

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 4032/MUM/2018 (A.Y: 2008-09)

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| Income Tax Officer - 8(3)(3) Room No. 616, 6 th Floor Aayakar Bhavan M.K. Road Mumbai-400 020 | v. | M/s. Superwave Constructions Pvt. Ltd., {Amalgamated with M/s. Valentine Mercantile Pvt. Ltd.,} Flat No. 253, 25 th Floor Kalpataru Horizon, S.K. Ahire Marg Worli, Mumbai – 400 031 PAN: AAJCS3336H |
| (Appellant) | | (Respondent) |

Assessee by : **Shri N. Kapadia &
Shri Navinkumar Mishra**

Department by : **Shri Chaudhary Arunkumar Singh**

Date of Hearing : **22.08.2019**

Date of Pronouncement : **11.09.2019**

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)–14, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 14.03.2018 for the A.Y. 2008-09.

2. Revenue has raised following grounds in its appeal: -

"1. *Whether on the facts and in the circumstances of the case and in the Ld. CIT(A) has erred in holding that the assessment order passed by the AO without*

-serving any notice to the successor, in the name of nonexistent concern viz. M/s, Superwave Construction P. Ltd. Is null and void without appreciating the facts as under:

- a) Assessee company has never objected the notice issued u/s. 148 of the I.T, Act. However, the assessee has raised the objection with regard to its amalgamation, in response to notice u/s. 142(1) of the IT, Act, which was subsequently dealt with and thereafter assessee has attended regularly and cooperated in inquiry relating to the assessment proceedings.*
- b) Once the assessee company has appeared in assessment proceedings and co-operated in inquiry relating to an assessment, it shall be deemed that notice has been served upon him in time in accordance with the provisions of section 292BB and such assessee shall be precluded from taking any objection that notice was served upon him in an improper manner.*
- c) The assessee did not raised the issue of non-existence of company even at the time of filing of appeal. The issue was raised during the course of appellate proceeding by making additional ground of appeal and Ld. CIT(A) allowed to file additional ground of appeal which may not be allowed as it was not raised due to additional evidence or new circumstances.”*

3. Briefly stated the facts are that, the Assessing Officer reopened the assessment by issue of notice u/s. 148 of the Act dated 30.03.2015. Assessing Officer also issued notice u/s. 143(2) and 142(1) of the Act calling for details in the name of M/s. Superwave Constructions Pvt. Ltd. In the course of the assessment proceedings and in response to notice u/s. 142(1) of the Act, the assessee by various letters submitted that M/s. Superwave Constructions Pvt. Ltd., is not in existence as on date as the said company got amalgamated with M/s. Valentine Mercantile Pvt. Ltd., as per the order of the Hon'ble Bombay High Court dated 19.10.2012. However, the Assessing Officer completed the assessment on 18.03.2016 u/s. 143(3) r.w.s. 147 of the Act by making addition u/s. 68 of the Act in the name of amalgamating company namely M/s. Superwave

Constructions Pvt. Ltd., with respect to share capital and share premium received by the assessee.

4. The assessee preferred appeal before the Ld.CIT(A) on the addition made u/s. 68 of the Act. In the course of the proceedings before the Ld.CIT(A) the assessee raised an additional ground challenging the validity of the assessment order passed in the name of M/s. Superwave Constructions Pvt. Ltd., as this company was amalgamated with M/s.Valentine Mercantile Pvt. Ltd., w.e.f. 19.10.2012 and since the Assessing Officer passed re-assessment order dated 18.03.2016 on a non-existing entity. The Ld.CIT(A) to verify the submission of the assessee that in the course of the assessment proceedings it was brought to the notice of the Assessing Officer by the assessee that M/s.Superwave Constructions Pvt. Ltd., was amalgamated with M/s. Valentine Mercantile Pvt. Ltd., and no more in existence, a remand report was called for. In the remand report dated 06.02.2018 the Assessing Officer has accepted that the fact of amalgamation of M/s. Superwave Constructions Pvt. Ltd., with M/s. Valentine Mercantile Pvt. Ltd., was brought to the notice of the Assessing Officer by the assessee vide its letter dated 14.08.2015. Taking the facts on record that despite the fact that the assessee intimating the Assessing Officer that M/s. Superwave Constructions Pvt. Ltd., was not in existence as on date i.e. when the notices were issued

u/s. 148, 143(2) and 142(1) of the Act, and it was amalgamated with M/s.Valentine Mercantile Pvt. Ltd., w.e.f. 19.10.2012, and also since the Assessing Officer has not issued any notice in the name of the amalgamated company M/s. Valentine Mercantile Pvt. Ltd., and instead completed the assessment on a non-existing entity i.e. M/s. Superwave Constructions Pvt. Ltd., the Ld.CIT(A) quashed the re-assessment made by the Assessing Officer following various decisions of the Tribunal of the Mumbai Benches. Against this order the Revenue is in appeal before us.

5. Ld. DR vehemently supported the order of the Assessing Officer and relied on various case laws in his written submissions.

6. Ld. Counsel for the assessee on the other hand submitted that, assessee has intimated the Assessing Officer by letter dated 15.12.2015 that M/s. Superwave Constructions Pvt. Ltd., has been amalgamated with M/s. Valentine Mercantile Pvt. Ltd., and a copy of the order of the Hon'ble Bombay High Court was also furnished before the Assessing Officer and requested for cancellation of PAN of the assessee. The Ld. Counsel for the assessee also referring to various other letters which were filed in the course of the assessment proceedings in response to the notice u/s.142(1) submitted that assessee intimated that M/s. Superwave Constructions Pvt. Ltd., is not in existence as on date since amalgamated

into M/s. Valentine Mercantile Pvt. Ltd., w.e.f 19.10.2012. Ld. Counsel for the assessee submits that since the Assessing Officer has not issued any notice in the name of the amalgamated company and completed the assessment in the name of the amalgamating company i.e. M/s. Superwave Constructions Pvt. Ltd., which is a non-existing entity, the reassessment order made is bad in law. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of Pr.CIT v. Maruti Suzuki India Limited [107 taxman.com 375] and CIT v. Spice Entertainment Ltd. in Civil Appeal No. 285 of 2014 dated 02.11.2017. Ld. Counsel for the assessee also filed a chart showing the similarities between the facts and merits of the assessee's case and that of the decision of the Hon'ble Supreme Court in the case of Pr.CIT v. Maruti Suzuki India Limited (supra). He submits that that the decisions squarely apply to the facts of the assessee's case.

7. We have heard the rival submissions, perused the orders of the authorities below. It is an undisputed fact that the assessee had intimated the Assessing Officer that the amalgamating company M/s. Superwave Constructions Pvt. Ltd., was amalgamated with M/s. Valentine Mercantile Pvt. Ltd., by virtue of the order of the Hon'ble Bombay High Court dated 19.10.2012. Copy of the order of the Hon'ble Bombay High Court was also submitted before the Assessing Officer. Assessee also requested for

cancellation of PAN. Even in response to the notice u/s. 148, 142(1) of the Act and in the course of the assessment proceedings the assessee brought to the notice of the Assessing Officer that the company M/s. Superwave Constructions Pvt. Ltd., is no more in existence since amalgamated with M/s. Valentine Mercantile Pvt. Ltd. However, the Assessing Officer completed the assessment on a non-existing entity i.e. M/s. Superwave Constructions Pvt. Ltd., inspite of the submissions made by the assessee on several occasions that this amalgamating company is no more in existence. This fact was also accepted by the Assessing Officer in his remand report furnished before the Ld.CIT(A) as is evident from the order of the Ld.CIT(A).

8. The Hon'ble Supreme Court in the case of Pr.CIT v. Maruti Suzuki India Limited (supra) held that the Assessing Officer assumed jurisdiction to make an assessment in pursuance of the notice u/s. 143(2) of the Act. The notice was issued in the name of the amalgamating company in spite of the fact that the communication to the Assessing Officer was made intimating the fact of amalgamation. Therefore, the initiation of assessment proceedings against an entity which had ceased to exist was void abinitio. While holding so, the Hon'ble Supreme Court held as under:

"29. From a reading of the order of this Court dated 6 April 2018 in the Special Leave Petition filed by Skylight Hospitality LLP against the judgment of the Delhi High Court rejecting its challenge, it is evident that the peculiar facts of the case weighed with this Court in coming to this conclusion that there was only a clerical

mistake within the meaning of Section 292B. The decision in Skylight Hospitality LLP has been distinguished by the Delhi, Gujarat and Madras High Courts in:

- (i) Rajender Kumar Sehgal;
- (ii) Chandreshbhai Jayantibhai Patel; and
- (iii) Alamelu Veerappan.

30. There is no conflict between the decisions of this Court in Spice Entofainment (dated 2 November 2017)³⁶ and in Skylight Hospitality LLP (dated 6 April 2018³⁷).

31. Mr Zoheb Hossain, learned Counsel appearing on behalf of the Revenue urged during the course of his submissions that the notice that was in issue in Skylight Hospitality Pvt. Ltd. was under Sections 147 and 148. Hence, he urged that despite the fact that the notice is of a jurisdictional nature for reopening an assessment, this Court did not find any infirmity in the decision of the Delhi High Court holding that the issuance of a notice to an erstwhile private limited company which had since been dissolved was only a mistake curable under Section 292B. A close reading of the order of this Court dated 6 April 2018, however indicates that what weighed in the dismissal of the Special Leave Petition were the peculiar facts of the case. Those facts have been noted above. What had weighed with the Delhi High Court was that though the notice to reopen had been issued in the name of the erstwhile entity, all the material on record including the tax evasion report suggested that there was no manner of doubt that the notice was always intended to be issued to the successor entity. Hence, while dismissing the Special Leave Petition this Court observed that it was the peculiar facts of the case which led the court to accept the finding that the wrong name given in the notice was merely a technical error which could be corrected under Section 292B. Thus, there is no conflict between the decisions in Spice Entofainment on the one hand and Skylight Hospitality LLP on the other hand. It is of relevance to refer to Section 292B of the Income Tax Act which reads as follows: “

“292B. No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.”

In this case, the notice under Section 143(2) under which jurisdiction was assumed by the assessing officer was issued to a non-existent company. The assessment order was issued against the amalgamating company. This is a substantive illegality and not a procedural violation of the nature adverted to in Section 292B.

In this context, it is necessary to advert to the provisions of Section 170 which deal with succession to business otherwise than on death. Section 170 provides as follows:

“170. (1) Where a person carrying on any business or profession (such person hereinafter in this section being referred to as the predecessor) has been succeeded therein by any other person (hereinafter in this section referred to as the successor) who continues to carry on that business or profession,—

(a) the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession;

(b) the successor shall be assessed in respect of the income of the previous year after the date of succession.

(2) Notwithstanding anything contained in sub-section (1), when the predecessor cannot be found, the assessment of the income of the previous year in which the succession took place up to the date of succession and of the previous year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor, and all the provisions of this Act shall, so far as may be, apply accordingly.

(3) When any sum payable under this section in respect of the income of such business or profession for the previous year in which the succession took place up to the date of succession or for the previous year preceding that year, assessed on the predecessor, cannot be recovered from him, the 99[Assessing] Officer shall record a finding to that effect and the sum payable by the predecessor shall thereafter be payable by and recoverable from the successor and the successor shall be entitled to recover from the predecessor any sum so paid.

(4) Where any business or profession carried on by a Hindu undivided family is succeeded to, and simultaneously with the succession or after the succession there has been a partition of the joint family property between the members or groups of members, the tax due in respect of the income of the business or profession succeeded to, up to the date of succession, shall be assessed and recovered in the manner provided in section 171, but without prejudice to the provisions of this section. *Explanation.—For the purposes of this section, “income” includes any gain accruing from the transfer, in any manner whatsoever, of the business or profession as a result of the succession”*

Now, in the present case, learned Counsel appearing on behalf of the respondent submitted that SPIL ceased to be an eligible assessee in terms of the provisions of Section 144C read with clause (b) of sub section 15. Moreover, it has been urged that in consequence, the final assessment order dated 31 October 2016 was beyond limitation in terms of Section 153(1) read with Section 153 (4). For the purposes of the present proceeding, we do not consider it necessary to delve into that aspect of the matter having regard to the reasons which have weighed us in the earlier part of this judgment.

32. On behalf of the Revenue, reliance has been placed on the decision of this Court in *Commissioner of Income Tax, Shillong v Jai Prakash Singh* (“*Jai Prakash Singh*”). That was a case where the assessee did not file a return for three assessment years and died in the meantime. His son who was one of the legal representatives filed returns upon which the assessing officer issued notices under Section 142 (1) and Section 143 (2). These were complied with and no objections were raised to the assessment proceedings. The assessment order mentioned the names of all the legal representatives and the assessment was made in the status of an individual. In appeal, it was contended that the assessment proceedings were void as all the legal representatives were not given notice. In this backdrop, a two judge Bench of this Court held that the assessment proceedings were not null and void, and at the worst, that they were defective. In this context, reliance was placed on the decision of the Federal Court in *Chatturam v CIT39* holding that the

jurisdiction to assess and the liability to pay tax are not conditional on the validity of the notice: the liability to pay tax is founded in the charging sections and not in the machinery provisions to determine the amount of tax. Reliance was also placed on the decision in Maharaja of Patiala v CIT40 ("Maharaja of Patiala"). That was a case where two notices were issued after the death of the assessee in his name, requiring him to make a return of income. The notices were served upon the successor Maharaja and the assessment order was passed describing the assessee as "His Highness...late Maharaja of Patiala". The successor appealed against the assessment contending that since the notices were sent in the name of the Maharaja of Patiala and not to him as the legal representative of the Maharaja of Patiala, the assessments were illegal. The Bombay High Court held that the successor Maharaja was a legal representative of the deceased and while it would have been better to so describe him in the notice, the notice was not bad merely because it omitted to state that it was served in that capacity. Following these two decisions, this Court in Jai Prakash Singh held that an omission to serve or any defect in the service of notices provided by procedural provisions does not efface or erase the liability to pay tax where the liability is created by a distinct substantive provision. The omission or defect may render the order irregular but not void or illegal. Jai Prakash Singh and the two decisions that it placed reliance upon were evidently based upon the specific facts. Jai Prakash Singh involved a situation where the return of income had been filed by one of the legal representatives to whom notices were issued under Section 142(1) and 143(2). No objection was raised by the legal representative who had filed the return that a notice should also to be served to other legal representatives of the deceased assessee. No objection was raised before the assessing officer. Similarly, the decision in Maharaja of Patiala was a case where the notice had been served on the legal representative, the successor Maharaja and the Bombay High Court held that it was not void merely because it omitted to state that it was served in that capacity.

33. *In the present case, despite the fact that the assessing officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Entertainment on 2 November 2017. The decision in Spice Entertainment has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in Spice Entertainment.*

34. *We find no reason to take a different view. There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011-12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable."*

9. As could be seen from the above, the Hon'ble Supreme Court held that when the notice u/s. 143(2) under which the jurisdiction was assumed

by the Assessing Officer was issued to a non-existing company, the Assessment Order which was issued against the amalgamating company it is a substantive illegality and not a procedural violation of the nature adverted to in section 292B of the Act. The Hon'ble Supreme Court held that despite the fact that the Assessing Officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only on the name of the amalgamating company. It was held that the basis on which jurisdiction was invoked was fundamentally wrong when the amalgamating entity ceased to exist upon the approved scheme of amalgamation. It was also held by the Hon'ble Supreme Court that participation in the proceedings by the assessee in the circumstances cannot operate as an estoppel against law and this position still holds the filed in view of the judgment of the Hon'ble Supreme Court in the case of Spice Entertainment which was rendered on 02.11.2017.

10. In the case of before us the Assessing Officer issued notice u/s. 148, 143(2) and 142(1) of the Act in the name of the amalgamating company M/s. Superwave Constructions Pvt. Ltd., and the re-assessment order was also completed u/s. 143(3) r.w.s. 147 of the Act in the name of the M/s. Superwave Constructions Pvt. Ltd., which is a non-existing entity. Therefore, facts being identical, respectfully following the decision of the

Hon'ble Supreme Court in the case of Pr.CIT v. Maruti Suzuki India Limited (Supra), we uphold the order of the Ld.CIT(A) and reject the grounds raised by the Revenue. The case laws relied on by the Ld. DR have no application to the facts of the assessee's case.

11. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on the 11th September, 2019

Sd/-
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Mumbai / Dated 11/09/2019
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum