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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (T) No.168 of 2016

Order reserved on : 17-4-2018

Order delivered on : 4-5-2018

M/s Ardent Steel Limited, Having its Registered Office at A 40, Lotus Corporate Park, Jay Coach Signal, Off Western Express Highway, Goregaon East, Mumbai, Maharashtra – 400 063, Through its Managing Director Sanjay Gupta.

---- Petitioner

Versus

1. Assistant Commissioner of Income Tax (Central) – 2, Ayakar Bhawan, Civil Lines, Raipur (C.G.)
2. Commissioner of Income Tax, Civil Lines, Raipur, District Raipur (C.G.)

---- Respondents

For Petitioner: Mr. Ajay Wadhwa and Mr. Ankit Singhal, Advocates.

For Respondents: Mrs. Naushina Ali, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. ORDER

1. The jurisdiction of this Court under Article 226 of the Constitution of India has been invoked by the petitioner herein calling in question the notices dated 15-3-2016 and 13-4-2016 issued under Section 148 of the Income Tax Act, 1961 (for short, 'the IT Act') for reassessing the petitioner's income for the assessment year 2009-10 and eventually also seeks to challenge the order dated 5-8-2016 by which the assessing officer has rejected the petitioner's objection.

2. The aforesaid challenge has been laid in the following factual backdrop: -

3. The petitioner was duly assessed for the assessment year 2009-10. It is the case of the petitioner that on 13-4-2016, for the first time, he was served with notice under Section 148(1) of the IT Act through his Chartered Accountant and the petitioner was never served with notice alleged to be issued under Section 148(1) of the Act on 15-3-2016. Responding to the notice so issued, the petitioner filed return on 2-5-2016 and thereafter, sought reasons to believe from the assessing officer and thereafter, he was served with notice dated 4-5-2016 under Section 143(2) of the IT Act for the assessment year 2009-10. Thereafter, the petitioner sought certain information by letter dated 9-5-2016 and ultimately, he filed objections against the reasons for reopening the completed assessment under Section 148 of the IT Act on 18-7-2016 clearly stating that he was never served with notice dated 15-3-2016 and he had already changed his address duly updated in the PAN data base and the address has been clearly mentioned in the tax returns and request was made for closure of the case. But, thereafter, on 5-8-2016, the objection against reassessment proceedings initiated under Section 148 of the IT Act for the said assessment year, was rejected indicating that notice was issued on 15-3-2016 on the address shown in the tax returns and it has returned back on 28-3-2016 to the office citing the reason to be “left”. Questioning the initiation of proceeding of reassessment under Section 148 of the IT Act, this writ petition has been preferred principally on the ground that no notice was issued within the period of limitation as prescribed under Section 149(1)(b) read with Section 148(1) of the IT Act and, therefore, the initiation of proceeding for reassessment

is barred by limitation and even otherwise, alternatively, no notice was served to the petitioner under Section 148(1) of the IT Act, as such, initiation of proceeding for reassessment and the order deciding objections dated 5-8-2016 deserve to be quashed.

4. Return has been filed by the respondents stating inter alia that only objections have been rejected and the assessing officer has not arrived at a final decision to be communicated and the petitioner has alternative remedy with it if it is not satisfied with the outcome of the assessment proceeding and the writ petition as framed and filed is not maintainable. The petitioner has been served with notice dated 15-3-2016 through speed post and has filed its return of income in response to notice under Section 148 of the IT Act and also participated in the assessment proceedings and thereafter, by his conduct, abandoned the right to claim non-service of notice under Section 148. Thus, the irregularities, if any, got cured by the subsequent conduct of the assessee, as the petitioner himself on 2-5-2016 filed its return mentioning the reference of notice under Section 148 of the IT Act dated 15-3-2016, which clearly indicates the service of notice. Therefore, the writ petition as framed and filed is premature and deserves to be dismissed.

5. Mr. Ajay Wadhwa, learned counsel appearing on behalf of the petitioner, would submit that no notice within the period of limitation as required under Section 149(1)(b) of the IT Act, within a period of six years from 31-3-2010 was issued for reopening the concluded and completed assessment, as the notice dated 15-3-2016 was never issued / dispatched on the correct address of the petitioner

since the petitioner's address has been changed after filing of return which is apparently in the knowledge of the assessing officer. The same assessing officer has issued notices for reassessment for the year 2008-09 on the correct address of the petitioner, therefore, the correct address of the petitioner was well within the knowledge of the said assessing officer and as such, issuance of notice on wrong address cannot be said to be issuance of proper notice under Section 149(1)(b) of the IT Act for initiation of reassessment proceeding under Section 148(1) read with Section 147 of the IT Act. Alternatively, it is further submitted that no notice under Section 148(1) of the IT Act was ever served to the petitioner which is *sine qua non* and condition precedent as well for opening the reassessment proceeding under Section 147 read with Section 148 of the IT Act. Mere participation of the petitioner in the reassessment proceeding would not amount to service of notice as contemplated under Section 148(1) of the IT Act. Therefore, the entire reassessment proceedings initiated and the objections rejected for reopening the assessment proceeding deserves to be quashed.

6. Mrs. Naushina Ali, learned counsel appearing for the respondents, would vehemently oppose the submissions made on behalf of the petitioner and would submit that notice issued under Section 148(1) of the IT Act dated 15-3-2016 to the address of the petitioner Company mentioned in the return by speed post is a valid service of notice in the manner prescribed in the Act and the said notice was returned unserved on 28-3-2016 and thereafter, the petitioner

has filed its return of income in response to the notice under Section 148 and participated in the personal hearing and thereafter, by his conduct abandoned the right to claim non-service of notice under Section 148. Therefore, the petitioner by subsequent participation in the proceeding and by filing return has waived the service of notice, if any and as such, the objections have rightly been rejected and the writ petition is premature and deserves to be dismissed with costs.

7. I have heard learned counsel for the parties, considered the rival submissions made herein-above and gone through the record with utmost circumspection.

8. The first issue for consideration would be whether the writ petition challenging the show cause notice issued under Section 147 read with Section 148 of the Act, 1961 is maintainable in law.

9. It was vehemently submitted on behalf of the respondents relying upon the decision of the Supreme Court in the matter of **Commissioner of Income Tax and others v. Chhabil Dass Agarwal**[1] that such a writ petition would not be maintainable, whereas the petitioner has relied upon the decision of the Supreme Court in the matter of **Calcutta Discount Co. Ltd. v. Income-Tax Officer, Companies District I, Calcutta**[2].

10. In **Calcutta Discount** (supra), Their Lordships of the Supreme Court have clearly and unmistakably held that the High Court in appropriate cases has power and jurisdiction to issue an order prohibiting the Income Tax Officer from proceeding to reassess the

1 (2014) 1 SCC 603
2 AIR 1961 SC 372

income when the conditions precedent do not exist. K.C. Das Gupta, J, speaking for the Supreme Court and delivering the majority judgment held as under: -

> "It is well-settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences
>
> The High Court may, therefore, issue a high prerogative writ prohibiting the Income-tax Officer from proceeding with reassessment when it appears that the Income-tax Officer had no jurisdiction to commence proceeding".

11. The principle of law laid down in **Calcutta Discount** (supra) has been followed with approval by the Supreme Court thereafter in the matter of **The Commissioner of Income-tax, Gujarat v. M/s. A. Raman and Co.**[3] in which Their Lordships have held that the High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued under Section 147 of the Income Tax Act, 1961, if the conditions precedent to the exercise of jurisdiction under Section 147 of the Act do not exist, and observed as under: -

> "6. The High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued under Section 147 of the Income Tax Act, 1961, if the condition precedent to the exercise of the jurisdiction does not exist. The Court may, in exercise of its powers, ascertain whether the Income Tax Officer had in his possession any information: the Court may also determine whether from that information the Income Tax Officer may have reason to believe that income chargeable to tax had escaped assessment. But the jurisdiction of the Court extends no further. Whether on

3 AIR 1968 SC 49

> the information in his possession he should commence a proceeding for assessment or reassessment, must be decided by the Income Tax Officer and not by the High Court. The Income Tax Officer alone is entrusted with the power to administer the Act: if he has information from which it may be said, prima facie, that he had reason to believe that income chargeable to tax had escaped assessment, it is not open to the High Court, exercising powers under Article 226 of the Constitution, to set aside or vacate the notice for reassessment on a re-appraisal of the evidence."

12. The above-stated enunciation of law laid down in **Calcutta Discount** (supra) reiterated in **M/s. A. Raman and Co.'s** case (supra) by Their Lordships of the Supreme Court has further been followed very recently by the Supreme Court in the matter of **Jeans Knit Private Ltd. Bangalore v. Deputy Commissioner of Income Tax Bangalore**[4] and it has been clearly held that writ petition filed by the assessee challenging the issuance of notice under Section 148 of the Act, 1961 and the reasons which were recorded by the Assessing Officer for reopening the assessment is maintainable, after noticing the earlier decision of the Supreme Court in **Chhabil Dass Agarwal's** case (supra) and observed as under: -

> "2. We find that the High Courts in all these cases have dismissed the writ petitions preferred by the appellant/assessee herein challenging the issuance of notice under Section 148 of the Income Tax Act, 1961 and the reasons which were recorded by the Assessing Officer for reopening the assessment. These writ petitions are dismissed by the High Courts as not maintainable. The aforesaid view taken is contrary to the law laid down by this Court in Calcutta Discount Limited Company v. Income Tax Officer, Companies District I, Calcutta [(1961) 41 ITR 191 (SC)]. We, thus, set aside the impugned judgments and remit the cases to the respective High Courts to decide the writ petitions on merits.

4 2016 SCC OnLine SC 1536

> 3. We may make it clear that this Court has not made any observations on the merits of the cases, i.e. the contentions which are raised by the appellant challenging the move of the Income Tax Authorities to re-open the assessment. Each case shall be examined on its own merits keeping in view the scope of judicial review while entertaining such matters, as laid down by this Court in various judgments.
>
> 4. We are conscious of the fact that the High Court has referred to the judgment of this Court in Commissioner of Income Tax v. Chhabil Dass Agarwal, [(2013) ITR 357 (SC)]. We find that the principle laid down in the said case does not apply to these cases."

13. Thus, in light of the principle of law laid down in **Calcutta Discount** (supra) followed in **M/s. A. Raman and Co.'s** case (supra) and **Jeans Knit Private Ltd.** (supra) and considering the facts leading to challenge to the show cause notice, I do not have any slightest doubt in my mind to hold that the writ petition is maintainable to challenge the notice for reassessment issued under Section 147 read with Section 148 of the Act, 1961 and accordingly, I overrule the first preliminary objection raised on behalf of the Revenue in that regard.

14. This determination would bring me to the merits of the matter. Two questions that arise for consideration would be,

> (i) Whether notice under Section 148 of the IT Act has been issued in terms of Section 149 of the IT Act to the petitioner before initiating proceeding for reassessment under Section 147 of the IT Act?; and
>
> (ii) Alternatively, whether notice under Section 148 of the IT Act has been served to the petitioner to furnish return of income in prescribed form for the assessment year 2009-10?

Question No.1

15. It would be appropriate to notice Section 147 of the IT Act to resolve the dispute. Section 147 of the IT Act provides as under: -

> "**Income escaping assessment.**
>
> 147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :
>
> Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:
>
> xxx xxx xxx"

16. Thus, Section 147 of the IT Act is not a charging Section. It merely provides a machinery whereby an income which has escaped assessment or has been under-assessed in the relevant assessment years can be brought into the network of taxation.

17. The power of reopening is not unbridled and is governed by inbuilt checks. The Supreme Court in **Sri Krishna Pvt. Ltd.'s** case[5] while interpreting the said provisions, set out the circumstances as to when the Court may look into and examine the conclusion arrived

5 (1996) 221 ITR 538

at by the Income-tax Officer in proposing to initiate reassessment proceedings and sounded a note of caution by holding that the existence of the reason(s) to believe is supposed to be the check, a limitation, upon his power to reopen the assessment. Section 148(2) of the IT Act imposes a further check upon the said power, viz., the requirement of recording of reasons for such reopening by the Assessing Officer. Section 151 imposes yet another check upon the said power, viz., the Commissioner or the Board, as the case may be, has to be satisfied, on the basis of the reasons recorded by the Income-tax Officer, that it is a fit case for issuance of such a notice. The power conferred upon the Assessing Officer by Sections 147 and 148 is thus not an unbridled one. It is hedged in with several safeguards conceived in the interest of eliminating room for abuse of this power by the Assessing Officers. All the requirements stipulated by Section 147 must be given due and equal weight.

18. The Gujarat High Court in the matter of **P.V. Doshi v. CIT**[6] had laid down the conditions precedent for initiating reassessment proceedings which as under: -

> "(i) reasonable belief reached by the Assessing Officer under clause (a) or clause (b) of Section 147;
>
> (ii) recording of reasons by the Income-tax Officer under Section 148(2);
>
> (iii) sanction before issuing the notice of reassessment by the higher authorities under Section 151. These three conditions have been introduced by way of safeguards in public interest so that the finally concluded proceedings,

6 (1978) 113 ITR 22 (Guj.)

which at the time of the original assessment could be reopened through the initial procedure of appeal, revision or rectification before the assessment became final, could not be lightly reopened with the consequent hardship to the Assessee and also unnecessary waste of public time and money in such proceedings. These conditions have, therefore, to be treated as being mandatory..."

19. Section 148(1) of the IT Act provides for issuance of notice when income has escaped assessment and service of notice. Section 149 provides time limit for notice. Notice must be issued within the limitation period prescribed in Section 149(1), however, service of notice within the limitation period is not a prerequisite for conferment of jurisdiction on the assessing officer. A clear distinction has been made out between 'issue of notice' and 'service of notice' under the IT Act. Section 149 prescribes the period of limitation. It categorically prescribes that no notice under Section 148 shall be issued after the prescribed limitation has lapsed. Section 148(1) provides for service of notice as a condition precedent to making the order of reassessment. Once a notice is issued within the period of limitation, jurisdiction becomes vested in the Assessing Officer to proceed to reassess. The mandate of Section 148(1) is that reassessment shall not be made until there has been service. The Delhi High Court in the matter of **Commissioner of Income-tax (Central)-I v. Chetan Gupta**[7] culled the principles relating to Section 148 of the IT Act as under: -

"46. To summarize the conclusions:

(i) Under Section 148 of the Act, the issue of notice to

7 (2015) 62 taxmann.com 249 (Delhi)

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 148 of 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) to (vii) xxx xxx xxx"

20. The requirement of issue of notice is satisfied when a notice is actually issued within the period of limitation prescribed. Service of notice under the Act is not a condition precedent to conferment of jurisdiction on the Assessing Officer to deal with the matter but it is a condition precedent for making of the order of assessment.

21. In the matter of **R.K. Upadhyaya v. Shanabhai P. Patel**[8], the

8 (1987) 3 SCC 96

Supreme Court has held that the word 'issue' employed in Section 149 of the IT Act does not mean service of notice and observed as under: -

> "... A clear distinction has been made out between 'issue of notice' and 'service of notice' under the 1961 Act. Section 149 prescribes the period of limitation. It categorically prescribes that no notice under Section 148 shall be issued after the prescribed limitation has lapsed. Section 148(1) provides for service of notice as a condition precedent to making the order of assessment. Once a notice is issued within the period of limitations, jurisdiction becomes vested in the Income Tax Officer to proceed to reassess. The mandate of Section 148(1) is that reassessment shall not be made until there has been service. The requirement of issue of notice is satisfied when a notice is actually issued. ..."

22. The principle of law laid down in **R.K. Upadhyaya** (supra) has been followed by a three-Judge Bench of the Supreme Court in the matter of **Commissioner of Income Tax and another v. Major Tikka Khushwant Singh**[9]. Similarly, the High Court of Gauhati in the matter of **Commissioner of Income Tax v. Mintu Kalita**[10], placing reliance upon **R.K. Upadhyaya** (supra) has held in no uncertain terms that service of notice under Section 148 of the IT Act for the purpose of initiating proceedings for reassessment is not a mere procedural requirement but it is a condition precedent for initiation of proceedings for reassessment under Section 147. However, service of notice under Section 148 of the IT Act is an integral part of the cause of action arising out of initiation of a

9 (1995) 212 ITR 650 (SC)
10 (2002) 253 ITR 334 (Gauhati)

proceeding under Section 147 (see **CESC Ltd. v. DCIT**[11]).

23. Now, the question for consideration would be, when can be notice under Section 148 of the IT Act can be said to have been issued?

24. At this stage, it would be appropriate to notice Section 149(1) of the IT Act which reads as under: -

> "**Time limit for notice.**
>
> **149.** (1) No notice under section 148 shall be issued for the relevant assessment year,—
>
> (a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);
>
> (b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.
>
> *Explanation*.—In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of *Explanation 2* of section 147 shall apply as they apply for the purposes of that section."

25. A focused glance of the aforesaid provision would show that the maximum time limit for issuance of notice under Section 148 of the IT Act is six years from the end of relevant assessment year. In the present case, the relevant assessment year is 2009-10 and the impugned notice is said to have been issued on 15-3-2016 on the incorrect address of the petitioner / assessee which has already been changed on the date of issuance of notice by updating the

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11 (2003) 263 ITR 402 (Cal.)

PAN data base. The term 'shall be issued' used in Section 149 of the IT Act is extremely important.

26. The expression “issue” has been defined in *Black's Law Dictionary* to mean “To send forth; to emit; to promulgate; as, an officer issues order, process issues from court. To put into circulation; as, the treasury issues notes. To send out, to send out officially; to deliver, for use, or authoritatively; to go forth as authoritative or binding. When used with reference to writs, process, and the like, the term is ordinarily construed as importing delivery to the proper person, or to the proper officer for service etc.”

27. In *P. Ramanathan Aiyer's Law Lexicon*, the word “issue” has been defined as follows: -

> “Issue. As a noun, the act of sending or causing to go forth; a moving out of any enclosed place; egress; the act of passing out; exit, egress or passage out (Worcester Dict.); the ultimate result or end.
>
> As a verb, 'To issue' means to send out, to send out officially; to send forth; to put forth; to deliver, for use, or unauthoritatively; to put into circulation; to emit; to go out (Burrill); to go forth as a authoritative or binding, to proceed or arise from; to proceed as from a source (Century Dict.)
>
> Issue of Process. Going out of the hands of the clerk, expressed or implied, to be delivered to the Sheriff for service. A writ or notice is issued when it is put in proper form and placed in an officer's hands for service, at the time it becomes a perfected process.
>
> Any process may be considered 'issued' if made out and placed in the hands of a person authorised to serve it, and with a *bona fide* intent to have it served.”

28. Thus, the expression “to issue” in the context of issuance of notice, 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 of the IT Act would therefore have to be read in the aforesaid context. Thus, the expression ”shall be issued” would mean to send out to the place in the hands of the proper official for service. After issuing notice and after due dispatch, it must be placed in hands of the serving officer like the post office by speed post or by registered post etc., by which the officer issuing notice may not have control over the said notice after issuance of the said notice. It must be properly stamped and issued on the correct address to whom it has been addressed. Mere signing of notice cannot be equated with the issuance of notice as contemplated under Section 149 of the IT Act.

29. The High Court of Karnataka in the matter of **Commissioner of Income-tax v. B J N Hotels Ltd.**[12], has clearly held that it is for the Revenue by producing the dispatch register to establish that the orders are complete and effective i.e., it is issued, so as to be beyond the control of the authority concerned within the period of limitation. Likewise, the Kerala High Court in the matter of **Government Wood Works v. State of Kerala**[13] has held that in the absence of dispatch date made available to the Court from the records, to prove that the order is issued within the prescribed period, order passed by Assessing Officer is barred by limitation.

30. At this stage, Section 27 of the General Clauses Act, 1897 may

12 (2016) 382 ITR 110 (Karnataka)
13 (1988) 69 STC 62

noticed herein profitably. Section 27 of the General Clauses Act, 1897 reads as follows: -

> "**27. Meaning of service by post.—**Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

31. Section 27 of the General Clauses Act, 1897 provides that where any Central Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting. In such a case, unless the contrary is proved it would be deemed to have been served at the time when the letter would be delivered in the ordinary course of post to the assessee.

32. In this connection, the decision of a Division Bench of the Delhi High Court in the matter of **ST Microelectronics (P.) Ltd v. Deputy Commissioner of Income-tax**[14] may be noticed herein in which the assessee filed return of income, it changed its address thereafter, new address was updated in PAN database which was duly recorded and all communications were thereafter received by

14 (2016) 384 ITR 550 (Delhi)

petitioner from respondents at new address. The Delhi High Court relied upon para 12 of the judgment of the Supreme Court in the matter of **Collector of Central Excise v. M.M. Rubber & Co.**[15] which states as under: -

> "It may be seen therefore, that, if an authority is authorised to exercise a power or do an act affecting the rights of parties, he shall exercise that power within the period of limitation prescribed therefore. The order or decision of such authority comes into force or, becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order or decision was passed or made: that is to say when he ceases to have any authority to tear it off and draft a different order and when he ceases to have any locus penitentiae. Normally that happens when the order or decision is made public or notified in some form or when it can be said to have left his hand. The date of communication of the order to the party whose rights are affected is not the relevant date for purposes of determining whether the power has been exercised within the prescribed time."

Relying upon **M.M. Rubber & Co.'s** case (supra), the Delhi High Court held that the Revenue has failed to demonstrate that the Assessing Officer who passed the assessment order ceased to have any control over such order and that it left his hand soon after it was passed. The Department having failed to do so, a presumption has to be drawn that the final assessment order was not passed within the time period specified under Section 144(c)(4) read with Section 144(c)(3) of the IT Act.

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15 AIR 1991 SC 2141

33. Having noted the principles of law governing issuance of notice under Section 149(1) of the IT Act, reverting to the facts of the present case, it is the case of the Revenue that notice was issued under Section 148(1) of the IT Act by the officer concerned on 15-3-2016 on the address shown in the return and it was sent for delivery well within the period of limitation through speed post for delivering to the present petitioner, which is seriously disputed by the petitioner and even prayed for production of said notice, but ultimately, it has not been produced by the Revenue on record. The said notice was ultimately, said to have been returned unserved on 28-3-2016 and served to the petitioner through its Chartered Accountant on 13-4-2016 after the period of limitation which is 31-3-2016. The notice dated 13-4-2016 is filed along with the writ petition in which the petitioner's address is shown to be as under: -

> "The Principal Officer,
> Ardent Steel Limited
> Unit No.606, Town Centre, 6th Floor,
> Andheri Kurla Road, Saki Naka
> Andheri (East)
> Mumbai – 400059"

34. It is the case of the petitioner that address of the petitioner has been changed and the changed new address has duly been communicated to the petitioner by the Income Tax Pan Services Unit vide Annexure A/12 according to which new address of the petitioner is as below: -

> "Ardent Steel Limited,
> A 401 Lotus Corporat Park, Jay Coach Signal,
> Off Western Express, Highway Goregoen E, Mumbai,
> Maharashtra – 400063
> Tel. No.: 91 – 9437076481"

35. The petitioner has filed number of documents along with his application clearly demonstrating that the petitioner has been issued with show cause notice under Section 271(1)(c) of the IT Act for the assessment year 2008-09 by the same assessing officer namely Shri Birendra Kumar, Assistant Commissioner of Income-tax (Central) – 2, Raipur, on 17-6-2016 in the address “A-401, Lotus Corporation Park, Goregaon (East), Mumbai (M.H.)”; notice under Section 274 read with Section 271 {notice under Section 271(1)(c)} of the IT Act on 31-3-2016; notice under Section 142(1) of the IT Act on 18-3-2016; notice under Section 143(2) of the IT Act on 23-2-2016; and notice under Section 142(1) of the IT Act on 12-2-2016. All notices have been issued and served to the petitioner on the new address “A-401, Lotus Corporation Park, Goregaon (East), Mumbai (M.H.)”. The respondents have neither filed the said notice dated 15-3-2016 with envelope having the postal endorsement “left” with a copy to the other side nor filed copy of dispatch register with postal receipt nor furnished any explanation as to why the same Assessing Officer, who has issued and served notices to the petitioner on the newly changed correct address available with him and on which address he has issued notices in February and March, 2016 for the assessment year 2008-09, decided and issued notice on the old address for the assessment year 2009-10. Even the said notice dated 15-3-2016 was issued on the incorrect / old address to the petitioner assessee, therefore, presumption under Section 27 of the General Clauses Act, 1897 is also not available in favour of the Revenue.

36. Burden to establish that notice under Section 149(1)(b) read with Section 148(1) of the IT Act has been issued to the petitioner was on the Revenue which the Revenue has failed to discharge, as the Revenue has clearly failed to establish that the notice was issued on or before 31-3-2016 on the assessee / petitioner's correct address and it was dispatched on or before 31-3-2016 and it was put to the proper serving officer for serving in accordance with law. Therefore, I have no hesitation to hold that no notice under Section 149(1)(b) read with Section 148(1) of the IT Act was issued to the petitioner well within the period of limitation on or before 31-3-2016 on the officially notified correct address available in the official record for service of notice to the petitioner which is a jurisdictional fact and condition precedent for initiation of assessment proceeding under Section 148(1) of the IT Act. Thus, the first question is answered accordingly.

Question No.2

37. This would bring me to the second question, whether notice under Section 148(1) of the IT Act was served to the petitioner, as service of notice is the condition precedent for reopening assessment under Section 148(1). This plea is an alternative plea raised on behalf of the petitioner without prejudice to the plea raised so far as issuance of notice is concerned.

38. It is the case of the Revenue that the petitioner has participated in the assessment proceedings after service of notice through Chartered Accountant and filed return and also raised objections and objections were decided on 18-7-2016, therefore, the petitioner

is deemed to have waived the service of notice under Section 149(1) of the IT Act relying upon Section 292BB of the IT Act which provides as under: -

> "**Notice deemed to be valid in certain circumstances.**
>
> 292BB. Where an assessee has appeared in any proceeding or co-operated 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."

39. A careful perusal of the aforesaid provision would show that a proviso is appended to the main provision which provides that the aforesaid provision would not apply where the assessee has raised such objection before the completion of such assessment or reassessment. In the instant case, the petitioner has raised objections while submitting its reply to the reasons for reassessment on 18-7-2016 which are as under: -

> "3. In our case, we re-iterate that no notice u/s 148 was served on the company. We may bring to your kind notice the fact that all our returns of income are up-to-

date and have been filed till the AY 2015-16 (Copies of the acknowledgements for the last three assessment years are enclosed). The address of the company has been clearly mentioned in our tax returns and even the data for issuance of PAN also reflect the said address. We are unable to understand why the notice u/s 148 was not served even though the correct address is available with the Department.

4. We request you to take judicial cognizance of our objection regarding the non issuance and service of notice as per the requirement of the proviso to section 292BB of the Act.

5. We most respectfully submit that in view of the factum of the non service of the notice, the re-opening of assessment for the AY 2009-10 ought to be dropped and the notice u/s 148 withdrawn."

40. The objections have been replied by the Revenue as under: -

"I. You have contended that the notice u/s 148 of the Act was not served through the correct address and in view of the factum of the non-issuance and service of notice as per the requirement of the provision to section 292BB of the Act, the re-opening of assessment for A.Y. 2009-10 ought to be dropped and the notice u/s 148 withdrawn. In this connection, it is to inform you that this office had issued notice u/s 148 of the Income tax Act, 1961 dated 15.03.2016 to the address of your company as mentioned on PAN and in tax returns of M/s Ardent Steel Ltd. Any notice sent through speed post by Indian Postal Department is a valid service of notice as per the manner and procedures provided in the Act. The sad notice was returned back to this office by the Indian Postal Department citing the reasons "Left" on 28.03.2016.

II. It is also to inform you that the notice u/s 148 of the

Act in your case was issued only after taking necessary approval from the competent authority. Further, the notice u/s 148 of the Act was issued only after the Assessing Officer had a reason to believe on the basis of facts and information available in his possession that the income had escaped assessment.

III. During the course of search and seizure operation in the case of Hira Group, Shri B.L. Agrawal, CMD of Hira Group in his statement given on oath has accepted the findings of the search team. In his reply to the Question No. 24 in which the name of your company M/s Ardent Steel Ltd. is categorically mentioned alongwith the names other concerns of the Hira Group of Companies, Shri B.L. Agrawal has clearly stated that various companies of Hira Group which includes M/s Ardent Steel Ltd. had introduced undisclosed share application/capital money through Kolkata based paper concerns. ..."

41. The aforesaid narration of facts would show that no notice was served to the petitioner. The plea of Section 292BB of the IT Act would not be available to the petitioner as the petitioner has submitted its objection on 18-7-2016 to the assessing officer prior to the completion of assessment proceeding. Law in this regard is well settled which may be noticed herein profitably.

42. A Full Bench of the Allahabad High Court in the matter of **Laxmi Narain Anand Prakash v. Commissioner of Sales Tax**[16] has held that the notice of initiation proceeding under Section 21 of the U.P. Sales Tax Act, 1947 was a condition precedent and not only a procedural requirement. The mere fact that the assessee had obtained knowledge of the proceeding and participated could not

16 AIR 1980 All 198

validate the proceeding being initiated without jurisdiction. It has been subsequently held that "it is firmly established that where a Court or Tribunal has no jurisdiction, no amount of consent, acquiescence of waiver can create it."

43. A Division Bench of the Delhi High Court in **Chetan Gupta's** case (supra) speaking through Dr. S. Muralidhar, J, has clearly held that merely because an assessee may have participated in the proceedings, the requirement of service of proper notice upon the person in accordance with the legal requirement under Section 148 of the Act is not dispensed with and reassessment proceedings finalized by the Assessing Officer without effecting service of notice on the assessee under Section 148(1) of the IT Act are invalid and laid down the principles in this regard as under: -

> "(i) to (iv) xxx xxx xxx
>
> (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."

44. Similar is the proposition laid down by the Gauhati High Court in **Mintu Kalita's** case (supra) holding that service of notice is condition precedent for exercise of power under Section 148 of the IT Act.

45. Thus, on the basis of above-stated legal analysis, I have no hesitation to hold that no notice was served to the petitioner under Section 148(1) of the IT Act and service of notice to the Chartered Accountant of the petitioner Company is not service at all and participation of the petitioner Company by filing return and filing objection to the notice to the reasons to believe cannot be held to be a valid service of notice as held by the Delhi High Court in **Chetan Gupta's** case (supra) and, therefore, it cannot be held that the petitioner was served with notice under Section 148(1) of the IT Act. Thus, having answered both the questions in favour of the assessee and against the Revenue, I hold that neither notice under Section 148(1) of the IT Act within the period of limitation as prescribed in Section 149(1)(b) of the IT Act was issued to the petitioner nor it was served in terms of Section 148(1) of the IT Act, therefore, the reassessment proceedings initiated by the said notice and the order deciding objection dated 5-8-2016 are without jurisdiction and without authority of law.

46. As a fallout and consequence of the aforesaid discussion, the notices dated 15-3-2016 and 13-4-2016 and the order dated 5-8-2016 deserve to be and are hereby quashed. The petitioner would also be entitled for a cost of ₹ 25,000/- which will be paid by the respondents within two weeks from today.

47. The writ petition is allowed to the extent outlined herein-above.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (T) No.168 of 2016

M/s Ardent Steel Limited

Versus

Assistant Commissioner of Income Tax (Central) – 2 and another

Head Note

Reassessment proceeding must be initiated within the time limit prescribed under Section 149(1)(b) of the Income Tax Act, 1961.

पुनर्निर्धारण की कार्यवाही आयकर अधिनियम, 1961 की धारा 149(1)(ब) के अन्तर्गत विहित समय–सीमा में आरम्भ की जानी चाहिए ।