

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

I.T.A. No. 77 of 2022

Principal Commissioner of Income Tax Appellant
(Central)

Mr. Radheyshyam Chimanka, Senior Standing Counsel
Along with Mr. A. Kedia, Junior Standing Counsel
-versus-

Narayan Kumar Khaitan Respondent
None

CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN

ORDER
14.02.2023

Order No.

Dr. S. Muralidhar, CJ.

01. 1. The short question that sought to be urged by the Revenue Department in the present appeal, directed against an order dated 15th June, 2022 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack allowing the Assessee's ITA Nos.170 to 175/CTK/2019 for the Assessment Years (AYs) 2009-10 to 2015-16, is whether service of notice by Speed Post on the last-known address amounts to valid service as per the provisions of the Income Tax Act, 1961 (Act).

2. The background facts for the purposes of the present appeal are that there was a search and seizure proceedings under Section 132 of the Act in the case of M/s. Shivom Minerals Ltd and group on 24th September, 2014. On the basis of the seized books of accounts,

the case of the Respondent/Assessee was taken up for scrutiny for AY 2010-11. It is stated that during the course of search, certain incriminating documents were found and, thereafter assessment proceedings under Section 153C read with Section 143(3) for the said AY was completed accepting the income returned.

3. Subsequently, the case of the Respondent/Assessee was picked up under Section 263 of the Act and it was concluded that the original assessment order under Section 153C was erroneous and prejudicial to the Revenue. In the proceedings under Section 263 of the Act, notice dated 6th March, 2019 was issued for being served upon the Assessee at his last known address.

4. Before the Principal Commissioner of Income Tax (PCIT) one Shri Uttam Kumar, purportedly a staff of the Assessee appeared and informed the PCIT that the Assessee was in judicial custody. Instead of directing notice to be issued to the Assessee through the Superintendent of Jail, the PCIT treated the appearance of Shri Uttam Kumar as sufficient service of notice on the Assessee in terms of Section 292BB of the Act and proceeded to pass his order under Section 263 of the Act revising the assessment proceedings for AY 2011-12. An addition of a huge sum on account of unexplained receipts was thereafter made without hearing the Assessee.

5. It is in the above background, it is sought to be contended by Mr. Radheyshyam Chimanka, learned Senior Standing Counsel for the Department that in terms of Section 292BB, the appearance of Shri

Uttam Kumar, a staff of the Assessee, should itself be treated as appearance of the Assessee and once the Assessee has appeared, he can no longer be claim that he was not served with a notice.

6. The Court is unable to agree with the above submissions. Section 292BB reads as under:

“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.”

7. The above provision in a taxing statute admits only of strict interpretation. If the legislative intent was that the appearance of an Assessee or his authorized representative was sufficient for the purposes of presuming service notice, then there should be an express provision to that effect. The provision, on the other hand, only talks of appearance by the Assessee and not an authorized representative of the Assessee.

8. Factually, however, as noted by the ITAT in the impugned order, Shri Uttam Kumar was not an authorized representative of the Assessee. He was simply the staff who appeared to inform the PCIT

where the Assessee could be located. This was the jail. Despite being informed that the Assessee was in judicial custody, the PCIT did not make the effort of having the notice served upon the Assessee through the Superintendent of the concerned jail.

9. This Court concurs with the observation of the ITAT in the impugned order that a person in judicial custody is deprived of many of the constitutional rights which he could otherwise exercise. Any officer of the Government including a PCIT should be conscious that once information was received that a person to whom notice has to be served is in judicial custody, then an appropriate order should be passed requiring service of notice on such person through the Superintendent of the concerned jail. This is the bare minimum requirement in law. With the PCIT having failed to do so, it was not open to the Department to contend the mere appearance of a staff of such person in judicial custody before the PCIT should be taken to be the appearance by the Noticee/Assessee himself.

10. Two decisions have been relied upon by Mr. Chimanka in support of the plea that in the facts of the present case, it should be taken that the Assessee was properly served. The first decision, *Commissioner of Income-Tax, Delhi-II, New Delhi v. Madhys Films (P) Ltd. (2008) 301 ITR 69 (Delhi)* was in a fact situation quite different from the one on hand. There, the question was whether for the purposes of Section 27 of the General Clauses Act, 1897 service by post should be deemed to have been affected properly by properly addressing pre-paying and posting by

registered post, a letter at the last-known address of the Assessee. Since it was shown that the notice was properly served at the address available with the Department, the Court proceeded on the basis that there was a presumption of proper service of notice. That case did not involve the Assessee being in judicial custody which fact was within the knowledge of the Department and yet no notice was served on the Assessee while in judicial custody.

11. The second decision cited, i.e., *Commissioner of Income Tax v. Privilege Investment (P) Ltd. (2017) 395 ITR 147* also did not involve an Assessee being in judicial custody. Neither of the decisions, therefore, help the Department to contend that the ITAT committed an error in declining to accept the plea of the Revenue in the present case.

12. Since no substantial question of law arises, the appeal is dismissed.

(Dr. S. Muralidhar)
Chief Justice

(M.S. Raman)
Judge

S. Behera