IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 17794 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and

HONOURABLE MR. JUSTICE ILESH J. VORA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**NO**

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RAMBHAI MAFATLAL PATEL

Versus

INCOME TAX OFFICER WARD 3, PATAN

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Appearance:
MR DARSHAN R PATEL(8486) for the Petitioner(s) No. 1
MRS MAUNA M BHATT(174) WITH MR KARAN SANGHANI, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE ILESH J. VORA

Date : 18/03/2021

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1 By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

> *"(A) Issue a writ of certiorari and/or a writ of mandamus and/or any other writ direction or order to quash and set aside the impugned objection rejection order dated 1.11.2018 annexed hereto at Annexure G the proceedings initiated u/s 147 on the strength of notice u/s 148 dated 30.3.2018, unilaterally said by the respondent to have been issued and served on the petitioner though the same is never received by the petitioner.*
>
> *(B) Issue a writ of certiorari and/or a writ of mandamus and/or any other writ direction or order to quash and set aside all further subsequent notices and summons including all proceedings in continuation and in consonance with the notice u/s 148 dated 30.3.2018 said to have been issued and served by the respondent upon the petitioner, though the same is never received by the petitioner.*
>
> *(C) Pending admission, hearing and disposal of this petition, ad-interim relief be granted and the respondent be ordered to restrain from taking any other steps in this regard including ex. parte order or implementation of the preliminary order dated 1.11.2018 at Annexure G and further notices issued for purpose of reassessment and all further subsequent notices and summons including all proceedings in continuation and in consonance with the notice u/s 148 dated 30.3.2018 said to have been issued and served by the respondent upon the petitioner, though the same is never received by the petitioner.*
>
> *(D) Award the cost of this petition.*
>
> (E) Grant such other and further reliefs as this Hon'ble Court deems fit."

2 The order passed by a Coordinate Bench of this Court dated 27th November 2018 in the present matter while issuing notice reads thus:

> *"1. Mr. Darshan Patel, learned advocate for the petitioner has submitted that, in this case, the assessment of the petitioner for the assessment year 2011-12 is sought to be reopened under section 147 of the Income Tax Act, 1961, however, no notice under section 148 of the Act has been served upon the petitioner. It was submitted that despite aforesaid fact having been brought to the notice of the assessing officer, he has still persisted on*

continuing with the reopening proceedings. It was submitted that in the absence of service of statutory notice under section 148 of the Act, continuance of the proceedings under section 147 of the Act is without any authority of law. In support of his submission, learned advocate has placed reliance upon the decision of the Delhi High Court in the case of ***Commissioner of Income Tax (Central)-I v. Chetan Gupta, (2015) 62 taxmann.com 249 (Delhi),*** *wherein the Court has held that burden to establish that service of notice has been effected on the assessee or his duly authorized representative is on the revenue.*

2. Having regard to the submissions advanced by the learned advocate for the petitioner, issue NOTICE returnable on 7.1.2019. By way of ad-interim relief, further proceedings pursuant to the impugned notice are hereby stayed. Direct service is permitted."

3 Mr. Patel, the learned counsel appearing for the writ applicant vehemently submitted that his client has not been in receipt of the impugned notice issued by the Assessing Officer for reopening of the assessment under Section 148 of the Income Tax Act, 1961 (for short, 'the Act') at any point of time. Mr. Patel, the learned counsel would submit that notice to an assessee under Sections 148 and 143(2) respectively is quite different from a notice under Section 142(1) of the Act. The valid service of notice on the assessee strictly in terms of Section 148 read with Section 282(1) of the Act is mandatory and without such service of notice, the Assessing Officer cannot proceed to make a re-assessment. Mr. Patel would submit that the onus is upon the Revenue to establish that the service of notice had been effected on the assessee. The failure to serve such notice would lead to the inevitable result of invalidating the reassessment order itself if passed any.

4 On the other hand, Ms. Bhatt, the learned Senior Standing Counsel appearing for the Revenue has vehemently opposed this writ application and submitted that the writ applicant had his agricultural land at Kalol, District : Gandhinagar. No sooner the department came to know about the sale transaction of the land situated at Kalol then the

impugned notice was issued to the writ applicant at the address at Kalol. Ms. Bhatt would submit that it came to the notice of the department that the assessee had sold a parcel of agricultural land owned by him during the year under consideration and the case on hand is one of Non-PAN. In order to verify the sale transaction and as the assessee had not filed any return of income for the A.Y. 2011-12, the Assessing Officer has reasons to believe that the income to the tune of Rs.47,50,000/- has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment for the assessment year. However, Ms. Bhatt very fairly pointed out that in the sale deed itself, the residential address of the writ applicant is shown to be that of village : Khorsam, Taluka : Chanasma, District : Patan, and therefore, in such circumstances, the department should have dispatched the notice to the address at village : Khorsam and not to the address where the agricultural farm is situated i.e. at Kalol, Gandhinagar. Ms. Bhatt also fairly pointed out that the land was sold way back in 2010, and in such circumstances, in 2018, when the notice was issued, the purchaser of the farm would be in possession at Kalol. Ms. Bhatt also pointed out that the endorsement on the acknowledgement receipt is *"notice unserved"*. However, Ms. Bhatt has to say something on merits of the contention put forward by the learned counsel appearing for the writ applicant. Ms. Bhatt would submit that in the case on hand, the notice under Section 142(1) of the Act dated 23rd August 2018 was served on the assessee i.e. before making the reassessment. The language of Section 148 - *"**before making the assessment,** re-assessment or recomputation under Section 147, the Assessing Officer shall serve on the assesee a notice ……."*. Therefore, service of notice is required before framing reassessment. Section 149 of the Act prescribes the time limit within which the notice under Section 148 is to be issued. Section 149 reads : *"No notice under Section 148 shall be issued for the relevant assessment year……."*. The language used in Section 149 is "issued" and

not “served”. Therefore, the assessee's contention that he was not served with the notice under Section 148 within the time prescribed is beyond the provision. Ms. Bhatt seeks to rely upon the decision in the case of **Rajesh Sunderdas Vaswani vs. Meena and others** reported in **[2017] 392 ITR 571 (Guj) [Paras 9 and 10].**

5 The short point for the consideration of this Court is whether the Revenue can proceed with the reopening sought to be initiated under Section 147 of the Act in the absence of any notice under Section 148 of the Act actually served upon the assessee?

6 Section 292 BB of the Act of 1961 is a deeming Clause, which is quoted as under:

> "*[**292BB. Notice deemed to be valid in certain circumstances-** Where an assessee has appeared in any proceeding or cooperated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was-*
>
> *(a) not served upon him; or*
>
> *(b) not served upon him in time; or*
>
> *(c) served upon him in an improper manner:*
>
> *Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment.]”*

A bare perusal of Section 292 BB of the Act of 1961 reveals that it applies to a case where the assessee has appeared in a proceeding and cooperated in any inquiry relating to an assessment or reassessment. In such circumstances, it has been declared that such conduct of the

assessee shall be deemed to be a valid notice under the provisions of the Act of 1961, duly served upon the assessee as well as served within time. Therefore, according to this Section even if no notice was issued and was not served upon the assessee but he voluntarily by any reason, appeared in assessment or reassessment proceeding, he is precluded thereafter from taking objection with respect to the service in time. In the case on hand, the Revenue does not seek to rely upon such conduct of the assessee of taking part in the assessment proceedings or reassessment proceedings, but, has, specifically, put forward a case that notice was issued to the assessee by Speed Post Registered A.D., and therefore, the notice is deemed to have been served upon the addressee i.e. the assessee.

7 Be that as it may, according to the learned counsel appearing for the writ applicant, by virtue of the provisions of Section 292 BB, the service cannot be treated to be valid service as there is no benefit of the presumption in favour of the Income Tax Department. In the facts of the case, we are of the considered opinion that the Revenue rightly did not rely upon any presumption under Section 292BB of the Act because the assessee raised objection before the completion of the assessment in the present case.

8 In the aforesaid context, the decision of the Delhi High Court in the case of **Commissioner of Income Tax (Central)-I vs. Chetan Gupta reported in [2015] 62 taxmann.com 249 (Delhi)** should be looked into.

- **SERVICE OF NOTICE A JURISDICTIONAL REQUIREMENT**

9 The Court first would like to deal with the question whether

notice under Section 148 of the Act is a jurisdictional requirement. The relevant portion of Section 148 (1) reads as under:

> "***148. Issue of notice where income has escaped assessment*** *- (1) Before making the assessment, reassessment or recomputation under Section 147, the Income-tax Officer shall serve on the Assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub- section.*"

10 The Supreme Court in **R. K. Upadhyaya vs. Shanhai P. Patel reported in [1987] 3 SCC 96**, explained that there was a distinct shift in the scheme of the provisions of the 1961 Act in comparison with the corresponding provision i.e. Section 34 under the 1922 Act under which the mandatory requirement was that both the issuance and service of notice had to be completed within the prescribed period. Consequently, the service of notice within the limitation period was the foundation of jurisdiction under the 1922 Act. In **Y. Narayana Chetty v. Income Tax Officer, Nellore [1959] 35 ITR 388 (SC)** the Supreme Court observed in the context of Section 34 of the 1922 Act:

> "*The notice prescribed by section 34 of the Income tax Act for the purpose of initiating reassessment proceedings is not a mere procedural requirement; the service of the prescribed notice on the assessee is a condition precedent to the validity of any reassessment made under section 34. If no notice is issued or if the notice issued is shown to be invalid then the proceedings taken by the Income- tax Officer without a notice or in pursuance of an invalid notice would be illegal and void.*"

11 This was also the basis for the decision in **Banarasi Debi v. ITO (1964) 53 ITR 100 (SC)**. However, under the 1961 Act the procedural requirement has been spread over three sections, being Sections 147, 148 and 149. The period of limitation within which notice under Section

148 has to be issued is specified in Section 149. Section 153 (2) of the Act stipulates that no order of re-assessment can be passed beyond the period of one year from the expiry of the financial year in which service of the notice was effected. Section 148 (1), however, is clear that no reassessment can take place without service of notice being effected on the Assessee or his authorised representative.

12 In **R.K. Upadhyaya (supra)** the Supreme Court explained that "*the mandate of Section 148 (1) is that reassessment shall not be made until there has been service.*" However, the said decision does state that jurisdiction becomes vested in the AO to proceed with the assessment once notice is issued within a period of limitation. It also emphasized that no reassessment shall be made "*until there has been service.*" The legal position therefore, even under the 1961 Act, is that service of notice under Section 148 is a jurisdictional requirement for completing the re-assessment. This has been emphasized in several other decisions of the High Courts as well.

13 In **C. N. Nataraj v. Fifth Income-tax Officer (1965) 56 ITR 250 (Mys),** the High Court of Mysore was dealing with the case where the notice under Section 148 of the Act was issued in the names of the Assessee who were minors and not in the names of their guardians. The notices were served on a clerk of the father of the Assessee who was neither an agent of the Assessee nor authorized to accept notices on their behalf. The Court, relying on the decision in **N. Narayana Chetty (supra)** observed:

> "*There is no doubt that a notice prescribed under section 148 of the Act for initiating reassessment proceedings is not a mere procedural requirement ; the service of the prescribed notice on the assessee is a condition precedent to the validity of any reassessment made under section 147. If no notice is*

> *issued or if the notice issued is shown to be invalid, then the proceedings taken by the Income tax Officer without a notice or in pursuance of an invalid notice would be illegal and void.*"

14 In **CIT v. Hotline International (P) Ltd. [2008] 296 ITR 333,** the Delhi High Court held that affixation of notice on an address at which the security guard of the Assessee-company refuses to receive such notice cannot be construed to be a proper service of notice under Section 148 of the Act. The security guard was not an agent of the assessee and therefore, the reassessment proceedings were held to be bad in law.

15 In **Dina Nath v. Commissioner of Income-tax [1994] 72 Taxman 174 (J & K),** the notice under Section 143 (2) of the 1961 Act was served upon one S, who was neither a member of the family of the Assessee nor his duly authorized agent. However, S had been accepting the notice on behalf of the Assessee and prosecuting the cases on his behalf earlier before the income tax authorities. The High Court held:

> "*The object of issuance the notice or summons is to intimate the concerned person to appear and answer the queries or the question sought to be clarified by a Court or the authorities. As serious consequences are likely to follow, a notice or summons must necessarily be issued and served in the form and in the manner prescribed by law.*"

16 The High Court in **Dina Nath (supra)**, referred to Order V Rule 12 CPC as well as Order III Rule 6 CPC. It thereafter concluded that notice must be served personally upon the individual or upon his agent duly authorized in terms of Order III Rule 6 CPC. The contention of the Assessee was upheld and the reassessment proceeding was quashed.

17 In **Jayanthi Talkies Distributors v. Commissioner of Income-**

tax (1979) 120 ITR 576 (Mad), the notice was served by the notice-server of the Department on the Manager of the assessee-firm. The Manager wrote to the ITO seeking time. Since no return was filed by the Assessee within the time granted, the ITO completed the reassessment under Section 144 of the 1961 Act. On appeal the High Court found that none of the partners of the Assessee-firm had been personally served with the notice. Service was effected only on the Manager of the firm who had no specific or written authority to receive such notice. It was held:

> "*when the statute provides that a notice should be served in a particular mode, it was not possible to hold that there had been a proper service of notice merely from the fact that the person to whom the notice had been addressed had received the notice through some other source or that he had become aware of the contents of the notice. There had not been a due service of notice as contemplated by the provisions of the Code of Civil Procedure dealing with service of notice or summons. Therefore, the service of the notice on the Manager who had no written authority to receive the same could not be held to be a proper service on the Assessee.*"

18 In **Sri Nath Suresh Chand Ram Naresh v. CIT [2006] 280 ITR 396,** it was reiterated that service of valid notice under Section 148 was "*the foundation for the initiation of reassessment proceedings and a condition precedent for the validity of the notice.*" It was held that the Tribunal was not right in holding that the notices under Section 148 addressed as “SCR" and the karta “S” were valid notices for reassessing the income of the HUF “MM" or “MS" or its successors.

- **<u>ONUS ON REVENUE TO PROVE SERVICE OF NOTICE:</u>**

19 There is sufficient judicial authority for the proposition that the burden of showing that service of notice has been effected on the Assessee or his duly authorized representative is on the Revenue. These

include **Fatechand Agarwal v. Commissioner of Wealth-Tax [1974] 97 ITR 701 (Ori)** and **Venkat Naicken Trust v. ITO [1999] 107 Taxman 391 (Mad)**. In **CIT v. Thayaballi Mulla Jeevaji Kapasi (1967) 66 ITR 147 (SC)**, the Respondent to whom the notice was directed was not in town. The only information which the process server had was that the Respondent was either in Bombay or Ceylon. Thereafter, the process server affixed the notice on the business premises of the Respondent. The Supreme Court affirmed the essential principle that "if no notice was served within the period, the Income-tax Officer was incompetent to commence proceedings for reassessment under Section 34 of 1922 Act." It was further held that "service of notice under Section 34 (1) (a) within the period of limitation being a condition precedent to the existence of jurisdiction, if the Income-tax Officer was unable to prove that the notice was duly served upon the Respondent within the prescribed period, any return filed by the Respondent after the expiry of the period of eight years will not invest the Income-tax Officer with authority to reassess the income of the Respondent pursuant to such return." On the facts of that case it was held that the Revenue had sufficiently discharged the onus by producing the affidavit of the process server.

20 Ms. Bhatt, the learned Senior Standing Counsel, in support of her submissions, seeks to rely upon a recent pronouncement of the Supreme Court in the case of **Principal Commissioner of Income Tax, Mumbai vs. I-Ven Interactive Limited, Mumbai reported in [2019] 418 ITR 662 (SC)**.

21 We have looked into the aforesaid decision of the Supreme Court and are of the view that the same does not help the Revenue in any manner. In the said case, notice under Section 143(2) of the Act was sent by the Assessing Officer to the assessee at the address as mentioned

in the PAN database and the same was within the time limit prescribed in the proviso to Section 143(2) of the Act. However, the case put up by the assessee before the Supreme Court was that the said notice was not served upon him as he had changed its name and address and it shifted to new address prior thereto and therefore, the said notice was not served upon the assessee and by the time, when subsequently, the notices were served upon the assessee, the notice under Section 143(2) of the Act was barred by the period prescribed in the proviso to Section 143(2) of the Act. The Supreme Court took the view that the Assessing Officer cannot be said to have committed any error as he was justified in dispatching the notice at the address as per the PAN database. If the assesee had changed its address, then it was obligatory for the assessee to inform about the change of address to the department.

22 We shall now look into the decision of this Court in the case of **Rajesh Sunderdas Vaswani (supra)**. In the said case, it was argued on behalf of the writ applicant that though the notice was dated 30th March 2015, the same was not booked for delivery with the postal department before 1st April 2015. Whereas it was argued on behalf of the Revenue that the notice was, in fact, handed over to the postal authority for delivery on 31st March 2015 itself. However, on account of overload in the postal department, the same was booked on 1st April 2015. In such circumstances, this Court interpreted the expression “to issue” used in the context of notice referred to in Section 149 of the Act. This Court interpreted the said expression holding that the date of issue of notice would be the date on which the same is handed over for service to the proper officer i.e. the postal department. The Court, thereafter, went into the factual aspect whether the envelope containing the notice for reopening addressed to the writ applicant had been handed over to the

postal department for delivery on 31st March 2015 or was handed over on 1st April 2015.

23 In the aforesaid context, this Court relied upon a decision in the case of **Kanubhai M. Patel (HUF) vs. Hiren Bhatt or his successors to office and others** reported in **(2011) 334 ITR 25 (Guj),** wherein this Court observed as under:

> *"16. 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 31.03.2010, whereas the same were sent to the speed post centre for booking only on 07.04.2010. Considering the definition of the word issue, it is apparent that merely signing the notices on 31.03.2010, 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 07.04.2010, the date of issue of the said notices would be 07.04.2010 and not 31.03.2010, as contended on behalf of the revenue. In the circumstances, impugned the notices under section 148 in relation to assessment year 200304, having been issued on 07.04.2010 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."*

24 Ultimately, this Court took the view that the question was a highly disputed question of fact and *prima facie*, materials indicated that the department had handed over the envelope to the postal authorities on 31st March 2015 itself for delivery.

25 We fail to understand how this judgement is applicable to the case

on hand. In the case on hand, the pivotal question is whether Section 148 notice was actually served upon the writ applicant or not. The Revenue itself has conceded that it was not served upon the writ applicant at any point of time. In such circumstances, this decision in the case of **Rajesh Sunderdas Vaswani (supra)** is hardly of any avail.

26 In the case on hand, the assessee has no PAN. As noted above, this is a case of Non-PAN. The picture is now abundantly clear. The Revenue may be justified in taking cognizance of the sale transaction of the agricultural land, which, at one point of time, was owned by the assessee herein. This agricultural land we are talking about is situated at Kalol, District : Gandhinagar. The only mistake that the department committed was to dispatch the notice under Section 148 of the Act to the address at Kalol, Gandhinagar and not to the residential address of the writ applicant at village : Khorsam, Taluka : Chanasma, District : Patan. In such circumstances, it is obvious that the writ applicant could never be said to have receive such notice.

27 In the result, this writ application succeeds and is hereby allowed. The order disposing of the objections dated 1st November 2018 filed by the assessee against the reopening proceedings (Annexure : G page : 22) is hereby quashed and set aside.

28 This writ application is disposed of accordingly in terms of the above.

(J. B. PARDIWALA, J)

(ILESH J. VORA,J)

CHANDRESH