of the Income Tax Act for a maximum period prescribed for issuance of notice is six years where income chargeable to tax has escaped assessment orwhere the amount is likely to amount to be over one lakh rupees or more for that year.

18. Facts are on record indicate that the impugned notice was issued dated 31.03.2017 under Section 148 of the Income Tax Act, 1961.

19. However, neither postal receipt for such dispatch nor any postal acknowledgment has been filed by the Income Tax Department to substantiate a conclusion that indeed a notice had been dispatched on the said date and received by the petitioner thereafter.

20. If indeed notice was dispatched on 31.03.2017, limitation under Section 149 for the purpose of Section 148 r/w 147 will stand satisfied.

21. However, there are no records to substantiate that such a notice was indeed sent on 31.03.2011. The extract of the dispatch register

which has been filed by the Income Tax Department also does not disclose the same.

22. Further, in response to the query addressed by the petitioner dated 30.11.2017 purportedly in response to telephonic call on 24.01.2017 from the Officer of the Income Tax Department wherein it was informed that a notice under Section 148 of the Income Tax Act had been sent to the petitioner's E-mail id contactddca@gmail.com. It is not sufficient to conclude that notice had been sent to the petitioner as the said notice at e-mail id contactddca@gmail.com was that of the petitioner's auditor who filed returns of the petitioner for the assessment year 2016-17. There is also no proof such a e-mail was sent to the said consultant.

23. There is no substitute for issuance of notice under Section 148 of the Income Tax Act to the correct address of the petitioner in time.

24. Further, it was incumbent on the part of the Income Tax Department to produce a letter from the postal department as to whether notice was purportedly dispatched on 31.03.2017 and was indeed received

by the petitioner. This facility is available with the postal department and normally when postal acknowledgment are not received from the postal department, such certificates can be obtained from the department as to whether postal cover containing the notice and dispatched through registered post had been delivered to the addressee or not.

25. The fact that the impugned re-assessment notice was issued on the last date of for reopening the assessment itself raises a serious doubt as to whether indeed notice would have been sent on 31.03.2017 in absence of any cogent evidence, evidencing the dispatch of the said notice to the petitioner.

26. Since there is no evidence to prove actual dispatch coupled with actual delivery of notice, the impugned communication asking the petitioner to come for the hearing is liable to be interfered.

27. Thus, invocation of power under Section of 148 r/w 149 for the purpose of reopening the assessment under Section 147 is to be held as having been issued without jurisdiction.

C.SARAVANAN,J.

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28. In the result, the writ petition is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

17.03.2021

Index : Yes/No
Internet : Yes/No
kkd

To

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