

## Commissioner of Income Tax Vs Chandra Agencies

**Court:** Delhi High Court

**Date of Decision:** Oct. 20, 2010

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Order 5 Rule 17, Order 5 Rule 19, Order 5 Rule 19A, Order 5 Rule 20

Income Tax Act, 1961 – Section 131, 133, 139(2), 143(1), 143(2)

**Citation:** (2011) 178 DLT 179 : (2011) 202 TAXMAN 106

**Hon'ble Judges:** Suresh Kait, J; A.K. Sikri, J

**Bench:** Division Bench

**Advocate:** Rashmi Chopra, for the Appellant; C.S. Aggarwal Prakash Kumar and O.P. Sapra, for the Respondent

### Judgement

A.K. Sikri, J.

On 25th February, 2008 it was recorded by this Court that the only question raised in these appeals is whether the notice

was affixed at the latest and correct address of the Assessee. We treat these appeals admitted on this issue and proceed to decide.

2. All these three appeals arise out of the common judgment of the Tribunal whereby the Tribunal has quashed the reassessment done by the

Assessing Officer u/s 147/148 of the income tax Act primarily on the ground that there was no valid service of notices u/s 148 of the Act upon the

Assessees herein. M/s Chandra Agencies, one of the Assessees was the partnership firm at the relevant time and other two Assessees were its

partners. That is how all these cases are inter-related.

3. Brief facts, which need to be noted in this regard are that the case pertains to the assessment year 1985-86. In this year, the normal assessment

was carried out and completed u/s 143(1) of the Act on 10th June, 1987 on the return income filed by the Assessee in the status of the registered

firm. The Assessing Officer wanted to reopen the assessment and for this purpose, notice u/s 148 of the Act was prepared and issued on 27th

March, 1995 after obtaining the approval from the Commissioner of Income Tax-VIII, New Delhi. It is the case of the Assessing Officer that the

same were served through Process Server/Inspector by affixation at the following last known address of the firm on 29th March, 1995:

(i) C-89, NDSE, Part-II, New Delhi.

(ii) E-167-168, Jhilmil Colony, Delhi

(iii) 17, Hotel Continental, Regal Building

4. As per the Assessing Officer, the service of notice by affixation became necessary as the Assessee could not be served by normal process,

inasmuch as, all efforts to trace them has failed. Thereafter, notices u/s 143(2) of the Act alongwith questionnaire, requisite details and particulars

were issued on 19th March, 1997 on one of these Assessee namely Mr. Kapil Khanna requiring him to attend and produce the books of

accounts of the firm alongwith the requisite details.

5. On 26th March, 1997 Mr. Kapil Khanna appeared and participated in the proceedings pursuant to the aforesaid notice u/s 143(2) of the Act

alongwith questionnaire served upon him. However, the Assessee did not appear thereafter and assessment was completed u/s 144/148 of the

Act. Against this assessment, the Assessee preferred appeal before the CIT (A) raising various contentions which included the contention that the

entire assessment proceedings were bad in law for the reason that no notice u/s 148 of the Act had ever been served upon the Assessee's firm or

its partners. On this issue, the CIT (A) did not find any substance in the argument of the Assessee and held that the reassessment proceedings were

valid in law. However, as far as quantum of assessment is concerned, some relief was granted. In these circumstances, both the Assessee as well

as the Department preferred appeals before the Income Tax Appellate Tribunal. The contention of the Assessee that no valid service of notice u/s

148 of the income tax Act was ever affected upon the Assessee has found favour with the Tribunal and on this ground, the assessment

proceedings has been set aside. It is under these circumstances, the revenue has preferred these appeals.

6. Before we deal with the question as to whether there was no proper service or not, following admitted facts need to be recorded.

7. As pointed out above, the normal assessment for the year 1985-86 (corresponding to financial year 1984-85) was completed on 10th June,

1987. The Assessee's firm, however, was dissolved on 31st July, 1986. The dissolution deed was executed among the partners. This was duly

placed on record of the department. In this dissolution deed, address of the firm was shown as C-89, NDSE, Part-II, New Delhi. A public Notice

of dissolution of firm was given on 29th September, 1986 and this was also placed on record of the department. Thereafter, return of income for

the assessment year 1987-88 was filed with the Assessing Officer, District-V, G on 16th January, 1988. Significantly, in this return, the firm had

disclosed the address as 4413, Jatavpura, Pahari Dhiraj, Delhi. For completion of assessment for the assessment year, 1987-88, notice u/s 131 of

the Act was issued on 7th March, 1988 at the aforesaid Pahari Dhiraj address. Pursuant to the assessment, even TDS refund was allowed which

was dispatched by the Assessing Officer at the aforesaid Pahari Dhiraj address on 15th March, 1988. The Assessee's firm also filed the return for

the assessment year 1988-89 giving same Pahari Dhiraj address. All the notices for the purpose of assessment were issued by the Income Tax

Department at this address. This aspect is highlighted just to demonstrate that when the assessment proceedings in respect of assessment year

1987-88 and 1988-89 were carried out in the year 1988, the Assessing Officer, District -V,G knew the then available address of the Assessee's at

Pahari Dhiraj which was on the record of the department. By this time, the Assessing Officer had also come to know that the Assessee's firm had

been dissolved. As per the department, notices to the Assessee's were issued at the three addresses namely C-89, NDSE, Part-II, New Delhi, E-

167-168, Jhilmil Colony, Delhi and 17, Hotel Continental, Regal Building. These notices were sent through registered A.D. posts which were

admittedly not served to any of these Assessee's in these addresses. Thereafter, the Process Server/Inspector gave his report in the following

words:

As directed by the ITO, I visited 17, Hotel Continental Regal Building, New Delhi, 167-168 Jhilmil Colony, Delhi and C-89 NDSE Part II, New

Delhi, which as per our file are the office address of M/s Chandra Agencies, Residence of Sh. K.L. Khanna & Sh. Kapil Khanna, Partners of the

said firm, respectively.

During my visit to 17 Continental hotel, Regal Building there is no such firm in that address and there is only an office functioning in the name of Raj

Agencies. On enquiries it is learnt that M/s Chandra Agencies have vacated this premises long time back and they know nothing about them.

I had also seen to 167-168 Jhilmil Colony and there is no such person in the name of Sh. K.L. Khanna on this address. In 167 Sh. S.L. Saini and in

168 Sh. Sardari Lal are presently residing and they know nothing about Mr. K.L. Khanna. They informed that Sh. K.L. Khanna has sold this

property to them long time back.

I also visited C-89, NBDSE Part II, New Delhi where I found that Sh. Gupta is residing, who informed that Sh. Kapil Khanna was residing in this

premises and vacated some years back. He does not know the present address of Mr. Kapil Khanna.

In the above circumstances notices u/ s 148 in the above addresses for 85-86 could not be served and are returned herewith.

8. The aforesaid report discloses that when Inspector visited at 17, Hotel Continental, Regal Building, he found that no such firm was existing at

that address. On enquiries, he learnt that partnership firm has vacated this premises long time back. Similarly, Sh. K.L. Khanna, was not found at

167-168, Jhilmil Colony which happened to be his address. Instead one S.L. Sahni was residing there who informed that Sh. K.L. Khanna has

sold the property to him long time back. Likewise, at C-89, NDSE, Part-II, one Mr. Gupta was found residing who also informed that Sh. K.L.

Khanna had vacated that premises some years back. This report shows that on none of these addresses, the erstwhile partners were residing as on

March, 1995 when the notices were sought to be served. Even when these facts came to the notice of the Assessing Officer, instead of making any

efforts to locate the present addresses, he ordered the service by affixation. No attempt had been made by the Revenue to issue the notices

through Regd. Post A/D and make an attempt to serve the notice, through registered post as per the requirement of Rule 19A, Order-V of CPC

Code, which was then a mandatory requirement in law for service of a valid notice & Bhagwan Singh and Others Vs. Ram Balak Singh and

Another, and as such, the substituted service under Rule 17 of Order V of CPC could have been effected only where the serving officer after using

all due and reasonable diligence did not find the addressee or his agent. It is only then the serving officer could have affixed the copy of notice or

summons at the so called last known address of the Respondent. It is stated that the mere fact that the serving officer did not find the addressee at

his address to be served with the notice is not sufficient to establish that the addressee could not be found. It must be shown that not only the

serving officer went to the place at a reasonable time when the party could be expected to be present, but also, if he was not found, that the proper

and reasonable attempts were made to find him either at that address or elsewhere. If, after such attempts, the position still is that the party is not

found, then and then only, it can be said that the addressee could not be found. Accordingly, even where the serving officer went to the Assessee's

address and finding that the Assessee had gone out, tendered the notice to a person, who was pointed out to him as the Assessee's son and on the

latter's refusal to accept it, affixed the notice on the premises, it was held that the service was not good service (See. Gopiram Agarwalla Vs. First

Additional Income Tax Officer and Others, & Ganeshi Lal and Sons and Another Vs. Income Tax, Officer, A Ward and Others, ). For a valid

affixure, as held by the Supreme Court in CIT v. Ramendra Nath Ghosh, the serving officer must mention in his report the names and addresses of

persons who pointed out the Assessee's place of business. To make service by affixure under Rule 17 effective, Rule 19 of Order V of the CPC

states ""Where a summons is returned under Rule 17 the Court shall, if the return under that rule has not been verified, by the affidavit of the serving

officer, and may, if it has been so verified, examine the serving officer, on oath or cause him to be so examined by another court, touching his

proceedings, and make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order

such service as it thinks fit"". In the instant case there has been no attempt on the part of the Revenue to find the addressee and serve the notice,

which can be termed as due and reasonable. Such a move of service by affixation was clearly not proper without making venture to find out the

present addresses of these Assesseees atleast from the records.

9. We have already noted above that this case relates to the reassessment of proceedings in respect of assessment year 1985-86. The firm had

been dissolved thereafter and when the returns for the assessment years 1986-87 and 1987-88 were filed, the factum of the submission was

specifically brought to the notice of the Assessing Officer. In those proceedings, the Assessee firm had given its address as 4413, Jatavpura, Pahari

Dhiraj, Delhi. Curiously, it is the same Assessing Officer of the same Ward who had completed these assessments by sending communication at

Pahari Dhiraj address. When the Assessing officer was informed that the firm was not existing at 167-168 Jhilmil Colony, he straightway jumped to

the conclusion that as per the record, that was the last known address. He did not even care to see the files of the assessment years 1986-87 and

1987-88. Had this care been taken, all necessary information would have been revealed to him and it would have been possible to serve the

Assesseees at their present addresses which were specifically made available to the Assessing Officer/department. Under these circumstances, the

conclusion of the ITAT is correct that even when correct addresses were available, no effort was made to serve these assesseees at those addresses.

10. We may record the discussion in this behalf, contained in the order of the Tribunal, which proceeds as under:

After that the return for assessment year 1987-88 was filed in the name of the firm, M/s Chandra Agencies at the address of 4413, Mohalla jatav,

Pahari Dhiraj, Delhi and the assessment was also completed by mentioning the same address as above. This assessment was completed on

18.1.1988. Self-assessment tax for assessment year 1987-88 in case of M/s Chandra Agencies was also made on the same address i.e 4413, Gali

Jatav, Pahari Dhiraj, Delhi. A copy of assessment order for assessment year 1987-88 and receipt of self-assessment tax are placed at pages 132

and 133 of the paper book. After than an order u/s 154 was passed by the Assessing Officer on 7.3.1988 and the same was served on the same

address i.e. 4413, Mohalla Jatav, Pahari Dhiraj, New Delhi. Summons u/s 131 of the Income Tax Act were issued by the AO on 7.3.1988 on the

address at 4413, Mohalla Jatav, Pahari Dhiraj. A notice u/s 139(2) and 133 was issued by the Assessing Officer for assessment year 1988-89 on

3.5.1988 on this address i.e. 4413, Jatavpur, Pahari Dhiraj with P.A. No. C-531, a copy of which is placed at page 146 of the paper book. From

all these details, it is clearly emerged and established that last known address of the firm was 4413, Mohalla Jatav, Pahari Dhiraj, New Delhi and

not 17, Hotel Continental, Regal Building Connaught Place, New Delhi or 167-168, Jhilmil Colony, New Delhi or C-89, NDSE Part-II, New

Delhi, means thereby that the notice by affixture was not affixed on the last known address. We further noted that the notices u/s 148 earlier were

prepared on 20.3.1995 and they were given to the Inspector for making service on the Assessee and the report was given that he went on the

address given and found that nobody lives on the address given in the notice. Copies of these notices were placed at page 45,46,47. Thereafter

notices u/s 148 were prepared on 27.3.1995 and they were directed by the AO to be affixed on the addresses mentioned in the notices and

accordingly the notice were affixed on three addresses, as mentioned above. Copies of these notices are laced at pages 141 to 143. We have seen

these copies of the notices and found that no name of any witness is mentioned on these notices. It is clearly shows that the notices were affixed on

the above three addresses in absence of any witness, which is mandatory a per Order V, Rule 17 of CPC, 1908. We further noted that a report

was given by Inspector, One Sh. K. Bhatnagar of Ward 12 (2) on 18.3.1995 wherein it is stated that he visited Continental Hotel, 17 Regal

Building, New Delhi and C-89, NDSE, Part -II, New Delhi and was informed that M/s Chandra Agencies had left this address, as they have

closed down their business from these premises. Once there was a report that the firm has been shifted from these addresses, then in our

considered view, there was no necessity of even fixing the notices on these addresses on 28.3.1995, as the report was given by the Inspector only

on 18.3.1995. Nothing is borne out from the records available on record that Assessing Officer has attempted to know the whereabouts of the

firm as well as of its partners. The assessment records were available with the Assessing officer and the last known address i.e. 4413, jatavpura,

Pahari Dhiraj, Delhi was available on the record. We surprised that why the Assessing Officer has not made service on the last known address i.e.

4413, Jatavpura, Pahari Dhiraj, Delhi.

11. The following two things emerge from the aforesaid:

(a) No proper enquiry or attempt was made to know the whereabouts of the firm and its partners by the Assessing Officer even when these details

were available with the department and, therefore, dispatching notices at the aforesaid addresses where the assessee were not residing, was of no

consequence.

(b) The order of affixation by the assessing Officer in these circumstances was clearly improper.

12. The legal position, as per the provision of Section 282 of the Act is that a notice or an article under the said Act is to be served on the person

thereunder either by post or in the manner in which summons are issued by the Court under the Code of Civil Procedure. The relevant provisions

in this behalf are contained in Order V of CPC. Catena of case law has emerged on the interpretation of order V Rule 20 regarding substitution of

service. In this case, the Assessee could not be served by normal process. It is only a deemed service on which the department is relying i.e. by

affixation. However, such a move can be resorted to only when the department has discharged initial onus by showing that the authority concerned

has reason to believe that the Assessee was intentionally hiding him from the authorities for the purpose of avoiding service or that there were other

good reasons to come to the conclusion that the summons could not be served in the ordinary way. (See Kunj Behari Vs. Income Tax Officer and

Others, , Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others, and Commissioner of Income Tax, West Bengal III

and Others Vs. Ramendra Nath Ghosh, )

13. We, thus concur with the findings of the Tribunal that even the mandatory procedure as laid down in Order V Rule 20 of the CPC has not

been followed by ordering substituted service. It was on the premise that the aforesaid three addresses, where the affixation was done, were the

last known addresses. When foundation on this belief itself goes away, inasmuch as, those were not the last known addresses and infact the

addresses where the Assessee had shifted were duly communicated to the department but no care was taken by the Assessing Officer to look

into its records. It is only the department which is to be blamed for this serious lapse.

14. We may take note of one argument of the learned Counsel for the Appellant at this stage. It was submitted that certain documents are filed to

show that the Assessee continued on the aforesaid addresses even in the year 1989-90. The first document is a copy of the Registration of

Marriage under the Hindu Marriage Act, as per which, address of Mr. Kapil Khanna is shown as C-84, Jhilmil Colony, New Delhi. However,

admittedly, notice was not sent at this address but sent at another address in the same colony namely 167-168, Jhilmil Colony, Delhi. Therefore,

this document is of no consequence. Another document is the challan vide which Sh. K.L. Khanna paid the advance tax. This pertains to

assessment year 1987-88 and C-89, NDSE, Part-II is shown as address. However, this again would not help the department in view of the report

of the Inspector that when he went to serve notice in March, 1995 he was specifically informed that Mr. Khanna has vacated the said house and it

was occupied by one Sh. Gupta who is residing there. We observe at the cost of repetition that in these circumstances, had the care been taken by

the Assessing Officer to look into his own record, he would have found the changed address of Mr. Khanna.

15. We thus conclude that there was no proper/valid service of notice u/s 148 of the Act upon the Respondents.

16. Notwithstanding the aforesaid position, alternate argument of the learned Counsel for the Appellant was that since the Assessee had appeared

and participated in the proceedings, no prejudice was caused to him and, therefore such a plea of non-service of notice u/s 148 of the Act cannot

be taken. She further submits that at the time when Mr. Khanna appeared before the Assessing Officer, he did not even take the objections about

the non-service of notice u/s 148 of the Act. In support, the learned Counsel has relied upon the judgment of this Court in the case of

Commissioner of Income Tax Vs. Vins Overseas India Ltd., . We are afraid even this argument would be of no avail to the revenue. That was a

case where the service of notice u/s 143(2) of the Act was in question namely whether it was served or not. It was found that notices were sent at

the correct address of the Assessee through registered post. In these circumstances, with the aid of provision of 27 of the General Clauses Act,

1987 a presumption was drawn that it was served upon the Assessee when such notice was not received back and the court further observed that

it was a rebuttable presumption. On the facts of that case it was found that the Assessee had not been able to rebut the said presumption. It was

further found that the Assessee had not appeared on the date fixed before the Assessing Officer which appearance was caused pursuant to

issuance of notice u/s 143(2) of the Act. At the most, this judgment would help the revenue to content that when Sh. Khanna appeared before the

Assessing Officer, he was served with a notice u/s 143(2) of the Act. Infact that is not in question or in dispute. In the present case, we are

concerned with the service of notice u/s 148 of the Act. Mr. Khanna had appeared when he was served at the correct address, with a notice u/s

143(2) of the Act. (We may remark here that when correct address could be found subsequently, with due care and attention this could have been

done at the initial stage also while sending notice u/s 148 of the Act). Be as it may, the fact remains that the Assesseees were not served with any



notice u/s 148 of the Act. It is the case of the Assessee that when Mr. Khanna appeared before the Assessing Officer, he was not even informed

at that stage that the proceedings were reopened in respect of the assessment year in question pursuant to notice u/s 148 of the Act. Even a copy of

that notice was not served upon him when he appeared. In these circumstances, one has to proceed on the premise that no notice u/s 148 of the

Act was ever served upon the Assessee or even given to them when Mr. Khanna appeared before the Assessing Officer. When there is complete

absence of service of notice u/s 148 of the Act, the consequence in law is that the entire proceedings for reopening the assessment would be void.

Therefore, merely because Mr. Khanna had appeared before the Assessing Officer when he was called upon to do so by service of notice u/s

143(2) of the Act would not validate the assessment and nullify the effect of non-service of notice u/s 148 of the Act.

17. We thus find no merit in these appeals and accordingly dismissed the same.