IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO.513 OF 2019

Harjeet Surajprakash Girotra … Petitioner

Vs

Union of India & Ors. … Respondents

Mr.Anupam Dighe with Ms.Chandni Tanna i/b India Law Alliance for the Petitioner

Mr.Sham Walve for the Respondent No.2

CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.

ORDER RESERVED ON: JULY 8, 2019
ORDER DELIVERED ON: JULY 16, 2019

P.C.:

1. Heard learned Counsel for the parties for final disposal of the petition. The petitioner has challenged a notice dated 13.2.2019 and the consequential actions taken by the respondents pursuant to such notice. The brief facts are as under:

The petitioner is an individual, a widowed lady. She has been allotted a Permanent Account Number ('PAN' for short) by the Income Tax Department. However, according to her, being a

housewife, she had never filed return of income since she did not have any taxable income. After the death of her husband, she resides mostly with her sisters at Jabalpur.

2. It appears that Respondent No.2 – Assessing Officer issued a notice of reopening of the assessment of the petitioner for the Assessment Year 2011-2012. The said notice dated 15.3.2018 was despatched for delivery through post. It was returned by the postal authority on 23.3.2018 with a remark “left”. According to the Department, the address in the said postal communication was as stated by the assessee in her PAN which she never requested to be changed. On the basis of such notice and the postal despatch, the Assessing Officer carried on the assessment for the said Assessment Year. During the assessment, however, he attempted to serve notices on the petitioner at the address given by her in her bank account, the details of which were with the Department.

3. The Assessment Officer passed a reassessment order dated 28.12.2018. The Department thereafter issued a recovery notice dated 1.2.2019 seeking recovery of the petitioner’s tax dues pursuant to the said assessment order. According to the

Department, during the period relevant to the Assessment Year in question, the petitioner had entered into various high value transactions such as cash deposits in the bank account, purchase of mutual funds, sale and purchase of immovable properties, etc.

4. According to the petitioner, she was completely unaware and oblivion to such proceedings since she was no longer residing at the address indicated in her PAN card and the entire assessment thus proceeded ex-parte. Only upon being telephonically informed about certain despatches by the Department, she rushed from Jabalpur to Mumbai and gathered basic information. She, therefore, filed the Writ Petition challenging the reopening of the assessment and the consequential actions taken by the Department.

5. Appearing for the Petitioner, the learned Counsel submitted that mere issuance of notice of reopening of the assessment by the Department is not sufficient. Service thereof to the assessee is also necessary. In the present case, the notice issued by the Department could not be served since the petitioner had changed her address. The Department, therefore, had to follow the

procedure prescribed under the Income Tax Rules, 1961 ('Rules' for short) to serve such notice. In the present case, the same has not been done. Without valid service of notice, reassessment could not have been done.

6. On the other hand, the learned Counsel for the Department opposed the petition, contending that the notice of reopening of assessment was issued by the Assessing Officer. This would be sufficient compliance with the requirement of section 148 of the Income Tax Act ('the Act' for short). The notice was also despatched for service at the petitioner's address given by her in her PAN card. She never intimated the change in address. The Department had, therefore, no information about her not residing at the said place if at all. The petitioner was systematically dodging the service of notice. The Counsel pointed out that several notices were issued during the reassessment which also, the petitioner did not accept. He further submitted that the petitioner had entered into high value transactions during the previous year relevant to the assessment year in question, despite which she did not file the return of income.

7. As is well known, section 147 of the Act pertains to income escaping assessment. In terms of subsection (1) of section 147, if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and any other income chargeable to tax which has escaped assessment. Section 148 of the Act pertains to the issue of notice where income has escaped assessment. Sub-section (1) of section 148 provides that before making assessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish the return of income in prescribed form. Section 149 of the Act pertains to time limit for such notice to be issued under section 148 of the Act.

8. In terms of section 148(1) of the Act, thus, before making reassessment under section 147, the Assessing Officer had to serve on the assessee the notice requiring him to furnish a return. Service of notice is necessary and not its mere issuance. In terms of provisions contained in section 149 of the Act, such notice could have been issued latest by 31.3.2018. As we have noted, the Department did issue such a notice on 15.3.2018 and despatched

it through post for its service to the petitioner at the address given by her in the PAN card. This postal despatch, however, was returned by the postal department with a remark “left”. The Assessing Officer proceeded on the basis of such notice and its return and completed the assessment after issuing notices under section 143(2) of the Act. The question is could he have done so?

9. It is consistent view of the Courts that not mere issuance of notice of reopening of assessment but its service on the assessee, that too, within the time frame envisaged under section 149 of the Act is necessary for a valid reopening of assessment. In case of **Y. Narayan Chetty & Anr. vs. Income Tax officer, Nellore & Ors.** reported in **(1959) 35 ITR 388**, the Supreme Court in the context of Income Tax Act, 1922 had observed as under:

> 5. The first point raised by Mr. Sastri is that the proceedings taken by respondent 1 under s.34 of the Act are invalid because the notice required to be issued under the said section has not been issued against the assessees contemplated therein. In the present case the Income Tax Officer has purported to act under s.34(1)(a) against the three firms. The said sub-section provides inter alia that "if the Income Tax Officer has reason to believe that by reason of the omission or failure on the part of the assessee to make a return of his income under Section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax has been underassessed", he may, within the time prescribed, "serve on the assessee a notice containing all or any of the requirements which may be included in the notice under sub-section (2) of Section 22 and may proceed to reassess such income, profits or gains". The argument is that the service of the

> requisite notice on the assessee is a condition precedent to the validity of any reassessment made under Section 34; and if a valid notice is not issued as required, proceedings taken by the Income Tax Officer in pursuance of an invalid notice and consequent orders of reassessment passed by him would be void and inoperative. In our opinion, this contention is well-founded. The notice prescribed by Section 34 cannot be regarded as a more procedural requirement; it is only if the said notice is served on the assessee as required that the Income Tax Officer would be justified in taking proceedings against him. If no notice is issued or if the notice issued is shown to be invalid then the validity of the proceedings taken by the Income Tax Officer without a notice or in pursuance of an invalid notice would be illegal and void. That is the view taken by the Bombay and Calcutta High Courts in the *CIT* v. *Ramsukh Motilal* and *R.K. Das & Co.* v*. CIT* and we think that that view is right."

10. In the case of **Shanabhai B. Patel vs. R.K. Upadhyaya, Income Tax Officer, Ahmedabad** reported in **(1974) 96 ITR 141,** the Division Bench of Gujarat High Court had examined similar issue and opined as under:

> 9. In our opinion, therefore, the assumption of jurisdiction by the Income-tax Officer of reassessing an assessee is subject to the provisions contained in section 148 to 153 of the Act. Section 148 and 149, which we have reproduced above, clearly show that such jurisdiction cannot be assumed without issuance of notice within the prescribed period and service thereof on the assessee concerned. Mr. Kaji, however, attempted to persuade us that the very fact that the legislature has divided these different provisions contained in the old section 34 of the 1922 Act by suitably enacting sections 147, 148 and 149, where the Income-tax Officer has been given power to reassess after service of notice on the assessee issued within the prescribed period, clearly indicates that the legislature intended to depart from the positions as it emerged from the provisions contained in section 34 of the old Act of 1922. We do not think that this submissions of Mr. Kaji is justified. The scheme for the power of reassessment has been now suitably divided in section 147 onwards of the 1961 Act. This scheme of power was originally comprehended within the provisions contained in section 34 of the 1922 Act. This division of the provisions contained in the old section 34 into section 147 onwards, do not in any way materially alter the positions which could justify the court in accepting

the interpretation canvassed by Mr. Kaji that the different stages have been prescribed before the assumption of jurisdiction. These stages, according to Mr. Kaji, are the issuance of notice within the prescribed period and service of the notice on the assessee. On the plain reading of sections 147, 148 and 149, we do not think that this contention of Mr. Kaji can be sustained. Though the marginal notes of the sections are not decisive, they give us an idea about the intention of the legislature, that it did not contemplate two stages as contended by Mr. Kaji. Section 148 provides for the service of notice before the jurisdiction for reassessment can be assumed. The marginal note of this section reads, "Issue of notice where income has escaped assessment". Section 149 provides for issuance of notice before the expiry of the prescribed period and the marginal note of this section reads: "Time limit for notice". In our opinion, therefore, these words, "service of notice" or "issuance of notice", have no fixed connotation but are interchangeable, as held by the Supreme Court in *Banarsi Debi's* case. The Division Bench of this court in *Induprasad Devshanker Bhatt v. J. P. Jani, Income-tax Officer, Circle IV, Ward-O, Ahmedabad*, was dealing with a similar contention that the words "issue" and "service" as used in section 34 cannot be equated with each other and that the stage of issue of notice is a distinct and different stage from the stage of service of notice. Mr. Justice Bhagwati (as he then was) observed as under :

"Now, it is undoubtedly true that, according to the decision of Desai C.J., as he then was, and Miabhoy J. in Madanlal Mathurdas v. Chunilal, Income-tax Officer, the words 'issue' and 'serve' as used in section 34 cannot be equated with each other and that the stage of issue of notice is a distinct and different stage from the stage of service of notice and ordinarily this decision being a decision of a Division Bench of this court would be binding upon us, but having regard to the subsequent decision of the Supreme Court in Banarasi Debi v. Income-tax Officer, this decision can no longer be regarded as good law and its authority must be held to have been impliedly overruled, though we may point out that even if the view taken by the Bombay High Court in this decision were correct, we should still have found considerable difficulty in accepting the contention that the proceedings under section 34 commence on the issue of the notice. The Supreme Court in the decision to which we have just referred pointed out that the words 'issued' and 'served' are used as interchangeable terms in the context of notice issued under section 34 and that where the legislature has used the word 'issued' in the context of such notices, that word is used in the same sense as the word 'served'. This decision of the Supreme Court made it clear that, so far as notices under section 34 are concerned, there are no two distinct and separate stages such as the stage of issue of notice and the stage of service of notice; the notice is issued to the assessee when it is served upon him. If that be the

position, the entire foundation on which the superstructure of the argument urged on behalf of the petitioner is based must disappear. There being only one stage, whether it be described as issue of notice or as service of notice, proceedings under section 34 would commence when the step envisaged in that stage is taken and that would be when the notice is served on the assessee."

11. The decision of the Gujarat High Court was noticed by the Punjab & Haryana High Court in the case of **Major Tikka Khushwant Singh vs. The Commissioner of Income Tax, Patiala & Anr.** reported in **(1975) 101 ITR 106.** The Court observed as under:

"Thus, it will be assumed that while enacting the 1961 Act, the legislature knew that the words "serve" and "issue" were being used interchangeably according to the judicial interpretation. In spite of the knowledge it preferred to use the words in the aforesaid Act. Mr. Awasthy, the learned counsel for the revenue, has argued that in the 1961 Act, the two words have been used in two different sections. According to him before making the assessment, reassessment or recomputation under section 147, it is the duty of the Income-tax Officer to serve a notice on the assessee as required by section 148, whereas he can assume jurisdiction after issuance of the notice within the prescribed period under section 149 even though the same may not be served upon the assessee. He also submits that by dividing the provisions of section 34 of the 1922 Act in the 1961 Act, the intention of the legislature has become clear. We express our inability to accept the contention of the learned counsel for the Revenue. A reading of sections 148 and 149 clearly shows that the Income-tax Officer cannot assume jurisdiction to make assessment, reassessment of recomputation unless the notice has been issued and served within the time limit prescribed under the aforesaid sections. The same question came up before a Division Bench of the Gujarat High Court in Shanabhai P. Patel v. R.P. Upadhyaya, income-tax Officer, B. K. Mehta J., while speaking for the court, observed as follows:

"Sections 147, 148 and 149 of the Income-tax Act of 1961 confer the power of reassessment on the Income-tax Officer. This scheme of power was originally comprehended in the provisions of section 34 of the Act of 1922. The division of the provisions contained in section 34

of the 1922 Act into sections 147, 148 and 149 in the Act of 1961 does not in any way indicate that the legislature intended to depart from or materially alter the position as it emerged from the provisions of section 34 of the old Act regarding notice of reassessment. The Supreme Court held in Banarsi Debi vs. Income-tax Officer (1), that the words, 'service of notice' or 'issuance of notice' in section 34 have no fixed connotation but are interchangeable. The same meaning should be given to the words 'issue of notice' in section 148 and 'service of notice' in section 149.

"Under the Act of 1961 also there are no two distinct and separate stages of issue of notice and service of notice. Notice of reassessment is issued to the assessee when it is served on him. A notice of reassessment issued against the assessee before limitation but served on the assessee after limitation would be without jurisdiction, void and ineffective."

(4) We are respectfully in agreement with the above observations. Similar view was taken by a learned single judge of the Calcutta High Court in Lilooah Steel & Wire Co. Ltd. v. Income-tax Officer, (4). Mr. Awasthy has placed reliance on a Full Bench judgment of this court in Seth Balkishan Das v. Commissioner of Income-tax, Patiala (5). In that case the question referred to this court was : whether on the facts and in the circumstances of the case, the service of the notice under section 34 on the assessee was invalid at law as copy of the notice was not affixed at any conspicuous place in hte court-house or at any conspicuous place in the income-tax office. The matter for decision before the Full Bench was absolutely different. The learned counsel cannot derive any benefit from that case. In view of the aforesaid discussion, we are of the opinion that the words "issue" and "serve" are interchangeable and that the word "issue" has been used in section 1489 of the 1961 Act in the same sense in which the word "serve" has been used."

12. As per these decisions, thus, the notice of reassessment under section 148 of the Act had to be served on the assessee. In this context, we may examine the stand of the Department. We may recall, the notice dated 15.3.2018 was despatched to the petitioner's address as contained in her PAN card. This notice was returned by the postal department on or around 22.3.2018 with the

remark 'left'. It is also an admitted positiion that the petitioner had not intimated to the Department about her change of address. After receiving the envelope containing the notice from the postal department, till 31.3.2018 which was the last date for service of such notice, the department took no further steps. In this background, the question is can the Department contend that there was due service of the notice.

13. Section 282 of the Act pertains to service of notice generally and reads as under:

> "**Service of notice generally.**
> 282. (1) The service of a notice or summon or requisition or order or any other communication under this Act (hereafter in this section referred to as "communication") may be made by delivering or transmitting a copy thereof, to the person therein named, -
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> (a) by post or by such courier services as may be approved by the Board; or
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> (b) in such manner as provided under the Code of Civil Procedure, 1908 (5 of 1908) for the purposes of service of summons; or
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> (c) in the form of any electronic record as provided in Chapter IV of the Information Technology Act, 2000 (21 of 2000); or
>
> (d) by any other means of transmission of documents as provided by rules made by the Board in this behalf.
>
> (2) The Board may make rules providing for the addresses (including the address for electronic mail or electronic mail message) to which the communication referred to in sub-

section (1) may be delivered or transmitted to the person therein named.

Explanation. - For the purposes of this section, the expressions “electronic mail” and “electronic mail message” shall have the meanings as assigned to them in Explanation to section 66A of the Information Technology Act, 2000 (21 of 2000).”

14. As per the sub-section (1) of section 282 thus, the service of notice or summons, etc. may be made by delivering or transmitting a copy to the person named, *inter alia* as per clause (a) by post or by such courier service as may be approved by the Board or in such manner as provided under the Code of Civil Procedure for the purposes of service of summons. The Department has followed the procedure envisaged in clause (a) of sub-section (1) of section 282 of attempting to deliver the notice by post.

15. Rule 127 of the Rules pertains to service of notice, summon, requisition, order and other communications, the relevant portion of which reads as under:

“Service of notice, summons, requisition, order and other communication.

127.(1) For the purposes of sub-section (1) of section 282, the addresses (including the address for electronic mail or electronic mail message) to which a notice or summons or requisition or order or any other communication under the Act (hereafter in this rule referred to as "communication") may be delivered or transmitted shall be as per sub-rule

(2).

(2) The addresses referred to in sub-rule (1) shall be—

(a) for communications delivered or transmitted in the manner provided in clause (a) or clause (b) of sub-section (1) of section 282—

(i) the address available in the PAN database of the addressee; or

(ii) the address available in the income-tax return to which the communication relates; or

(iii) the address available in the last income-tax return furnished by the addressee; or

(iv) in the case of addressee being a company, address of registered office as available on the website of Ministry of Corporate Affairs:

Provided that the communication shall not be delivered or transmitted to the address mentioned in item (i) to (iv) where the addressee furnishes in writing any other address for the purposes of communication to the income-tax authority or any person authorised by such authority issuing the communication:

Provided further that where the communication cannot be delivered or transmitted to the address mentioned in item (i) to (iv) or any other address furnished by the addressee as referred to in first proviso, the communication shall be delivered or transmitted to the following address:-

(i) the address of the assessee as available with a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of the said Act); or ….."

16. As per sub-rule (1) of Rule 127 for the purposes of sub-section (1) of section 282, the addresses to which a notice or a summons, etc. may be delivered or transmitted, shall be as per the sub-rule (2). Clause (a) of sub-rule (2) of Rule 127 includes four sources of address for such transmission. First one being the address available in PAN database of the addressee. It was at this address that the notice in question was despatched. The first proviso to sub-rule (2) provides that the said communication shall

not be delivered at any of the above mentioned addresses where the assessee has furnished any other address for such purpose, which is not in the present case. The further proviso to sub-rule (2) which is of considerable importance to us provides that where communication cannot be delivered or transmitted to the addresses mentioned in item Nos.(i) to (iv) or the address furnished by the assessee as per the first proviso, the communication shall be delivered or transmitted to the addresses given below the said further proviso. At item No.(i) is the address of the assessee as available with the Banking company or a cooperative bank to which Banking Regulations Act, 1949 applies.

17. Since the delivery of the notice could not be made at the address of the assessee available in PAN database, by virtue of the further proviso to sub-rule (2) of Rule 127, the communication had to be delivered at the address as available with the banking company.

18. It is undisputed that the Department had access to the petitioner's bank account. It is precisely from the activities in such bank account that the department had gathered the material prima facie believing that the income chargeable to tax had escaped

assessment. In terms of Rule 127 and in particular, sub-rule (2) therefore, having regard to the further proviso therein, the Department had to deliver the notice of reassessment at the petitioner's address given by her to the bank where her account was maitnained. No such steps were taken. Service of notice, therefore, was not complete. In absence of service of notice before the last date envisaged under section 149 of the Act for such purpose, the Assessing Officer could not have proceeded further with the reassessment proceedings. His consequential steps of attempting to serve the notices of scrutiny assessment were of no consequence. Reopening of assessment was invalid. No valid assessment thereon could have been framed.

19. In the result, the impugned notice dated 15.3.2018 and the consequential order of reassessment passed by the Assessing Officer are set aside. All subsequent steps for coercive recovery of the tax dues arising out of such order of assessment are also set aside. The attachment of the petitioner's bank accounts would, therefore, stand nullified. The petition is allowed and disposed off accordingly.

(S.J. KATHAWALLA, J.) **(AKIL KURESHI, J.)**