IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 5295 of 2010
WITH
SPECIAL CIVIL APPLICATION NO.5296 OF 2010
AND
SPECIAL CIVIL APPLICATION NO.5297 OF 2010

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

KANUBHAI M PATEL HUF - Petitioner(s)

Versus

HIREN BHATT OR HIS SUCCESSORS TO OFFICE & 4 - Respondent(s)

Appearance:
MR RK PATEL for Petitioner
MR MR BHATT, SR. ADVOCATE with MRS MAUNA M BHATT for Respondent 1- 2
MR RM CHHAYA for Respondent(s) : 3 - 5.

Date: 13/07/2010

ORAL JUDGMENT

(Per: HONOURABLE MS.JUSTICE H.N.DEVANI)

1. These petitions have been filed with the following prayers:

[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 notice dated 31.03.2010 under section 148 of the Income Tax Act, 1961annexed hereto at Annexure B.

[B] Pending admission, hearing and disposal of this petition, ad-interim relief be granted and the respondent be ordered to restrain from enforcing compliance of the impugned notice dated 31.03.2010 under section 148 of the Income Tax Act, 1961 annexed hereto at Annexure B and/or taking any other steps in this regard including ex-parte order.

[C] Pending admission, hearing and disposal of this petition, stay the implementation / operation of the notice and orders to restrain the respondent from taking any further proceedings pursuant to the impugned notices at Annexure B.

[D] Award the cost of this petition.

[E] Grant such other and further reliefs as this Hon'ble Court deems fit.

2. On 29.6.2010, this Court had passed an order in the following terms :
"Heard learned counsel appearing for the parties. Considering the controversy that relates to the meaning of the term "issued" as appearing in section 149 of the Act, rule returnable on 13th July, 2010. To be listed on 2nd admission board for final disposal. Ad-interim relief granted earlier to continue as interim relief till disposal of the petition."

3. Since the common questions of facts and law are involved, the petitions were taken up for hearing together and are disposed of by this common judgment.

4. The facts of the case as appearing in the petitions are that the petitioners were assessed to income tax by the Income Tax Officer, at Ahmedabad for assessment year 2003-04. Return of income was filed along with statement of income etc. None of the petitioners have received any notice under section 143(2) of the Income Tax Act, 1961 (the Act). On 08.04.2010, each of the petitioners received a notice under section 148 of the Act dated 31.03.2010 for assessment year 2003-04 for reopening the assessment under section 147 of the Act. According to the petitioners, since the notice was dated 31.03.2010 and on the speed post cover in which the notice was received by the petitioners, there was a stamp of "31 MAR 2010" of the Speed Post Booking Centre, Ahmedabad, whereas the notice covers were delivered to the petitioners on 08.04.2010 by speed post, the petitioners got suspicious as to the correctness of the date of issue of the notice by the respondent No.1. The petitioners, therefore, approached the Superintendent, Speed Post Booking Centre, Ahmedabad, respondent No.5 herein and inquired as to date of booking of the speed post parcel cover in which the notice had been sent by the respondent No.1 bearing booking No.EG026684262 IN, EG026684245IN and EG026684259IN respectively. The petitioners vide letters dated 08.04.2010 requested respondent No.5 to issue the certificate or acknowledgment of date of booking of the post and date of delivery of the post for the aforesaid EMI Speed Post numbers. According to the information provided to the petitioners, the said covers forissuing notices were sent for booking to the Speed Post Centre on 07.04.2010 only. The petitioners were also given photocopies of the paper sheet wherein the petitioners had signed for receipt of the said covers, wherein also the aforesaid registration numbers were shown to have been booked on 07.04.2010 and the signatures for receipt of the covers by the petitioners were shown as on 08.04.2010. The petitioners have, therefore, challenged the legality and validity of the notices dated 31.03.2010 issued by the respondent No.1 under section 148 of the Act as being time barred, contending that the impugned notices have been issued beyond the time limit prescribed under the provisions of section 149 of the Act.

5. In response to the petition, the respondent No.1 has filed affidavit in reply, wherein it has been stated that the petitioners have themselves admitted that the notice is dated 31.03.2010 and that the said date is also mentioned on the speed post cover. That as the notices were duly signed on 31.03.2010, the same were valid in view of the provisions of section 149(1) of the Act. It is submitted that the notice was "ISSUED" on 31.03.2010 by the said office. That section 149 of the Act speaks of time limit for issue of notice and categorically prescribes that no

notice under section 148 shall be issued after the prescribed limitation has lapsed. Once a notice is issued within the period of limitation, jurisdiction becomes vested in the Income tax Officer to proceed to reassess. It is further averred that the notices were issued on 31.03.2010 as is also mentioned by the petitioner mentioning the date of notice, the service of the same may be late due to other reasons, which however will not affect the validity of notice issued. In the petition, it has been categorically averred that the petitioner had been provided information by the concerned Post Office that the covers for issuing the notices in question were sent for booking to the Speed Post Centre only on 07.04.2010. Various documents have also been annexed in support thereof. As per the certificate annexed as Annexure D to the petition, the speed post covers were booked on 07.04.2010 and delivered on 08.04.2010. However, the said averments have not been specifically dealt with in the affidavit-inreply and as such remain uncontroverted.

6. Mr. R. K .Patel, learned advocate for the petitioner has assailed the impugned notice. Reiterating the facts stated in the petition it is contended that the impugned notices dated 31.03.2010 for assessment year 2003-04 have been issued after the expiry of six years from the end of the assessment year under consideration, hence, the same are clearly barred by limitation. It is further submitted that though the postal covers in which the notices were received by the petitioner bear the stamp of Speed Post Booking Centre as of "31MAR 2010", on inquiry at the office of the respondent No.5, it is certified by the respondent No.4, Deputy Post Master, Customer Care Centre, Navrangpura, Ahmedabad, that the covers in which the notices were received by the petitioners were booked on 07.04.2010. Therefore, the impugned notices have not been issued on 31.3.2010 and are, accordingly, time barred. It is submitted that in the light of the fact that the notices have been issued beyond the prescribed period of limitation under section 149 of the Act, the action of the respondent No.1 itself without jurisdiction, hence, it is not necessary to undergo the procedure of filing objections against the impugned notices in terms of the decision of the Apex Court in the case of ***GKN Driveshaft (India) Ltd. v. Income-tax Officer***, 259 ITR 19 (SC). The learned advocate has further submitted that the date of issue of the notices under section 148 of the Act would be the date on which the same have been dispatched by registered post. It is submitted that in the facts of the present case, it is apparent that the notices have been dispatched by registered post only on 07.04.2010, hence, the same have clearly been issued beyond the prescribed period of limitation and as such, are time barred. In support of his submissions, the learned advocate has placed reliance upon the following decisions:

[a] Decision of the Supreme Court in the case of ***R. K. Upadhyaya v. Shanabhai P. Patel***, [1987] 166 ITR 161 (SC).

[b] Decision of the Supreme Court in the case of ***Commissioner of Income Tax and another v. Major Tikka Khushwant Singh,*** [1995] 212 ITR 650 (SC).

7. On the other hand, Mr. M. R. Bhatt, learned Senior Advocate appearing for the respondents No. 1 and 2, has opposed the petition, contending that as to whether the notices under section 148 of the Act have been issued within time limit, is essentially a question of fact and as such, the same cannot be decided in a writ petition under Article 226 of the Constitution of India. In support of the contention, reliance is placed upon the decision of the Madhya Pradesh High Court in the case of ***Rajkumar Agrawal v. Commissioner of Income Tax and others***, (2008) 296 ITR 231, for the proposition that the issue as to on (i) what date the notice was signed, (ii) on what date it was issued, and lastly (iii) on what date it was served upon the assessee, needs to be examined on the facts and with reference to the original record of the case and for that purpose some enquiry is needed at the level of the Assessing Officer. The writ court is not the proper forum to hold such enquiry though limited in nature. It is, accordingly, submitted that there are two versions which are coming on record, one the version of the assessee and the other that of the Assessing Officer which would require adjudication on facts. The issues involved would require evidence to be led by either side; hence, the Writ Court is not the proper forum to hold such inquiry. It is further submitted that the petitioners have approached this Court against notices under section 148 of the Act without following the procedure as laid down by the Apex Court in the case of ***GKN Driveshaft (India) Ltd.***, (supra). In the circumstances, the petitions themselves are premature.

8. Mr. R.M. Chhaya learned advocate for the respondents No.3, 4 and 5 has tendered a copy of the Department of Posts, India, EMS Speed Post, Daily Report for 07.04.2010 which is taken on record. The said report indicates that the envelopes containing notices in question were received on 07.04.2010. Learned advocate also supports the say of the petitioner as regards the notices in question having been sent for booking to the Speed Post Centre only on 7.4.2010 and relies upon the certificate issued by the respondent No.4.

9. Though, it has been contended on behalf of the revenue that as to on what date the notice was issued and as on what date it was served upon the assessee needs to be examined on facts and with reference to the original record of the case and that the writ court is not proper forum to hold inquiry though limited in nature inasmuch as there are two versions coming on record, one version of the assessee and the other of the Assessing Officer which would require adjudication on facts, the said contention does not merit acceptance in the light of what is stated hereinafter.

10. The contention that there are two versions coming on record, is dehors the record inasmuch as it is the case of the petitioners that the notices were sent to the concerned Speed Post Centre for booking only on 07.04.2010 which is supported by the respondents No.3 to 5, and the same is not controverted by the revenue in the affidavit in reply filed on behalf of the respondents No.1 and 2. Thus, insofar as the fact that the notices had been sent for booking only on 7.4.2010 is concerned, the same stands established from the record of the case. Though, there is stamp of the concerned post office bearing the date "31 MAR 2010", the same remains unexplained in light of the aforesaid admitted facts. In the circumstances, the only question of fact which the Court is required to determine is as to whether the notices had been sent to the post office on 31.03.2010 or 07.04.2010. In this regard, the record produced before the Court is sufficient to come to the conclusion that the notices had been sent for booking to the Speed Post Centre only on 07.04.2010, in absence of any evidence to the contrary being pointed out by the respondents, as well in the light of the fact that the said position as confirmed by the postal department has not been controverted by the revenue.

11. In the background of the aforesaid facts, the Court is required to examine the contention of the petitioners that the notices in question have been issued beyond the period of limitation prescribed under section 149 of the Act.

12. Section 149 of the Act insofar as the same is relevant for the purpose of the present petition reads thus:

***"149. Time limit for notice**.(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.
(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of Section 151."

13. On a plain reading of section 149, it is apparent that under the said provision, the maximum time limit for issuance of notice under section 148 is six years from the end of the relevant assessment year. In the present case, the relevant assessment year in each of the petitions is 2003-2004; the impugned notices are dated 31.03.2010; and the said notices were sent for booking to the Speed Post Centre, Ahmedabad, on 07.04.2010. On behalf of the petitioners, it has been contended that the notices which have been dispatched for service only on

07.04.2010, are clearly time barred in as much as the date of dispatch would be the date of issue of the notices. Whereas, on behalf of the revenue, it has been contended that the notices were actually signed on 31.3.2010, hence, the said date would be the date of issue and as such, the impugned notices have been issued within the time limit prescribed under section 149 of the Act.

14. In the background of the aforesaid facts and contentions, the core issue that arises for consideration is as to when can the notice under section 148 of the Act be said to have been issued. In this context it would be necessary to examine the true import of the expression "shall be issued" as employed in section 149 of the Act.

15. The expression "issue" has been defined in Black's Law Dictionary to mean "To send forth; to emit; to promulgate; as, an officer issues orders, 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."

[15.1] 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. 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 2003-04, 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.

17. As regards the contention that the petitioners have not filed objections against the reasons recorded for reopening assessment under section 147 as laid down in the decision of the apex court in the case of ***GKN Driveshafts Ltd***. (supra), in the light of the facts which have come on record, no useful purpose would have been served by asking the petitioner to first undertake the said exercise. The decision of the apex court is required to be applied after considering the facts and circumstances of each case. In a given case, considering the facts and circumstances, the Court may not find it necessary to ask an assessee to first undertake the exercise of filing objections and thereafter to approach the Court.

18. For the foregoing reasons, the petitions succeed and are, accordingly, allowed. The impugned notices dated 31.03.2010 (Annexure-B) under section 148 of the Income-tax Act, 1961 are hereby quashed and set aside. Rule is made absolute accordingly in each of the petitions with no order as to costs.

[D.A.MEHTA, J.]
[HARSHA DEVANI, J.]