

Form No. J.(2)
Item No.1

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

HEARD ON: 23.04.2024

DELIVERED ON: 23.04.2024

CORAM:

**THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA
M.A.T. 37 of 2023
With
I.A. No. CAN 1 of 2023**

M/s. Poddar Real Estates Pvt. Ltd.

Vs.

Income Tax Officer, Ward – 5(2), Kolkata & Ors.

Appearance:-

Mr. Soumitra Chowdhury

Mr. Pranabesh Sarkar

Mr. Kausheyo Roy

Mr. Samrat Das

Ms. Elina Dey

.....for the Appellant

Mr. Vipul Kundalia

Mr. Amit Sharma

.....for the Income Tax Authority

Mr. Bhaskar Prosad Banerjee

Mr. A. Maity

.....for the CGST & CX Authority

JUDGMENT

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

1. This intra-Court appeal by the writ petitioner is directed against the order dated 19th December, 2022 in W.P.A. No.27884 of 2022. In the said writ petition, the appellant had challenged the assessment passed under Section

148 of the Income Tax Act, 1961 (for brevity, “the Act”) as against the order passed under Section 271(i)(c) of the Act imposing penalty. The assessee has filed an appeal before the Commissioner of Income Tax (Appeals) and the appeal is pending. In the appeal memorandum, a specific ground has been raised by the assessee stating that the income tax return for the assessment year 2009-2010 was filed on 27th February, 2010 declaring a loss of Rs.89,410/-. No notice under Section 147 or Section 148 has been received by the assessee. Similarly, no assessment order dated 2nd December, 2016 was served on the assessee by the I.T.O., no notice under Section 143(2) and 143(1) of the Act was served on the assessee and no notice under Section 271 (1)(c) was served on the assessee and as the assessment order has not been served, the imposition of penalty under Section 271(i)(c) is wrong.

2. When the appeal came up earlier, the department was directed to file their affidavit-in-opposition so that the factual position can be clarified. If it is established that the assessee has not been served with the copy of the assessment order, it goes without saying that the assessee is entitled to an opportunity to put forth their matter. In terms of the directions issued earlier, affidavit in opposition has been filed by the department. From paragraph 9 of the affidavit, it is seen that the PAN jurisdiction over the assessee was transferred to Income Tax Officer, Ward – 5(2), Kolkata from Income Tax Officer Ward –46(1), Kolkata vide order dated 21st January, 2014. Thereafter, the ITO, Ward No.5(2), Kolkata merged with the ITO, Ward 5(1), Kolkata. In the order under Section 127 of the Act, the department admits that the address of the appellant/assessee is mentioned

as 22, BRB Basu Road, Canning Street, 1st Floor, Room NO.14, Kolkata – 700001. Thereafter, the affidavit proceeds to state the further steps taken and in sub- paragraph (e) it is stated that notice under Section 148 was issued by ITO, Ward 5(2), Kolkata on 31st March, 2016 and the service of the said notice was made by affixation by departmental inspector on 31st March, 2016 at the address 37, Abani Dutt Road, 1st Floor, Howrah – 711106. Thus, it is evident that despite the department being aware of the change of address, the notice under Section 148 of the Act has been served by affixing in the old address. This is sufficient to hold that the proceeding, which was taken *ex parte* is not sustainable in law.

3. For the above reasons, the appeal and the connected application (I.A. No. CAN 1 of 2023) are allowed. Consequently, the writ petition is allowed, the order passed under Section 148 and the consequential proceedings are set aside and the matter is restored to the file of the assessing officer. The assessing officer is directed to serve a copy of the notice issued under Section 148 dated 31st March, 2016 in the new address of the appellant within 15 days from the date of receipt of server copy of this order. On receipt of the said notice, the assessee is directed to submit their reply within 30 days therefrom and thereafter, after affording an opportunity to the assessee, the ITO is directed to pass a fresh order on merits and in accordance with law.
4. The learned senior counsel appearing for the department had submitted that the penalty demand notice was served through e-mail on 23rd June, 2017 as well as the earlier notice. The fact remains that the department is aware of the change of the address, which has been clearly noted in

paragraph 9 (e) of the affidavit-in-opposition. Therefore, we have no hesitation to hold that the assessee did not have the adequate opportunity to put forth its case.

5. The above direction be complied with within the time frame as mentioned above.
6. Needless to state that since the proceeding was initiated when Section 148 of the Act was at the pre-amended stage, the law prevailing on the said date would apply to the case on hand.
7. No costs.
8. 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)
CHIEF JUSTICE

I agree.

(HIRANMAY BHATTACHARYYA, J.)