Item No.9.

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

HEARD ON: 17.02.2023

DELIVERED ON: 17.02.2023

CORAM:

THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

M.A.T. No. 141 of 2023
with
I.A. No.CAN 1 of 2023
I.A. No.CAN 2 of 2023

Nouvelle Advisory Services Private Limited.
Vs.
Assistant Commissioner of Income Tax, Circle 13(1), Kolkata & Ors.

Appearance:-
Mr. Pratyush Jhunjhunwala
Ms. Debanjana De ... for the appellant.

Ms. Smita Das De ... for the respondents.

JUDGMENT

(Judgment of the Court was delivered by **T.S. SIVAGNANAM*, J.)***

1. We have heard Mr. Jhunjhunwala, learned counsel for the appellant/applicant and Ms. Das De, learned standing counsel for the respondents. We have perused the affidavit filed in support of the application for condonation of delay and we are satisfied that sufficient cause have been shown in preferring the instant appeal. Hence, the delay in filing the appeal is condoned and the application for condonation of delay being CAN 1 of 2023 is allowed.

2. This intra-Court appeal is directed against the order dated 24th November, 2022 passed by the learned Single Bench in W.P.A. No.25454 of 2022. The learned Single Bench had entertain the writ petition, directed the respondents to file affidavit-in-opposition after noting the submissions made by the learned Advocate for the appellant. The order reads as follows:-

> *"Heard learned advocates appearing for the parties.*
>
> *I find in this matter that the file of the petitioner has already been transferred under Section 127 of the Income Tax Act, 1961 to Kanpur jurisdiction sometimes in the year 2021 and as such at the motion stage this Court cannot pass the interim order of transferring back the file to Kolkata by setting aside the impugned order of transfer without giving the respondent Income Tax*

Authority opportunity to file affidavit-in-opposition for final adjudication of the matter.

Let the respondents file affidavit-in-opposition within four weeks, petitioner to file reply thereto, if any, within two weeks thereafter. List this matter for final hearing in the monthly list of February, 2023.

At the time of hearing, parties should be ready with the short written notes of arguments.

It is clarified that the pendency of this writ petition will not be a bar for the authority concerned to proceed with the assessment proceeding in the matter."

3. The appellant is aggrieved by that portion of the order where the learned Single Bench had observed that the pendency of the writ petition will not be a bar for the authority concerned to proceed with the assessment proceedings in the matter.

4. The learned Senior Advocate appearing for the appellant would contend that the transfer of jurisdiction passed pursuant to the order dated 29th July, 2021 is vitiated on account of failure to follow the mandatory procedure under Section 127 of the Act in and by which the assessee is entitled to an opportunity of being heard before the assessment jurisdiction

is transferred to the file of a different assessing officer. In fact, this submission has been noted by the learned Single Bench in the impugned order.

5. The order impugned in the writ petition dated 29th July, 2021 states that consequent to search and survey operation conducted in the case of the appellant, it has been proposed to transfer the jurisdiction of the case from Assistant Commissioner of Income Tax / Deputy Commissioner of Income Tax, Circle 13(1), Kolkata to Deputy Commissioner of Income Tax, Central Circle 1, Kanpur, it is the submission of the appellant that no search and survey operations were conducted on the appellant. Ms. Smita Das De, learned senior standing counsel appearing for the respondents, would submit that nexus has been established between the assessee on whom search and survey operation have been conducted and that of the appellant assessee and therefore, for administrative convenience, the assessment had been transferred to Central Circle 1, Kanpur.

6. Section 127 of the Act of 1961 gives power to transfer cases. It states that the Principal Director General or Director General or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner of Commissioner may after giving the assessee a reasonable opportunity of being

heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more Assessing Officers subordinate to him (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (Whether with or without concurrent jurisdiction) also subordinate to him.

7. Thus, the language of Section 127 is clear that the assessee should be given a reasonable opportunity of being heard in the matter before the power under Section 127 of the Act is invoked. The statute is also clear that such opportunity of being heard is to be given wherever it is possible to do so. If the authority proposes to dispense with the opportunity of hearing, the statute states that reasons have to be reocrde3d for not providing such an opportunity. On perusal of the order impugned in the writ petition dated 29th July, 2021, we find that no such reasons have been recorded by the authority for dispensing with the opportunity of personal hearing as no show cause notice was issued to the assessee prior to order of transfer.

8. In any event, the learned Single Bench was of the opinion that the appellant had made out a prima facie case for entertaining the writ petition. But, however, if the

assessment proceedings are to be proceeded by the assessing authority at Kanpur, then the writ petition itself would become infructuous. In any event, we are of the view that since no reasons have been recorded by the authority for dispensing with the opportunity of being heard, we find that there are no such reasons to do so. Therefore, the authority is bound to issue notice to the appellant and afford them a reasonable opportunity of being heard before a decision is taken.

9. For such reason, we are inclined to remand the matter back to the authority for a fresh decision. In the result, the appeal stands disposed of along with the writ petition by directing the appellant to treat the order passed by the Principal Commissioner of Income Tax-5, Kolkata dated 29th July, 2021 as a show cause notice and the appellant shall submit their objection within fifteen days from the date of receipt of the server copy of this judgment and order after which the Principal Commissioner of Income Tax shall afford an opportunity of hearing to the authorised representative of the assessee and pass a speaking order on merit and in accordance with law.

10. It appears that consequent upon the order dated 29th July, 2021, the assessing authority in Kanpur has taken up the re-

assessment proceedings and has passed an order dated 30th July, 2022 under Section 148A(d) of the Act and also issued a notice under Section 148 dated 30th July, 2022.

11. In the light of the above direction issued by us, the order passed under Section 148A(d) of the Act dated 30th July, 2022 and the notice issued under Section 148 dated 30th July, 2022 shall be kept in abeyance and shall abide by the fresh order that may be passed by the Principal Commissioner of Income Tax –5, Kolkata in terms of the above direction.

12. There shall be no order as to costs.

13. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree,

(HIRANMAY BHATTACHARYYA, J.)

AMITAVA NAG/PALLAB(AR.C)