(2016) 10 CAL CK 0003

CALCUTTA HIGH COURT

Case No: Writ Petition No. 62 of 2015

M/s. Remahay Stores Pvt. Ltd. — APPELLANT

Vs

Income Tax Officer — RESPONDENT

Date of Decision: Oct. 4, 2016

Acts Referred:

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1961 - Section 148

Citation: (2016) 4 CalLT 595

Hon'ble Judges: Arijit Banerjee, J.

Bench: Single Bench

Advocate: Mr. N.K. Poddar, Senior Advocate, Mr. V. Tibrewal and Mr. R. Chatterjee, Advocates, for the Petitioner; Mr. Nizamuddin, Advocate, for the Respondent

Final Decision: Disposed Off

Judgement

Arijit Banerjee, J. - The subject matter of challenge in the instant writ petition is a notice dated 31 March, 2014 issued under Section 148 of the Income Tax Act, 1961 (in short "IT Act") by the Income Tax Officer (in short "ITO"), Ward No. 9(3) Calcutta. The impugned notice is a notice of initiation of reassessment proceedings against the petitioner company in respect of assessment year 2007-08. The short grievance of the petitioner is that the impugned notice was sought to be served on the petitioner at its earlier address in spite of the Department being aware of the current address of the petitioner. As such, the petitioner did not receive the notice till a copy of the same was handed over to the petitioner after institution of the instant writ petition. The petitioner prays for quashing of the notice and for a writ of prohibition restraining the respondents from taking any action on the basis of the impugned notice.

Contention of the petitioner:

2. Appearing for the petitioner Mr. Poddar, Learned Sr. Advocate submitted that from a perusal of the impugned notice it appears that the same records both the erstwhile and current addresses of the petitioner company being 1/1A Biplabi Anukul Chandra Street, Electronic Building, 5th Floor, Room No. 5G, Kolkata-700072 and 11/1, Sunny Park, Flat E, Kolkata-700019 respectively. However, the notice was sent by speed post only to the earlier office address of the petitioner and not to the current address and hence the petitioner did not receive the notice. In this connection the petitioner relied on a report of the Inspector attached to the office of the ITO, Ward 9(3), Kolkata. He then referred to a notice dated 29 October, 2014 which referred to the earlier notice dated 31 March, 2014 which is under challenge in the present petition and called upon the petitioner to furnish the return under Section 148 of the IT Act within 30 days failing which reassessment would be done ex parte as per material available on record. In the last week of December, 2014, the petitioner received a notice dated 24 December, 2014 from the office of the ITO, Ward 12 (1), Calcutta intimating that jurisdiction of the case was with his office and the case was re-fixed for hearing on 6 January, 2015 which was the last opportunity for the petitioner to represent his case.

3. By a letter dated 5 January, 2014, the petitioner informed the ITO Ward 12(1) that no notice had been received by it under Section 148 of the IT Act at its registered office at 11/1 Sunny Park, 3rd Floor, Calcutta 700019.

4. The ITO wrote a letter dated 6 January, 2015 to the petitioner mentioning that notice under Section 148 of the IT Act dated 31 March, 2014 had been sent by speed post to the petitioner and had also been served by affixation. The petitioner was called upon to show-cause by filing written reply as to why his income should not be assessed ex parte under Section 144 of the IT Act.

5. By its letter dated 14 January, 2015 the petitioner informed the ITO that it had ascertained from the department of speed post that the notice issued under speed post reference EW571319860IN was not sent to the Sunny Park address where the petitioner''s registered office was located. The petitioner contended that in the absence of service of notice under Section 148, the proceeding by the department was unjustified and illegal.

6. On or about 19 January, 2015, the petitioner filed the instant writ application.

7. Learned Counsel submitted that a copy of the impugned notice dated 31 March, 2014 was supplied to the petitioner company only on 20 April, 2014 in response to the specific request made by the petitioner through its letter dated 12/14 April, 2015.

8. Mr. Poddar submitted that it is true that the income tax return of the petitioner in respect of financial year ending on 31 March, 2007 corresponding to the assessment year 2007-08 was originally filed by the company on 8 October, 2007 wherein earlier address of the petitioner was shown. However, the petitioner changed its office to

the present Sunny Park address with effect from 3 December, 2008. In this connection learned Counsel relied on Form No. 18 filed by the petitioner with the Registrar of Companies, West Bengal, in terms of Section 146 of the Companies Act, 1956.

9. The factum of shifting of office was also intimated to the IT Department vide Form No. 49A prescribed under Rule 114 of the Income Tax Rules, 1962 read with Section 139A(5)(d) of the IT Act, 1961. Upon such intimation the Department issued a new PAN card to the petitioner on 3 July, 2009. The said PAN card was sent to the petitioner under cover of a letter to the current address of the petitioner.

10. Learned Counsel then submitted that the fact that the address of the new registered office of the petitioner was fully known to the Department would also be evident from the following facts:-

(i) Copy of IT Acknowledgement evidencing filing of the Income Tax Return by the Petitioner Assessee Company for the assessment year 2009-10 on 30 September, 2009 showing its said new address.

(ii) Copy of IT Acknowledgement evidencing filing of the Income Tax Return by the Petitioner Assessee Company for the assessment year 2010-11 on 30 September, 2010 showing its said new address.

(iii) Copy of the intimation under Section 143(1) of the said Act in respect of the assessment year 2009-10 issued at the said new address by the Revenue Respondents on 28th December, 2010.

(iv) Copy of IT Acknowledgement evidencing filing of the Income Tax Return by the Petitioner Assessee Company for the assessment year 2011-12 on 20th September, 2011 showing its said new address.

(v) Copy of the intimation under Section 143(1) of the said Act in respect of the assessment year 2010-11 issued at the said new address by the Revenue Respondents on 20th April, 2011.

(vi) Copy of IT Acknowledgement evidencing filing of the Income Tax Return by the Petitioner Assessee Company for the assessment year 2012-13 on 27th September, 2012 showing its said new address.

(vii) Copy of the Notice dated 31st July, 2012 issued under Section 143(2) of the said Act in respect of the assessment year 2011-12.

(viii) Copy of the requisition under Section 142(1) of the said Act for the assessment year 2011-12 dated 4th July, 2013 made by the then Assessing Officer, the Respondent No. 2 herein.

(ix) Copy of the Notice dated 8th August, 2013 issued under Section 143(2) of the said Act in respect of the assessment year 2012-13.

(x) Copy of the Acknowledgement evidencing filing of Income Tax Return by the Writ Petitioner on 27th September, 2013 in respect of the assessment year 2013-14.

(xi) Copy of the Assessment Order dated 23rd October, 2013 passed by the then Assessing Officer, the Respondent No. 2 herein, under Section 143(2) of the said Act, in the case of the Writ petitioner, in respect of the assessment year 2011-12.

(xii) Copy of the Notice issued by the Commissioner of Income Tax, Kolkata-III, Kolkata having jurisdiction over the Petitioner Assessee Company under section 263 of the said Act for the assessment year 2009-10 at the said new address on 28th November, 2013.

(xiii) Copy of the Notice issued by the Commissioner of Income Tax, Kolkata – III, Kolkata having jurisdiction over the Petitioner Assessee Company under Section 263 of the said Act for the assessment year 2008-09 at the said new address on 15th January, 2014.

11. Learned Counsel then referred to Section 148 of the IT Act and submitted that the said provision requires that before initiating proceedings for assessment/re-assessment/re-computation under Section 147 of the IT Act, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period as may be specified in the notice, a return of his income in respect of which he is assessable under the Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed. Service of Section 148 notice (corresponding to Section 34 of the IT Act, 1922) is a condition precedent for initiating any proceedings for assessment/re-assessment/re-computation under Section 147 of the IT Act. In this connection learned Counsel relied on the Apex Court decisions in the cases of **CIT v. Thayaballi Mulla Jeevaji Kapasi, (1967) 66 ITR 147 (SC)**, and **CIT v. Kurban Hussain Ibrahimji Mithiborwala, (1971) 82 ITR 821**. Mr. Poddar submitted that if notice under Section 146 is not validly issued and/or served upon an assessee, the ITO would have no jurisdiction to proceed with the matter and the entire proceedings taken by him pursuant to such invalid notice would be void for want of jurisdiction. In this connection he also relied on two decisions of this court in the cases of **Rameshwar Sirkar v. Income Tax Officer, (1973) 88 ITR 374 (Cal)** and **Gajendra Kumar Banthia v. Union of India, (1996) 222 ITR 632 (Cal).**

12. Learned Counsel then referred to Section 282 of the IT Act which provides for the mode of service of a notice or summon or requisition or order or any other commutation under this Act. He also referred to O. 5 Rules 17-20 of the CPC, 1908 as regards mode of service. On this point, learned Counsel relied on the following seven decisions:-

(a) **Rameshwar Sirkar v. ITO, (1973) 88 ITR 374 (Cal).**

(b) **CIT v. Thayaballi Mulla Jeevaji Kapasi, (1967) 66 ITR 147 (SC).**

(c) **Lakshmi Narayan Prasad Bhagat v. State of West Bengal & Ors. (1979) 118 ITR 454 (Cal).**

(d) **Ramendra Nath Ghosh v. CIT (1967) 66 ITR 414 (Cal).**

(e) **Gopiram Agarwalla v. First Addl. Income Tax Officer (1959) 37 ITR 493 (Cal).**

(f) **Thomas (M.O.) v. CIT (1963) 47 ITR 775, 778, 780 (Ker).**

(g) **Kiran Machines v. ITO (2007) 295 ITR 4 (Mad).**

13. Learned Counsel submitted that it is now settled law that the mere fact that the serving officer does not find the party to be served with the notice at his address is not sufficient to establish that he cannot be found. It must be shown not only that the serving officer went to the place at a reasonable time when the assessee would be expected to be present but also that if he was not found, proper and reasonable attempts were made to find him either at that address or elsewhere. A notice by affixture without reasonable attempts to find the assessee is not a proper notice. In the instant case, the Inspector who allegedly tried to serve the notice by affixation did not follow any of the rules and procedures prescribed by statute as explained by judicial precedents. As such in the absence of service of notice under Section 148 of the IT Act on the petitioner, all proceedings taken in pursuance thereof are without jurisdiction, illegal and void ab initio.

Contention of the respondents:-

14. Before recording the submissions made on behalf of the respondents, I should record that direction for exchange of affidavits was given by this Court on 3 February, 2015. On 11 May, 2015, the writ petitioner was granted liberty to file supplementary affidavits and the respondents were permitted to file comprehensive affidavit-in-opposition dealing with the allegations in the writ petition as also in the three supplementary affidavits. However, the respondents have chosen not to file any affidavit. Oral submissions have been made on behalf of the respondents and a written notes of arguments has also been filed on their behalf.

15. Appearing on behalf of the Department, Mr. Nizamuddin, Learned Counsel submitted that after institution of the writ petition, pursuant to request made by the petitioner by letter dated 12/14 April, 2015, copy of the impugned notice was supplied to the petitioner. Hence, the petitioner''s grievance regarding non-service of the impugned notice has already been redressed.

16. Learned Counsel then submitted that the limitation period prescribed under Section 149 of the IT Act is for ''issuance of notice'' and not ''service of notice'' under Section 149(1)(b) of the IT Act. The Department had time till 31 March, 2015 to issue notice under Section 148. The notice was issued much prior thereto and was despatched through usual machinery. Whether or not the notice was received by

the petitioner is a disputed question of fact which the writ Court will not go into.

17. Learned Counsel submitted that during the pendency of the writ petition, the petitioner requested for the reasons recorded by the Assessing Officer for issuance of the impugned notice and the same were furnished to the petitioner by letter dated 23 February, 2015. It is significant that the petitioner filed objection to the said recorded reasons by its letter dated 5 March, 2015, but in the said objection there is no whisper of non-service of the impugned notice or about the notice being time barred. The petitioner merely recorded its objections on merits to the grounds for reopening the assessment. It was much later i.e. by letter dated 12/14 April, 2015 that the petitioner asked for a copy of the impugned notice.

18. It was next submitted that the condition precedent for issuance of a notice under Section 148 of the IT Act is that the Assessing Officer would record reasons for issuing the same and the notice shall be issued within the time prescribed under Section 149 of the IT Act. In the present case, the reasons were duly recorded and the notice was issued and despatched through the postal department apart from affixation within statutory time period. Further, it is nobody''s case that the authority issuing the notice lacked jurisdiction. He submitted that the impugned notice is in the nature of a show cause notice and the writ Court should not interfere with the notice at this stage. He relied on a decision of the Hon''ble Apex Court in the case of **Raymond Woollen Mills Ltd. v. Income Tax Officer, (1999) 236 ITR 34**, wherein in the context of a challenge to a notice under Section 147 of the IT Act, the Hon''ble Apex Court observed that it is only to be seen whether there was prima facie some material on the basis of which the department could reopen the case. Sufficiency and correctness of the material is not a thing to be considered at that stage and it would be open to the assessee to prove that the assumption of facts made in the notice was erroneous.

19. Learned Counsel finally submitted that the IT Act is a self-contained code providing adequate remedy to an aggrieved party. If the petitioner is dissatisfied with the re-assessment order passed pursuant to the impugned notice, he can challenge the same by way of appeal before the Commissioner of Income Tax (Appeals), thereafter before the Income Tax Appellate Tribunal and then by way of appeal to this Court. Learned Counsel submitted that in view of availability of such alternative remedy, the instant writ petition should not be entertained. In any event, at the highest this Court would set aside the order passed pursuant to the impugned notice and remand the matter back to the Assessing Officer for fresh assessment in accordance with law.

Court''s View:-

20. Two questions fall for determination in this case. Firstly, whether or not the notice under Section 148 of the Income Tax Act was duly served on the petitioner? Secondly, if the answer to the first question is in the negative, what is the effect of

such non-service of notice on the proceedings or action taken in pursuance of such notice?

21. The specific case of the petitioner is that its registered office was shifted from Biplabi Anukul Chandra Street address to Sunny Park address with effect from 3 December, 2008. The petitioner has disclosed Form 18 filed under Section 146 of the Companies Act, 1956 to corroborate the aforesaid fact. This fact is also not denied by the respondents even in course of making submission.

22. The petitioner has also disclosed copies of IT Return acknowledgement forms for the assessment years 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14 issued by the Department which mention the Sunny Park address of the petitioner. The petitioner has also brought on record copies of notices issued by the Department to the petitioner under Section 143(1) of the IT Act pertaining to various assessment years starting from 2009-10, all of which were sent to the Sunny Park address of the petitioner. Hence, it is beyond any doubt that the Department was well-aware of the current address of the petitioner.

23. From the report of the Inspector attached to the office of the IT Act, Ward-9(3), Calcutta, it is evident that the said Inspector attempted to contact the petitioner at its erstwhile address at Biplabi Anukul Chandra Street and not having found the petitioner there, affixed a copy of the notice under Section 148 of the IT Act at the said address. This report is dated 31 March, 2014. Although this report mentions that the said address was last known address of the petitioner, such statement is obviously incorrect. As stated above, starting from 2009-10 the Department has sent all correspondences and notices to the petitioner at its Sunny Park address. Further, the Department has disclosed no document to show that Section 148 notice was even sought to be served at the petitioner''s Sunny Park address nor any such point was urged in the course of making oral submission by Learned Counsel for the respondents.

Hence, it appears to be absolutely clear that the notice under Section 148 of the IT Act was never served on the petitioner at its Sunny Park address. In this connection I may refer to the decision of the Hon''ble Apex Court in the case of Commissioner of Income Tax v. Thayaballi Mulla Jeevaji Kapasi (supra), wherein the Hon''ble Apex Court referred to its earlier decision in the case of **Gopi Ram Agarwala v. First Income Tax Officer (1959) 37 ITR 439**, wherein it was held that the mere fact that the serving officer did not find the party to be served with the notice at his address is not sufficient to establish that he cannot be found. It must be shown not only that the serving officer went to the place at a reasonable time when he would be expected to be present, but also that if he was not found, proper and reasonable attempts were made to find him either at that address or elsewhere. If after such reasonable attempts the position still was that the party is not found, then and then only can it be said that he cannot be found.

In the instant case, it does not appear that any attempt was made by the serving officer to find the assessee at any other address. Indeed, I am at a loss to understand why the notice was sought to be served at the erstwhile address of the petitioner when the Department was fully aware of the shifting of the registered office of the petitioner to Sunny Park and had the current Sunny Park address in its records.

24. In Gajendra Kumar Banthia (supra), a Division Bench of this court held that in terms of Section 282 of the IT Act, a notice has to be served in the manner laid down in the Code of Civil Procedure which provides that service of summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as appointed in this behalf and sealed with the seal of the Court. Delivering or tendering the same is the sine qua non of such service. In Lakshmi Narayan Prasad Bhagat v. State of West Bengal (supra), a learned Judge of this court held that under the provisions of the Bengal Agricultural Act, 1944 and the Rules framed thereunder, even though an assessee has not filed his return of the agricultural income pursuant to a general notice, it is the obligation of the appropriate authorities to serve a notice under Section 24(1) or (2) of the Act or make an attempt to have the notice served on the assessee duly and personally before the notice is served by affixation. Hence, when there was no due and proper service of notices at any stage of the proceeding, be it at the initial stage or at the stage of the certificate proceeding, the service of notice by affixation would be invalid. (emphasis added is mine). In Ramendra Nath Ghosh v. Commissioner of Income Tax (supra), a notice of hearing was served on the assessee by post long after the hearing date. A Division Bench of this Court held that service by affixture was not proper service as provided in Order 5, Rule 17 of the CPC as the house on which the notice was served was not the residence of the appellant and the company which had been occupying the house and with which the appellant had been connected had gone into liquidation before the affixture. In Gopiram Agarwalla v. First Additional Income Tax Officer (supra), a Division Bench of this Court reiterated that the mere fact that the serving officer does not find the party to be served with the notice at the address is not tantamount to saying that he cannot be found. Before it can be said that the party cannot be found it must be shown not only that the serving officer went to the place at a reasonable time when he would be expected to be present but also that if he was not found, proper and reasonable attempts were made to find him either at that address or elsewhere. In Thomas (M.O) v. Commissioner of Income Tax (supra), a Division Bench of the Kerala High Court held that in view of the provisions contained in Section 63 of the Income Tax Act, 1922 (corresponding to Section 282 of the IT Act 1961), the procedure prescribed in O. 5 of the CPC must be strictly observed in serving notices under the IT Act. In Kiram Machines v. ITO (supra), a learned Judge of the Madras High Court held that in the facts of that case, the assessing officer had not recorded any satisfaction in his order that notice could not be served personally, before causing service of notice by affixture. Under Order 5, Rule 20 (1A)

of the CPC, the assessing officer could have ordered publication in a newspaper if the address of the assessee was not known or could not be furnished by his representative. That too, had not been done in that case. When an order of assessment levying tax is being passed, it is incumbent upon the assessing officer to serve the notice in accordance with the provisions. This had not been done. Thus, the principles of natural justice had been violated and on that ground the assessment order was liable to be set aside.

25. In view of the aforesaid, I have to hold that notice under Section 148 of the IT Act was not duly served on the petitioner.

26. Coming to the second question, I have no hesitation in holding that due and proper service of notice under Section 148 of the IT Act within the limitation period prescribed under Section 149 of the Act on the assessee is a condition precedent for initiation of re-assessment proceedings. This proposition of law has been long settled by a catena of cases. In CIT v. Thayaballi Mulla Jeevaji Kapasi (supra), the Hon''ble Supreme Court held that service of notice under Section 34 (1)(a) of the IT Act, 1922 (corresponding to Section 148 of the IT Act, 1961) within the period of limitation is a condition precedent to the exercise of jurisdiction. In CIT v. Kurban Hussain Ibrahimji Mithiborwala (supra), the Hon''ble Supreme Court held that the income tax officer''s jurisdiction to reopen an assessment depends upon the issuance of a valid notice to the assessee. If the notice issued is invalid for any reason, the entire proceedings taken by him would become void for want of jurisdiction. Similarly in Rameshwar Sirkar v. Income Tax Officer (supra), Sabyasachi Mukharji, J. (as his Lordship then was) observed that the service of notice under Section 148 is mandatory and is a condition precedent for the initiation of reassessment proceedings.

27. There does not seem to be any doubt that a re-assessment proceeding or an order passed in such proceeding without duly serving notice under Section 148 of the IT Act on the assessee, is void ab initio and a nullity in the eye of law. This must be the position in law since reopening of an assessment by the Department without duly notifying the assessee and without giving him an opportunity to oppose such a decision clearly amounts to breach of principles of natural justice. It cannot be gain-said that natural justice is one of the principal pillars of legal justice. Any action taken or any order passed by an authority in infraction of the rules of natural justice must be held to be null and void and of no effect whatsoever. Audi alteram partem no person can be condemned unheard. No order can be passed by an authority which is likely to visit a person with adverse civil consequences without affording him an opportunity of hearing.

28. In view of the aforesaid I am impelled to hold that any proceeding initiated by the Department pursuant to the notice dated 31 March, 2014 issued under Section 148 of the IT Act or any order passed in such proceeding is bad in law and of no effect. Such proceeding and order passed therein, if any, are hereby quashed.

29. Learned Counsel for the respondents urged that there is an alternative remedy available to the petitioner by way of statutory appeal under the IT Act and therefore this writ petition should not be entertained. While it is true that the Writ Court normally would not intervene when the aggrieved party has an efficacious alternative remedy available to him and particularly a remedy prescribed under the relevant statute, this is not a rule of law but only a rule of practise. It is settled law that when an action is taken or an order is passed by an authority in flagrant violation of the principles of natural justice, the Writ Court would be justified in interfering notwithstanding the existence of an alternative remedy. See **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai, (1998) 8 SCC 1).**

30. The petitioner has also prayed for quashing of the notice dated 31 March, 2014 issued under Section 148 of the IT Act. I am not inclined to do so. The assessing officer was well within his jurisdiction in issuing the notice. On the request of the petitioner the assessing officer also furnished to the petitioner the reasons for issuing such notice. It is not for this court to adjudge whether such reasons are good or bad so long as they are not perverse. The notice is really in the nature of a show-cause notice and the Writ Court normally does not interfere with such a notice. It is open to the noticee to respond to such notice and urge as to why the action proposed in such notice should not be taken. In the present case, the petitioner is at liberty to give its reply to the notice under Section 148 and also to participate in the reassessment proceedings if its Return for the relevant year is reopened. It has full opportunity to protect its interest and to contend as to why there should be no reassessment of its income for the relevant year. Needless to say, the assessing officer will grant the petitioner full opportunity of hearing in the matter.

31. Further, if the notice impugned is quashed, that would put an end to the possibility of any reassessment proceeding. Any fresh notice issued under Section 148 for the assessment year 2007-08 would be barred by limitation. That would not be a desirable position.

32. In conclusion, I hold that any reassessment proceeding initiated by the Department pursuant to the notice dated 31 March, 2014 which is impugned in this application or any order passed in such proceeding is bad in law and of no effect. The same are quashed. However, the Department will not be prevented from proceeding afresh in terms of the notice dated 31 March, 2014 and will give full opportunity of hearing with adequate notice to the petitioner. Being a public authority, I trust and believe that the Department will act fairly, reasonably and in compliance with the principles of natural justice. The reassessment proceedings, if initiated, should be completed as expeditiously as possible and definitely within a period of six months from date.

33. WP No. 62 of 2015 is accordingly disposed of. There will be no order as to costs.

34. Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.