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

\+ W.P.(C) 6056/2023

BCC DEVELOPERS AND PROMOTERS PVT. LTD. ..... Petitioner

Through: Ms.Tanya Kumari, Adv.

versus

DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE 4(2) & ANR. ..... Respondents

Through: Mr.Vipul Agrawal, Sr.SC, Mr.Gibrani Naushad and Ms.Sakshi, Shairwal Advs for R-1.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

O R D E R

% **12.01.2024**

1. On 10 May 2023 we had passed the following order:-

> **"CM No. 23701/2023**
> 1. Allowed, subject to the petitioner/assessee filing legible copies of the annexures, at least three days before the next date of hearing.
> **W.P.(C) 6056/2023 & CM No.23700/2023** ***[Application filed on behalf of the petitioner seeking interim relief].***
> 2. This writ petition concerns Assessment Year (AY) 2019-20.
> 3. Learned counsel for the petitioner/assessee points out that although the notice issued under Section 148A(b) of the Act, 1961 [in short, "Act"] is dated 31.03.2023, it has been digitally signed only on 01.04.2023, at 12:01 am.
> 4. It is, thus, contended that since limitation expired on 31.03.2023, the notice which was signed, *albeit* digitally, is invalid in law.
> 5. Mr Vipul Aggarwal, learned standing counsel, who appears on behalf of respondents/revenue, says that the very same notice was also dispatched *via* post, and that it was handed over to the postal authority on 31.03.2023.

6.1 We have queried Mr Aggarwal, whether the notice dispatched *via* post, bore the signature of the Assessing Officer (AO).
6.2 Mr Aggarwal says that he will return with instructions on this aspect of the matter.
7. We may also note that at present, counsel for the respondents/revenue do not have instructions which would point in the direction that the said notice was also dispatched *via* email.
8. Issue notice.
8.1. Mr Aggarwal, learned senior standing counsel, accepts notice on behalf of the respondents/revenue.
9. List the matter on 19.07.2023.
10. Mr Aggarwal will return with instructions.
11. In the meanwhile, there shall be a stay on the operation of the impugned order and notice.
12. Parties will act based on the digitally signed copy of the order."

2. Mr. Agarwal, on instructions has apprised us today that undisputedly the notice under Section 148A(b) of the Income Tax Act, 1961 ["**Act**"] though dated 31 March 2023 was dispatched electronically only on 01 April 2023. The Court in view of the above bears in the mind the principles laid down in **Suman Jeet Agarwal v. Income-tax Officer & Ors** [2022 SCC Online Del 3141] where the following observations were rendered:

"**25.7.** The contention of the Department that since the impugned notices were generated and digitally signed on March 31, 2021, the same should be considered as the date of issue, notwithstanding the fact that the same had not been despatched, was categorically rejected by the Madras High Court in Smt. Parveen Amin Bhathara (supra) following the judgment of Gujarat High Court in Kanubhai M. Patel (supra). The Gujarat High Court, dealing with a notice issued in paper form, at paragraphs 13 and 16 observed as under (page 31 of 334 ITR) :
Shanabhai P. Patel v. R. K. Upadhyaya, ITO (1974) 96 ITR 141 (Guj) ; [1973] SCC OnlineGuj 42

"Whereas, on behalf of the Revenue, it has been contended that the notices were actually signed on March 31, 2010, hence, the said date would be the date of issue and as such, the impugned notices have been issued within the time limit prescribed under section 149 of the Act.. .. Thus, the expression 'to issue' in the context of issuance of notices, writs and process, has been attributed the meaning, to send out; to place in the hands of the proper officer for service. The expression 'shall be issued' as used in section 149 would therefore have to be read in the aforesaid context. In the present case, the impugned notices have been signed on March 31, 2010, whereas the same were sent to the speed post centre for booking only on April 7, 2010. Considering the definition of the word 'issue', it is apparent that merely signing the notices on March 31, 2010, cannot be equated with issuance of notice as contemplated under section 149 of the Act. The date of issue would be the date on which the same were handed over for service to the proper officer, which in the facts of the present case would be the date on which the said notices were actually handed over to the post office for the purpose of booking for the purpose of effecting service on the petitioners. Till the point of time the envelopes are properly stamped with adequate value of postal stamps, it cannot be stated that the process of issue is complete. In the facts of the present case, the impugned notices having been sent for booking to the speed post centre only on April 7, 2010, the date of issue of the said notices would be April 7, 2010 and not March 31, 2010, as contended on behalf of the Revenue. In the circumstances, the impugned notices under section 148 in relation to assessment year 2003-04, having been issued on April 7, 2010 which is clearly beyond the period of six years from the end of the relevant assessment year, are clearly barred by limitation and as such, cannot be sustained.. ." (emphasis supplied)

The Gujarat High Court categorically held that it is on the date of despatch of the section 148 notice that the same will be held to be issued for the purpose of section 149 of the Act of 1961.

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25.12. The review of the aforesaid judgments of the Supreme Court and the several High Courts shows that all courts have consistently held that the expression "issue" in its common parlance and its legal interpretation means that the issuer of the notice must after drawing up the notice and signing the notice, make an overt act to ensure due despatch of the notice to the addressee. It is only upon due despatch, that the notice can be said to have been "issued".

25.13. Further, a perusal of the compliance affidavit reveals that while the function of generation of notice on Income Tax Business Application portal and digital signing of the notice is executed by the jurisdictional Assessing Officer, the function of drafting of the e-mail to which the notice is attached and triggering the e-mail to the assessee is performed by the Income Tax Business Application e-mail software system. Thus, mere generation of notice on the Income Tax Business Application screen cannot in fact or in law constitute issue of notice, whether the notice is issued in paper form or electronic form….

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25.17. The Department has not cited any judgment which would support its contention that mere drawing up of notice and signing it (pending despatch) amounts to issuance. The counsel for the respondent placed heavy reliance on the judgment of the Supreme Court in M. M. Rubber and Co. (supra). In the said case as well, the apex court was concerned with the issue of limitation while determining if the impugned order therein had been passed within time. However, the provision under consideration was section 35E(3) of the Central Excises and Salt Act, 1944 ("Act of 1944"), which reads as under :

> ".. . Sub-section (3) of section 35E of the Act which deals with the limitation for exercise of the powers under sub-sections (1) and (2) of the Act and which is the relevant provision for consideration in this appeal reads as follows :
>
> 'No order shall be made under sub-section (1) or sub-section (2) after the expiry of one year from the date of the decision or order of the adjudicating authority.'. . ."

The court in the aforesaid judgment deliberated with reference to the phrase "no order shall be made" in section 35E(3) of the Act of 1944 and concluded that the date on which the order was made by the adjudicatory authority by signing it is a relevant date for determining if it was passed within limitation. As is evident, the expression used in section 35E(3) of the Act of 1944, is "no order shall be made" which is distinct from the expression used in section 149 of the Act of 1961 which reads as "no notice under section 148 shall be issued". The two statutory provisions are materially different and the ratio of the said judgment can have no bearing in interpreting section 149 of the Act of 1961.

25.18. Additionally, the contention of the counsel for the Department that generation of section 148 notice on the Income Tax Business Application screen amounts to "issued" within the meaning of section 149 of the Act of 1961 is not borne out from the instructions issued by the Directorate of Income-tax (Systems). On the contrary, the said circulars duly recognize that after generation of notice the concerned Income-tax authority is required to take overt steps for issuing the said notice to the assessee. The circulars use the words "generation" and "issuance" distinctively…..

25.19. The counsel for the Department have also sought to argue that generation of a notice with document identification number on Income Tax Business Application screen conclusively indicates that the notice has been irrevocably issued. The submission of the respondent is not borne out from the applicable circular regarding document identification number issued by Central Board of Direct

Taxes and is therefore a mere ipse dixit of the counsel.

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25.23. We, therefore, answer question No. (I) in the negative against the Department and hold that the impugned notices dated March 31, 2021, which were despatched on April 1, 2021, or thereafter, would not meet the test of "issued" under section 149 of the Act of 1961 and would be time barred, unless saved by the judgment of the Supreme Court in Ashish Agarwal, (supra)."

3. In view of the admitted position, we allow the instant writ petition and quash the impugned notices dated 31 March 2023.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

JANUARY 12, 2024/kk