

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI**

**BEFORE
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 6139/Del/2016

Asstt. Year : 2006-07

Savera Marketing Pvt. Ltd. 26A, Sadhana Enclave, New Delhi – 110 017 Pan aabcs3389Q	Vs.	ITO, Ward 7(4) New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Ved Jain, Advocate
Department by :	Shri Umesh Takyar, Sr. DR
Date of Hearing	08.02.2022
Date of pronouncement	11.04.2022

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the order dated 05.09.2016 of the Commissioner of Income Tax (Appeals)-28 New Delhi (**"CIT(A)"**) pertaining to the assessment year 2006-07.

2. The assessee filed its return of income declaring loss of Rs. 29,290/- on 28.11.2006. The return was processed under section 143(1) of the Income Tax Act, 1961 (the **“Act”**) on 19.07.2007.

2.1 In the post search investigation carried out by the Directorate of Income Tax (Inv.) New Delhi in respect of the bogus accommodation entries provided by S.K. Jain group of companies, the name of the assessee figured as one of the beneficiaries of bogus accommodation entries. The bank account of the assessee was found credited with accommodation entries on various dates amounting in all to Rs. 2,10,00,000/- during the previous year relevant to the assessment year 2006-07 through the middle man, Sandeep Garg. The case of the assessee was, therefore reopened under section 147 of the Act by the Assessing Officer (**“AO”**) with the prior approval of the Addl. CIT, Range-7, New Delhi.

2.2 Notice under section 148 of the Act was issued to the assessee on 25.03.2013 in response to which the representative of the assessee attended the proceedings, filed the details culminating into completion of assessment under section 147/143(3) on 10.03.2014 on total income of Rs. 2,10,00,000/- being addition under section 68 of the Act.

3. The assessee appealed before the Ld. CIT(A) who vide his appellate order dated 05.09.2016 dismissed the appeal of the assessee. Aggrieved, the assessee filed appeal before the Tribunal on 30.11.2016 challenging the appellate order on 14 grounds which read as under :-

“1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad, both in the eye of law and on the facts.

2. On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in rejecting the contention of the assessee that the initiation of the proceedings under Section 147, read with Section 148, is

bad and liable to be quashed as the condition and procedure prescribed under the statute have not been satisfied and complied with.

3. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the reassessment proceedings initiated by the learned A.O. are bad in the eye of law as the reasons recorded for the issue of notice under Section 148 are bad in the eye of law and are contrary to the facts.*

4. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the order passed by learned A.O. is bad both in the eye of law and on facts as the same has been reopened on the basis of reasons without there being any whisper that the income has escaped due to the failure on part of the assessee to disclose fully and truly all material facts necessary for assessment, as the same has been reopened after a period of four years from the end of relevant assessment year and the assessment has already been made under Section 143(3).*

5. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the order passed by learned A.O. is bad both in the eye of law and on facts, as the assessee had already disclosed fully and truly all material facts necessary for the assessment under Section 143(3).*

6. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the order passed by learned A.O. under Section 147 is bad both in the eye of law and on facts, as the same has been passed without service of statutory notice under section 148.*

7. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that*

the order passed by AO is bad both in the eye of law and on facts as the same has been passed without receiving statutory notices under section 143(2) of the Act.

8. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition of Rs.2,10,00,000/- made by AO on account of share capital under section 68 of the Act.*

9. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the explanation and evidences brought on record by the assessee to prove the identity and creditworthiness of the shareholder as well as genuineness of the transaction.*

10. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition despite the fact that the same has been made by the AO without bringing any adverse material on record or to point out any defect in the evidences filed by the assessee.*

11. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition despite the fact that even after having served the notices under section 133(6) of the Act, the AO could not bring the investigation to its logical end.*

12. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition despite the same having been made on the basis of material collected at the back of the assessee without giving him an opportunity to rebut the same.*

13. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition by rejecting the contention of the assessee that no adverse inference can be drawn against the assessee on the basis of some statement recorded without giving assessee an opportunity to cross examine.*

14. The appellant craves leave to add, amend or alter any of the grounds of appeal.”

4. The hearing before the Tribunal was fixed for 11.01.2021. In the meantime, by the letter dated 04.01.2021 addressed to the Registrar, ITAT the assessee's AR submitted that the assessee has been merged with M/s. Shark Packaging (India) Private Limited w.e.f. 01.04.2008 vide order dated 21.01.2011 passed by the Hon'ble Delhi High Court under section 394 of the Companies Act, 1956 and requested that the above fact be taken on record. Revised Form No. 36 and application for admission of additional grounds of appeal stating therein that while filing an appeal on 30.11.2016 the assessee has left out the grounds of appeal on one of the legal issues pertaining to reopening under section 147 read with section 148 of the Act. It was requested that the additional grounds No. 15 and 16 mentioned below be admitted as these legal grounds go to the root of the matter and all the facts relating thereto are already on record.

“15. On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in confirming the order passed by the AO u/s 147/143(3), despite the fact that the same being passed in the name of a nonexistent entity, is illegal and void ab-initio.

16. On the circumstances and facts of the case, the reassessment framed in the name of M/s. Savera Marketing Pvt. Ltd. which had since amalgamated with M/s. Shark Packaging (India) Pvt. Ltd. and had ceased to exist in the eye of law, was non est.”

5. The hearing before the Tribunal took place on 08.02.2022.

5.1 At the very outset, Ld. DR submitted that the amalgamating company namely, assessee merged with the amalgamated company w.e.f. 21.01.2011 and therefore, the appeal filed by the assessee before the Tribunal on

30.11.2016 is itself not maintainable as it was filed by the non-existing company. He placed reliance on paras 10, 11, 12 and 14 of the judgment of the Hon'ble Delhi High Court in CIT vs. Spice Entertainment Ltd. [2011 (8) TMI 544 (Del)]. He also referred to para 18(ii) and para 19(iv) of the judgment of the Hon'ble Supreme Court in PCIT vs. Maruti Suzuki India Ltd. [2019 (7) TMI 1449 (SC)] in support of his submission. According to Ld. DR the judgment of the Hon'ble Supreme Court in M/s. Dalmia Power Limited & Anr. vs. ACIT [2019 (12) TMI 991 (SC)] is distinguishable on facts.

5.2 The Ld. AR on the other hand submitted that the assumption of jurisdiction by the Ld. AO is different from filing of appeal by the assessee. He referred to para 13 of the judgement of the Hon'ble Delhi High Court in CIT vs. Spice Entertainment Ltd. (supra) wherein the Hon'ble Delhi High Court quoted from the decision of the Hon'ble Punjab & Haryana High Court dealing with the effect of the provision of section 292B of the Act in CIT vs. Norton Motors [275 ITR 595].

5.3 Before we proceed further, it is expedient to check the veracity of the argument of the Ld. DR. Admittedly, the first inning of the assessment proceeding in the case of assessee was over with the processing of its return on 19.07.2007 under section 143(1) of the Act. The second inning commenced with the notice under section 148 issued by the Ld. AO on 25.03.2013. Prior to the date of issue of notice under section 148 by the Ld. AO, M/s. Shark Packaging (India) Pvt. Ltd. wrote a letter dated 18.06.2011 to the Ld. AO (page 10 of Paper Book) informing him that pursuant to the order of the Hon'ble High Court of Delhi dated 21.01.2011 M/s. Savera Marketing Pvt. Ltd. (the assessee) has been merged with M/s. Shark Packaging (India) Pvt. Ltd. and request was made to cancel the PAN allotted to M/s. Savera Marketing Pvt. Ltd. Seal of the office of the Ld. AO is affixed on this letter which bears the date 27.07.2011. Apparently, no cognizance of this communication was taken nor any action was initiated to cancel the PAN of the assessee. The Ld. AO continued the reassessment proceedings by issuing notice under section 143(2) of the Act dated 01.08.2013 addressed

to the Principal Officer, M/s. Savera Marketing Pvt. Ltd. fixing the date of hearing on 12.08.2013 (page 34 of Paper Book). Yet another notice under section 143(2) dated 22.08.2013 addressed to Shri Vijay Surjan (Director), M/s. Savera Marketing Pvt. Ltd. was issued fixing the date of hearing on 06.09.2013 (page 35 of paper book) along with notice under section 142(1) of the Act and Annexure A recording the reasons for the belief that the income of Rs. 2,10,00,000/- in the case of M/s. Savera Marketing Pvt. Ltd. has escaped assessment (pages 36 and 37 of Paper Book). Again notices under section 143(2) and under section 142(1) both dated 06.01.2014 were issued to Shri Vijay Surjan (Director), M/s. Savera Marketing Pvt. Ltd. fixing the date of final hearing on 10.01.2014 culminating in framing of assessment of M/s. Savera Marketing Pvt. Ltd. under section 147 read with section 143(3) of the Act dated 10.03.2014. This reassessment order of the Ld. AO was challenged by the assessee, M/s Savera Marketing Pvt. Ltd. before the Ld. CIT(A) who dismissed the appeal by order dated 05.09.2016 passed under section 250(6) of the Act in the name of M/s. Savera Marketing Pvt. Ltd.

5.4 In the background of the above factual matrix, it is obvious that the assessee had no choice but to file the first appeal before the Ld. CIT(A) in the name of M/s. Savera Marketing Pvt. Ltd. and also second appeal before the Tribunal likewise. Even prior to the issue of notice dated 25.03.2013 under section 148 by the Ld. AO, the factum of merger of M/s. Savera Marketing Pvt. Ltd. with M/s. Shark Packaging (India) Pvt. Ltd. was brought to the knowledge of the Ld. AO by written letter dated 18.06.2011 which was received in his office on 27.07.2011. On these facts and circumstances of the case, we do not find any fault on the part of the assessee in filing the first and second appeal in the name of M/s. Savera Marketing Pvt. Ltd. Consequently, we ignore the arguments of the Ld. DR that the appeal of the assessee itself is not maintainable. In our view reliance by him on certain paras in the decision of the Hon'ble Delhi High Court in Spice Entertainment Ltd. vs. CIT (supra) and the judgment of the Hon'ble Supreme Court in PCIT vs. Maruti Suzuki India Ltd. (supra) is misplaced as they do not support the case of the Revenue in any way. On the other hand, we find substance in

the argument of the Ld. AR that the assumption of jurisdiction by the Ld. AO under section 147/ 148 is entirely different issue from that of filing appeal by the assessee.

6. We find that the assessee's original appeal filed before the Tribunal on 30.11.2016 stands revised and revised Form No. 36 along with additional grounds of appeal has been filed before the Tribunal on 04.01.2021. In the peculiar facts and circumstances of the case, we allowed the appellant assessee to do so. But we refrain from adjudicating the 14 grounds taken by the assessee in the pre revised Form No. 36 filed on 30.11.2016 and dismiss the appeal for statistical purposes.

7. We now proceed to deal with the additional grounds taken in the revised Form No. 36. In the revised Form No. 36, the name of the appellant has been modified as "Savera Marketing Pvt. Ltd. (now merged with M/s. Shark Packaging (India) Pvt. Ltd.)". The additional grounds no. 15 and 16 have already been reproduced earlier in para 4 above.

8. After hearing the Ld. Representative of the parties, we admit the additional grounds raised by the assessee agreeing with the submission of the Ld. AR that these grounds are legal grounds going to the root of the matter and all the facts to consider them are already on record. We place reliance on the judgment of the Hon'ble Supreme Court in National Thermal Power Co. Ltd. vs. CIT [(1998) 229 ITR 383 (SC)] wherein the Hon'ble Supreme Court observed that undoubtedly, the Tribunal has the discretion to allow or not to allow new ground to be raised. But where the Tribunal is only required to consider a question of law arising from facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

9. The question of law which emanates from the additional ground is that the impugned reassessment order under section 147/143(3) passed by the Ld. AO on 10.03.2014 is illegal and ab-initio void as the same has been passed in the name of M/s. Savera Marketing Pvt. Ltd. a non-existing entity which had since been amalgamated with M/s. Shark Packaging (India) Pvt. Ltd. and has ceased to exist in the eye of law. The Ld. AR submitted a Paper Book consisting of 48 pages which throw light on the factual matrix of the case. He also filed a compilation of case laws relied upon by him.

10. We have heard the submissions of the parties and have carefully considered their arguments, perused all the material on record and arrived at the conclusion that the assessee deserves to succeed for the reasons we proceed to record.

11. Let us recapitulate the facts culled from the material on record. The assessee company submitted its return for the assessment year 2006-07 on 28.11.2006. It was processed under section 143(1) of the Act on 19.07.2007. A very significant development took place when the assessee company got merged with M/s. Shark Packaging (India) Pvt. Ltd. w.e.f. 01.04.2008 under a scheme of amalgamation approved by the Hon'ble High Court of Delhi vide order dated 21.01.2011 under section 394 of the Companies Act, 1956. The legal effect of this event of amalgamation is that the assessee company became non-est entity in the eye of law having merged into another legal entity, namely the amalgamated company. Any proceeding initiated and / or taken against a merged non-est entity is illegal and void ab-initio. It is now well settled principle of law that framing of assessment and / or proceedings against the non existing entity/ person is a jurisdictional defect as there cannot be any assessment against a non-est entity. We may notice the judicial precedents holding the same view :-

- (i) Spice Entertainment Ltd. vs. CIT [247 ITR 500 (Delhi)] approved by the Supreme Court in CIT vs. Spice Entertainment Ltd. (Civil Appeal No. 285 - 286 of 2014 decided on 02.11.2017) wherein it is held that

assessment framed in the name of non existing entity does not remain a procedural irregularity which could be cured by invoking the provisions of section 292B of the Act.

- (ii) Rustagi Engineering Udyog Pvt. Ltd. vs. DCIT [(2016) 382 ITR 443 (Delhi)] wherein it is observed that in a case of amalgamation, the amalgamating company would stand dissolved from the date on which the amalgamation/ transfer takes effect. The notices under section 148 issued to the assessee that had ceased to exist was liable to be set aside.
- (iii) BDR Builders & Developers Pvt. Ltd. vs. ACIT [(2017) 397 ITR 529 (Delhi)] holding that a notice issued in the name of transferor company after amalgamation was void ab-initio.
- (iv) ACIT vs. Dharmnath Shares & Services (P.) Ltd [(2018) 94 taxmann.com 458 (Guj.)] wherein it is held that once the assessee company had amalgamated with the transferee company, its independent existence did not survive, therefore, it would no longer be amenable to the assessment proceedings by issue of notice under section 148.
- (v) PCIT vs. Maruti Suzuki India Ltd. (CA No. 5409 of 2019 dated 25.07.2019) wherein the Hon'ble Supreme Court held that despite the fact that the Assessing Officer was informed about the factum of 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 ceased 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.

- (vi) Gayatri Microns Ltd. vs. ACIT [(2020) 424 ITR 288 (Guj.)] holding that the transferor would cease to exist as a result of approved scheme of amalgamation and as such notice issued under section 148 in its name would be fundamentally illegal and without jurisdiction. SLP filed by the revenue has been dismissed by the Supreme Court in ACIT vs. Gayatri Microns Ltd. [(2021) 278 Taxman 274 (SC)]

12. Let us now test the facts of the case in hand on the touchstone of the legal position set out above. The company Savera Marketing Pvt. Ltd. ceased to exist w.e.f. 01.04.2008 as it was amalgamated with M/s. Shark Packaging (India) Pvt. Ltd. under a scheme of amalgamation approved by the Hon'ble Delhi High Court vide order dated 21.01.2011. It is forthcoming from the records that the amalgamated company namely, M/s. Shark Packaging (India) Pvt. Ltd. vide letter dated 18.06.2011 to the Ld. AO intimated him that M/s. Savera Marketing Pvt. Ltd. (the assessee) has merged with M/s. Shark Packaging (India) Pvt. Ltd. pursuant to the order dated 21.01.2011 of the Hon'ble Delhi High Court and requested him to cancel the PAN allotted to the assessee, M/s. Savera Marketing Pvt. Ltd. Despite this information the Ld. AO proceeded to issue notice under section 148 dated 25.03.2013 in the name of non existing company and continued the reassessment proceedings by issue of statutory notices under section 143(2) and 142(1) also in the name of non-existing company culminating in passing of reassessment order under section 147 read with section 143(3) of the Act on 10.03.2014. Relying on the judicial precedents (supra) mentioned in para 11 above, we have no hesitation in holding that Ld. AO was not within his jurisdiction to frame the reassessment in the name of non-existing entity and such reassessment order dated 10.03.2014 is nullity and not sustainable in the eye of law. Consequently, the reassessment order dated 10.03.2014 passed by the Ld. AO in the name of M/s. Savera Marketing Pvt. Ltd. and confirmed by the Ld. CIT(A) vide his appellate order dated 05.09.2016 deserve to be quashed. We do so and order accordingly.

13. In the result, the additional grounds of appeal taken by the assessee before us are allowed. The other 14 grounds become infructuous.

Order pronounced in the open court on 11th April, 2022.

sd/-

(DR. B.R.R. KUMAR)

ACCOUNTANT MEMBER

sd/-

(ASTHA CHANDRA)

JUDICIAL MEMBER

Dated: 11 /04/2022

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
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Date on which the typed draft is placed before the Other Member	
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Date on which the fair order is placed before the Dictating Member for pronouncement	
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