

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G': NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.4832/Del/2018
Assessment Year : 2010-11

M/s SMA Construction
Pvt.Ltd.,
(Now amalgamated with
Buniyad Developers
Pvt.Ltd.),
A-54, Naraina Industrial
Area, Phase-1,
New Delhi – 110 028.
PAN : AAJCS5264N.

Vs. Principal Commissioner of
Income Tax-8,
New Delhi – 110 002.

(Appellant)

(Respondent)

Appellant by : Shri Rajeev Saxena, Advocate.
Respondent by : Shri S.S. Rana, CIT-DR.

Date of hearing : 07.03.2019
Date of pronouncement : 18.03.2019

ORDER

PER G.D. AGRAWAL, VICE PRESIDENT :-

This appeal by the assessee for the assessment year 2010-11 is directed against the order of learned Principal CIT-8, New Delhi dated 30th March, 2017.

2. In this appeal, the assessee has raised various grounds. However, they are all against the order passed under Section 263 of the Income-tax Act, 1961.

3. By way of ground Nos.1 & 2, the assessee has claimed that the order passed under Section 263 in the name of non-existent entity is void ab-initio.

4. At the time of hearing before us, it is stated by the learned counsel that the Principal Commissioner of Income-tax-8, New Delhi has passed the order under Section 263 on 30th March, 2017 in the name of M/s SMA Construction Pvt.Ltd. He stated that the above mentioned company is non-existent on the above date because of its amalgamation with M/s Buniyad Developers Pvt.Ltd. That the scheme of amalgamation has been approved by the Hon'ble Jurisdictional High Court vide order dated 27th September, 2011 and, by which, the amalgamation is approved with effect from the appointed date i.e., 1st April, 2009. Thus, after the approval of amalgamation, M/s SMA Construction Pvt.Ltd. is no more in existence and it is only M/s Buniyad Developers Pvt.Ltd., which is the transferee company as per the scheme of amalgamation, is in existence. He stated that the order under Section 263 passed on a non-existent entity is void ab-initio and nullity. In this regard, he relied upon the decision of Hon'ble Jurisdictional High Court in the case of Spice Entertainment Ltd. – 247 CTR 500.

5. Learned DR, on the other hand, relied upon the decision of Hon'ble Jurisdictional High Court in the case of Sky Light Hospitality LLP Vs. ACIT – [2018] 405 ITR 296 (Delhi). He further pointed out that Hon'ble Supreme Court has dismissed the SLP against the above judgment of Hon'ble Delhi High Court in the case of Sky Light Hospitality LLP. He, however, has not disputed the factual submission made by the learned counsel that the scheme of amalgamation is approved by Hon'ble Delhi High Court and, after the approval of the scheme, the assessee company stood amalgamated and transferred to M/s Buniyad Developers Pvt.Ltd.

6. We have carefully considered the arguments of both the sides and perused the material placed before us. We find that in the case of

Sky Light Hospitality LLP (supra) relied upon by the learned DR, the notice under Section 148 was issued in the name of M/s Sky Light Hospitality Private Limited. The legal position is that on the date of issue of notice, this company had ceased to exist and was dissolved upon conversion into limited liability partnership. The question before the Hon'ble Jurisdictional High Court was with regard to validity of issue of notice under Section 148 on the non-existent person. The Hon'ble High Court upheld the validity of the issue of notice with the following finding in paragraph 17 of their order :-

“17. In the context of the present writ petition, the aforesaid ratio is a complete answer to the contention raised on validity of the notice under Section 147/148 of the Act as it was addressed to the erstwhile company and not to the limited liability partnership. There was no doubt and debate that the notice was meant for the petitioner and no one else. Legal error and mistake was made in addressing the notice. Noticeably, the appellant having received the said notice, had filed without prejudice reply/letter dated 11.04.2017. They had objected to the notice being issued in the name of the Company, which had ceased to exist. However, the reading of the said letter indicates that they had understood and were aware, that the notice was for them. It was replied and dealt with by them. The fact that notice was addressed to M/s Sky Light Hospitality Pvt. Ltd., a company which had been dissolved, was an error and technical lapse on the part of the respondent. No prejudice was caused.”

Hon'ble Jurisdictional High Court has also referred to Section 292B.

7. On the other hand, in the decision relied upon by the learned counsel for the assessee in the case of Spice Entertainment Ltd. (supra), Hon'ble Delhi High Court held as under :-

“15. Likewise, in the case of Sri Nath Suresh Chand Ram Naresh Vs. CIT (2006) 280 ITR 396, the Allahabad High Court held that the issue of notice under Section 148 of the Income Tax Act is a condition precedent to the validity of

any assessment order to be passed under section 147 of the Act and when such a notice is not issued and assessment made, such a defect cannot be treated as cured under Section 292B of the Act. The Court observed that this provisions condones the invalidity which arises merely by mistake, defect or omission in a notice, if in substance and effect it is in conformity with or according to the intent and purpose of this Act. Since no valid notice was served on the assessee to reassess the income, all the consequent proceedings were null and void and it was not a case of irregularity. Therefore, Section 292B of the Act had no application.

16. When we apply the ratio of aforesaid cases to the facts of this case, the irresistible conclusion would be provisions of Section 292B of the Act are not applicable in such a case. The framing of assessment against a non-existing entity/person goes to the root of the matter which is not a procedural irregularity but a jurisdictional defect as there cannot be any assessment against a „dead person“.

17. The order of the Tribunal is, therefore, clearly unsustainable. We, thus, decide the questions of law in favour of the assessee and against the Revenue and allow these appeals.

18. We may, however, point out that the returns were filed by M/s Spice on the day when it was in existence it would be permissible to carry out the assessment on the basis of those returns after taking the proceedings afresh from the stage of issuance of notice under Section 143(2) of the Act. In these circumstances, it would be incumbent upon the AO to first substitute the name of the appellant in place of M/s Spice and then issue notice to the appellant. However, such a course of action can be taken by the AO only if it is still permissible as per law and has not become time barred.”

8. After considering both the above decisions of Hon'ble Delhi High Court, we find that the decision of Sky Light Hospitality LLP (supra) would be applicable while considering the applicability of validity of notice, while, for considering the validity of a final order, the decision of Spice Entertainment Ltd. (supra) would be applicable. Their Lordships have clearly held that while considering the validity of an order, Section 292B would not be applicable because the framing of an

assessment against a non-existent entity goes to the root of the matter which is not a procedural irregularity but a jurisdictional defect as there cannot be any assessment against a dead person. The above observation would be squarely application with regard to order under Section 263. When on the date of order under Section 263 admittedly the company M/s SMA Construction Pvt.Ltd. is not in existence, any order passed on a non-existent entity would be nullity. We, therefore, respectfully following the decision of Hon'ble Jurisdictional High Court in the case of Spice Entertainment Ltd. (supra), hold that the order passed under Section 263 in the case of M/s SMA Construction Pvt.Ltd. was void ab-initio and nullity. The same is quashed.

9. In the result, the appeal of the assessee is allowed.
Decision pronounced in the open Court on 18.03.2019.

Sd/-
(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Sd/-
(G.D. AGRAWAL)
VICE PRESIDENT

VK.

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1. Appellant : **M/s SMA Construction Pvt.Ltd.,
(Now amalgamated with Buniyad Developers
Pvt.Ltd.), A-54, Naraina Industrial Area, Phase-1,
New Delhi – 110 028.**
2. Respondent : **Principal Commissioner of Income Tax-8,
New Delhi – 110 002.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar